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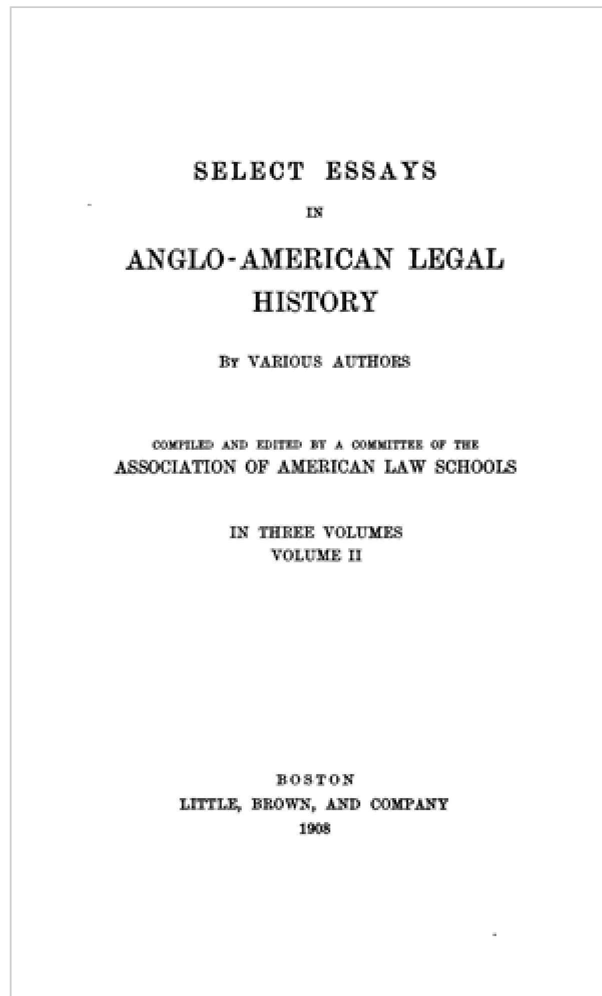

SELECT ESSAYS

IN

ANGLO-AMERICAN LEGAL HISTORY

BY VARIOUS AUTHORS

COMPILED AND EDITED BY A COMMITTEE OF THE
ASSOCIATION OF AMERICAN LAW SCHOOLS

IN THREE VOLUMES
VOLUME II

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PREFACE

THE first volume of this series seems to have met with the commendation of those for whom it was intended. This, in the opinion of the Editorial Committee, is partly due to the singular symmetry with which the individual essays were found to unite in a mosaic showing the general pattern of our law for the last six centuries. In the present volume, containing the first half of Book II, History of Particular Topics of the Law, that feature can no longer be looked for in such degree; the separate Essays will more usually have, in Coleridge's phrase, only "the same connection that marbles have in a bag,—they touch without adhering."

But what may be lost in symmetry is more than made up in concreteness. The solid tangibleness of the ultimate details gives somehow its own peculiar satisfaction. The Essays tell each its separate story of legal history: the varied succession of pictures pleases, like the assembled incidents of daily life depicted by Homer on Achilles's shield:

> "There he placed two fair cities. . . .
> Here a multitude
> Was in the forum, where a strife went on—
> Two men contending for a fine, the price
> Of one who had been slain. Before the crowd
> One claimed that he had paid the fine, and one
> Denied that aught had been received, and both
> Called for the sentence that should end the strife."

So through Procedure and Courts to Property and Torts these detailed cameos make up an interesting whole. Some day the missing spaces will be filled in, and the present tracings revised and re-set. Both the small facts and the large features of our last six centuries we shall then know as well at least as the Germans and the French already know their own much more complicated story.

The other contributors to the volume will surely pardon the Committee for specially mentioning its appreciation of the interest shown and the labor done by Professor Heinrich Brunner in re-writing for this Series his essay on the Sources of English Law. May his interest in our legal history stimulate some of us to take a like interest in the origins of that related system for which he has done so much!

No less important and attractive to us, for a later stage in our development, should be the history of Norman and French law, and the researches of the great scholars who labor on it. How much lies there for us, a mere glance at the citations on any page of the lamented leader Maitland will show. Thus far, none of that material has been available for this Series; but it is the hope of the Committee that the third volume will include one representative essay from the French field.

After all, we must recognize that an enlightened cosmopolitanism will be no new thing for us in the legal sphere. Many men from many other lands and systems, in time past, have shared in influencing our law. Bracton drew inspiration from an Italian, and Blackstone from a Frenchman; on Dutch learning Hardwicke and Kent were nourished; an Italian supervised the preparation of Domesday Book, and a Dutchman signed the Bill of Rights; Anglo-Saxon laws have been unearthed by a German, and Bracton's Note-Book by a Slav; and a Frenchman made Bentham famous. Even the latest achievement of Maitland, which traces back our theory of equitable trusts to an ancient Lombard idea (expounded in a modern German book), was given to the world in an Austrian periodical and is as yet formally unpublished in our own language. The day of the open door in legal learning is upon us.

It remains to repeat that the Lists of References prefixed to each of the Parts in this Book are not put forth as exhaustive, but are intended merely to assemble in convenient form the various materials which the Committee came upon in preparing the selection here reprinted.

The Committee of the
Association of American Law Schools.

Ernst Freund,
University of Chicago.

William E. Mikell,
University of Pennsylvania.

John H. Wigmore,*Chairman*,
Northwestern University.

March, 1908.

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A TABLE OF BRITISH REGNAL YEARS

Sovereigns	Commencement of Reign
William I	October 14, 1066
William II	September 26, 1087
Henry I	August 5, 1100
Stephen	December 26, 1135
Henry II	December 19, 1154
Richard I	September 23, 1189
John	May 27, 1199
Henry III	October 28, 1216
Edward I	November 20, 1272
Edward II	July 8, 1307
Edward III	January 25, 1326
Richard II	June 22, 1377
Henry IV	September 30, 1399
Henry V	March 21, 1413
Henry VI	September 1, 1422
Edward IV	March 4, 1461
Edward V	April 9, 1483
Richard III	June 26, 1483
Henry VII	August 22, 1485
Henry VIII	April 22, 1509
Edward VI	January 28, 1547
Mary	July 6, 1553
Elizabeth	November 17, 1558
James I	March 24, 1603
Charles I	March 27, 1625
The Commonwealth	January 30, 1649
Charles II[1]	May 29, 1660
James II	February 6, 1685
William and Mary	February 13, 1689
Anne	March 8, 1702
George I	August 1, 1714
George II	June 11, 1727
George III	October 25, 1760
George IV	January 29, 1820
William IV	June 26, 1830
Victoria	June 20, 1837
Edward VII	January 22, 1901

[1]Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth year of his reign.

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24. The Year Books.William Searle Holdsworth.
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APPENDICES
- A. List of Sources for Continental Mediæval Law.Edward Jenks.
- B. List of Sources for American Colonial Law.Paul Samuel Reinsch.
- 26. An Historical Survey of Ancient English Statutes.The Commissioners.

[Other References on the Subjects of this Part are as Follows:

In Select Essays:

A Prologue to a History of English Law, by F. W. Maitland (No. 1, Vol. I).

English Law and the Renaissance, by F. W. Maitland (No. 6, Vol. I).

The Five Ages of the Bench and Bar, by J. M. Zane (No. 19, Vol. I).

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The Manuscripts of the Year Books, by L. O. Pike (Green Bag, XII, 533; 1900).

Year Book Bibliography, by Charles C. Soule (Harvard Law Review, XIV, 557; 1901).

Ricardus Anglicus, by Sir Travers Twiss (Law Magazine and Review, 4th ser., XX, 1; 1896).

Bracton’s Notebook, by Paul Vinogradoff (Law Quarterly Review, IV, 436; 1888).

Historical Introductions to the Rolls Series, by William Stubbs, ed. Hassall (London, 1902).

Introductions to the Year Books of Edward II, by F. W. Maitland (Vols. XVII, XIX, XX, Selden Society; 1903-5).

Introduction to The Mirror of Justices, by F. W. Maitland and W. J. Whittaker (Vol. VII, Selden Society, 1893).

Introduction to Bracton and Azo, by F. W. Maitland (Vol. VIII, Selden Society, 1894).

Bracton and His Relation to Roman Law, by C. Güterbock, tr. E. Coxe (Philadelphia, 1886).

Sources and Literature of English History, by Charles Gross (London and New York, 1900).

List of Texts Used, prefixed to Pollock and Maitland's History, Vol. I, 2d ed., 1899.]

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22.

THE SOURCES OF ENGLISH LAW[1]

By Heinrich Brunner[2]

A.

THE ANGLO-SAXON SOURCES

IN the history of the English law the Anglo-Saxon sources occupy about the same relative position as the so-called "folk laws" and the other legal monuments of the Frankish period do in the history of the other Western Teutonic nations.[1] It is true, the independent development of Anglo-Saxon law was stopped by the Norman Conquest, its operation being superseded by the rule of the Anglo-Norman law. But Anglo-Saxon legal ideas have at least in part survived amidst Norman innovations and shared with them the formation of the historical foundations of the English legal and political constitution.

The importance of the study of the Anglo-Saxon sources is moreover not confined to English legal history, but extends to the legal history of all Teutonic nations. While the Western Teutons of the Continent used the Latin tongue for committing their legal monuments to writing, and while in Germany in statutes and documents German began to replace Latin only in the thirteenth century, the Anglo-Saxon like the North Teutonic sources were written in the vernacular. The insight thus gained into national legal terminology, the wealth of Anglo-Saxon legislation during the five centuries from Aethelberht to William the Conqueror, the purely Teutonic character of the law, uninfluenced by the Roman, and only slightly influenced by the Canon law, and finally the uninterrupted sequence of sources, which elsewhere, between the ninth and thirteenth centuries, reveal gaps that can be supplied only with difficulty,—all these conditions place the Anglo-Saxon legal monuments in the front rank of the sources of information of Teutonic law.

Among the sources of the Anglo-Saxon law we distinguish statutes,—the laws of the Anglo-Saxon kings being the most important of these,—legal formularies, treatises, and documents.

General statutes were enacted in the national assemblies.[2] in which the king consulted with the great men of the country (witan), especially with the secular and ecclesiastical dignitaries, regarding the maintenance and strengthening of the peace, and regarding innovations in the laws.

Like the German "folk laws," the laws of the Anglo-Saxons (dómas, gerædnessa, ásetnysse) have partly created new law, and partly enacted existing customary law.

The oldest statutes were occasioned by the conversion of the Anglo-Saxons to Christianity.

The Anglo-Saxon legal monuments may be grouped as follows:

1. The statutes of the *Kentians,* whose state at the time of Christianization was the leading Anglo-Saxon power. They begin with the domas of King Aethelberht, ninety brief chapters, in part of striking originality, concerning penalties especially for infliction of wounds, wergilds,[1] and the law of marital property rights. They date from the time when Augustinus was active in England, more particularly the years from 601 to 604.

Then follow the laws of Hlothære and Eadric (685-6), containing mainly criminal and procedural law, and the laws promulgated by King Wihtræd, 695, at a diet at Berstead, concerning ecclesiastical relations, purgatory oath, and larceny; Wihtræd's laws utilized the resolutions of a church synod of Hertford of 673; among other matters they contain penalties against idolatry and breach of fast, which presumably go back to the legislation of Earconberht (640-664) which has not come down to us, but is mentioned by Beda.

All Kentish laws have come down to us only in a more recent West Saxon transcript,[2] which has not entirely obliterated the traces of the Kentish dialect of the original text.

2. The *code of Ine,* king of the West Saxons, of the period from 688 to 695. According to the prologue Ine's code is the result of deliberations had by the king with the witan of his people concerning the salvation of souls and the condition of the kingdom, in order that right law (aéw) and right statutes (cynedómas) might be established and assured. The ecclesiastical enactments precede. Ine's laws surpass the Kentish in ease of diction, wealth of vocabulary and content as well as in bulk. The fact that Wessex became subsequently caput regni et legum[1] explains the regard paid to Ine's laws by the more recent legislation. They have come down to us not in their original form, but abridged, and in more modern language, as an appendix to the laws of Alfred.

3. *From the period of the union of the Anglo-Saxon kingdoms* we have:

a. The code of Alfred (871-900), probably from the closing period of his reign, when after many years' struggles with the Danes, he was able to think again of reconstructing the disintegrated law. The code proper is preceded by an introduction of forty-nine chapters, borrowed from the Bible (Exodus and Actus Apostolorum) and supplemented by some additions by Alfred. In the last chapter of the introduction Alfred declares that he has compiled in his code the laws of Ine, of Offa of Mercia,[2] and of Aethelberht of Kent, so far as the same seemed right to him, omitting those that did not commend themselves to him.

Alfred's code proposes to create a common law of his kingdom. As an appendix for Wessex the code of Ine (mentioned above under 2) was published, the provisions of which partly conflict with Alfred's own laws. In more recent laws the Alfred-Ine code is often cited simply as dómbók. The rubrical index dates from about 940 at the latest.

b. Alfred's treaties with the Danes of East Anglia. A treaty of Alfred with King Guthrum of East Anglia (of the years from 880 to 890) contains provisions regarding wergild, oath, guaranty, and trade. A second convention of Alfred with Guthrum, chiefly concerning ecclesiastical relations and precepts, has not come down in the original form, but in an altered version in which it was confirmed or renewed by Edward I after the acquisition of Guthrum's territory in 921 or somewhat later.

c. Two laws of Edward I; the older one, from the period between 900 and 924, deals with purchase, anefang, real actions, and perjury; the later one was enacted in 924-5 in Exeter for the advancement of public security.

d. From the time of Aethelstan (925 to 940) date: the ordinance of that king regarding tithes; the one regarding alms; the enactments of the diet of Greatley (the most important of Aethelstan's laws), and the resolutions of Exeter (927 to 937); further, an enunciation of the ecclesiastical and secular notables and of the people of Kent "de pace observanda" (928 to about 938), and the so-called Judicia civitatis Lundoniae (of about 930 to 940), an autonomous statute of the bishops and the gerefas, who through their tenants belonged to the jurisdiction of London, significant chiefly by the fact that they contain the by-laws of the London peace gilds (the oldest Teutonic gild statutes).

e. Edmund's laws from the years 940 to 946, comprising (α) the resolutions of a London synod convened by him, and (β) a law regarding expiation of homicide and composition of feuds, and (γ) the resolutions of "Culinton" regarding measures against thieves.

f. Edgar's laws, among which we may probably count an ordinance (946 to about 961) concerning the hundred court (Hundredgemót) and may count with certainty the resolutions of Andover (959 to about 962), and of Wihtbordesstan (962-3).

g. Aethelred's laws, closing the series of statutes enacted by native kings. We note among them particularly the diet resolutions of Woodstock (980 to 1013), of Wantage (981 to 1012), and of London (991 to 1002), a comprehensive law of 1008 presumably enacted at "Eanham," the contents being chiefly ecclesiastical and religious; a diet resolution of Bath (992 to 1011) and a constitution of 1014 concerning the particular peace of the churches and the legal status of the clergy, and finally a peace treaty of 991 with Olaf Tryggvason, concerning the peace purchased of the Northmen.

In the history of Anglo-Saxon legislation the transition from the ninth to the tenth century marks an important epoch. The views of the Church exercised a controlling influence upon the older statutes, which is shown equally in the several kingdoms, the Anglo-Saxon ecclesiastical law extending over the whole of England as early as the seventh century. This influence appears among other things in the limitation of capital punishment, and in the consequent extension of the system of amends (see Alfred, Introduction, ch. 49, 7), in the application of penal servitude, in the impaired status of illegitimacy, and in the regulation of proof, from which the duel is barred, while the ordeal of the lot is suppressed and that of the hot water appears only very rarely.

A transformation begins with the close of the ninth century. The Frankish law is drawn upon for Frankish ordeals and Frankish ordeal liturgies. Punishment of life and limb is applied increasingly for the strengthening of the peace. Besides, Anglo-Saxon legislation undergoes significant influences from the North. It pays some regard to the “Danelag,” the domain of the law of the Danes and other Northern folk who had settled in England, and Northern legal ideas and numerous Northern terms of law gain entrance into the Anglo-Saxon law.

4. *Decrees and the Code of Cnute.* Two several ordinances have come down to us from King Cnute, an ordinance of 1020 which exhorts the people to observe ecclesiastical and secular law, and for this refers to the recognition given to Edgar’s legal constitution (Eadgares lage) by English and Danes in 1018 at a diet in Oxford. The second decree (preserved in Latin translation only) is a manifesto of Cnute of 1027, in which after his expedition to Rome he proclaims the conventions with Emperor Conrad II, with King Rudolf of Burgundy, and with the Pope, and admonishes the people to pay the Peter’s pence, and to render the Church its dues.

Between Christmas, 1027, and 1034[1] Cnute promulgated at Winchester a comprehensive code, divided into two parts, the first containing ecclesiastical, the second secular statutes (woruldcunde geraednysse). The substance is borrowed for the greater part from older Anglo-Saxon laws from Ine to Aethelred, partly also from Kentish laws. Until the middle of the twelfth century Cnute’s legislation (which obtained no less than three independent translations into Latin) was regarded as the true gospel of the Anglo-Saxon law, in which character it was then superseded by the mythical Laga of Edward.

5. From the *tenth and eleventh centuries* we have some scattered laws or fragments of laws without names of kings, and legal monuments of which it is controverted and doubtful whether they are statutes or judicial findings or private writings. We should mention particularly a statute concerning the law of the “Dunsaete,” enacted about 935 at an Anglo-Saxon diet with the concurrence of Welsh notables (Waliae consiliarii).[1] It was intended for a border district, the country of the Dunsaetes, who are mentioned nowhere else, and should probably be located in Herefordshire; its purpose was to regulate the legal relations between the Dunsaetes of Kymric and English nationality separated from each other by a river (the Wye?), especially with reference to fresh pursuit, anefang, wergild, procedure, and international jurisdiction.

To the tenth century also belong certain anonymous statutes, which relate to the procedure for the ordeal of the iron and the hot water, to arson, murder, and anefang (forfang). The Northumbrian priests’ law, “Nordhymbra preosta lagu” (from between 1028 and about 1060), concerning the extinction of paganism and the ecclesiastical constitution of the Danes around York is an autonomous enactment of the Church.

The Anglo-Saxon laws were officially written on separate parchment sheets, none of which have been preserved. Many a law may have been irretrievably lost. What has come down to us of laws and other Anglo-Saxon legal monuments, comes chiefly from manuscript collections which were made in ecclesiastical centres, which do not go back of the eleventh century, and which do not always reproduce language or

arrangement faithfully. For our knowledge of some pieces we are indebted to Latin translations made in Anglo-Norman times.

6. A good insight into procedure is afforded by the preserved formulae, especially of oaths, of pleas to real actions, and of ordeals. A form of the coronation oath dates in its Anglo-Saxon version probably from the years 975 or 973 while the Latin text is certainly much older.[1]

7. Of *private writings* the most important may be mentioned.

a. The Rectitudines singularum personarum, the work of a bailiff concerning the rights and duties of the tenants of a noble estate. It was probably composed in the first half of the eleventh century.[2]

b. The treatise of the wise steward (scadwis gerefa), of about 1025, pointing out the matters requiring the attention of one in that employment.

c. The treatise (written by a clergyman) "Be gridhe and be munde," concerning the privileged safety according to Kentish, South English, and Danish law.

d. The notes regarding the amounts of the wergild among the "Northfolk," and in Mercia, and regarding the manner of its payment.

e. A treatise regarding espousals and marriage of about 1030.

f. An ecclesiastical instruction regarding the duties of a judge.[3]

8. *Documents*—both royal and private—from the time before the Conquest have come down in large numbers, partly in Latin, partly in Anglo-Saxon, among them, it is true, many spurious or doubtful pieces, the verification of which is rendered difficult through the absence of a settled diplomatic practice among the Anglo-Saxons.

Of especial significance was the title deed of real estate (bóc), land, if acquired by bóc, being called bócland (in distinction from the folkland which was acquired and possessed according to folk law[1]) and being alienated and transferred by delivery of the original title deed.

9. We should regard further as sources of Anglo-Saxon law, at least in part, several *law books* in the nature of compilations, which do not belong to the Anglo-Saxon age but to the twelfth century, written, not in Anglo-Saxon, but in Latin, but meaning or pretending to present Anglo-Saxon law, and partly composed for the purpose of giving to the modern law the appearance of being identical with the old one.

The following are Anglo-Latin law books:

a. The Quadripartitus.[2] This was the title of a legal treatise, which, according to the original plan of the author, was to be divided into four parts, upon the contents of which he remarks in a bombastic preface: Primus liber continet leges anglicas in

Latinum translatas; secundus habet quaedam scripta temporis nostri necessaria; tertius est de statu et agendis causarum; quartus est de furto et partibus ejus.

The first book contains a Latin version made by the compiler of a nearly complete collection of Anglo-Saxon legal documents. It is not merely highly valuable for the understanding and criticism of the Anglo-Saxon texts, but has been the exclusive means of preserving many very important pieces. Notwithstanding the frequent use of Anglo-Saxon legal terms, it bears clear traces of Frankish terminology (so it employs the word "intertiare" for anefang instead of the Anglo-Saxon befón or aetfón, it calls the outlaw forisbannitus, and translates "meldefeoh" by "delatura").

The second book begins with a special preface, and constitutes a collection of state papers of the time of Henry I, containing his coronation charter of 1100, records of Archbishop Gerhard of York, and the decree of Henry I "ut comitatus et hundreda sedeant" of about 1110.

The third and fourth book, which the preface announces, are missing.[1]

The author probably used the material which he intended for these books, or at least for the third book, in the subsequent composition of a new legal treatise (the Leges Henrici). The two extant books were completed in 1114. The compiler, whose name we do not know, was a secular clerk of Continental descent who entered into relations with Archbishop Gerhard of York, presumably into his service, subsequently became crown judge, and as such wrote legal treatises for the use of his colleagues.[2]

b. The Leges Henrici, a work written by the author of the Quadripartitus, into which he transferred from the latter treatise the brief introduction and the coronation charter of Henry I of 1100, which heads the book. The title Leges Henrici may be a remnant of the original title. The book contains partly Anglo-Saxon, partly Norman law. For the former the author used the first book of the Quadripartitus, more particularly Cnute's code, which appeared to him as the principal source of the Anglo-Saxon law then in force. His knowledge of the Norman law may be due to his practical experience as justitia regis. He used, moreover, parts of Frankish books of penances, the Breviarium Alaricianum from the Epitome Aegidii, passages from the Lex Salica and the Lex Ribuaria and Frankish capitularies, from the patristic literature St. Augustine, of canon sources directly or indirectly Pseudo-Isidore and Yvo of Chartres. Now and then the brings Latin and Anglo-Saxon proverbs. The work is deficient in arrangement and clearness, and suffers from numerous contradictions and repetitions. The style is full of mannerisms and far-fetched antitheses, and changes from redundancy to obscure brevity. In spite of this the work is an invaluable source for the knowledge of the period of fermentation which in the legal history of England preceded the full development of the Norman law. The work was written between 1114 and 1118.

c. The Instituta Cnuti aliorumque regum Anglorum,[1] a Latin compilation of Anglo-Saxon laws, the author of which is likewise a secular clerk. The first two parts contain in the main passages from Cnute's code (so-called Versio Cnuti Colbertina), while the third part, which went formerly by the misleading name of Pseudo-leges Cnuti regis,

compiles excerpts from Alfred-Ine and other Anglo-Saxon sources, among others two passages the Anglo-Saxon original of which has not been preserved. The whole compilation probably dates from the first decade of the twelfth century.

d. The Consiliatio Cnuti,2 likewise a Latin and almost complete translation of Cnute's code, preceded by an independent preface, and followed by an appendix which consists of the statutes (mentioned under 5, *supra*) concerning arson, murder, forfang, and of the ordinance regarding the hundred court (3, *f, supra*). We gather from the ecclesiastical tendencies that the author was a clergyman, from the blunders in translation that he was no Anglo-Saxon, from the avoidance of technical legal terms, and the fondness for classical expression, that he was not a practical lawyer. The work, which was based on a lost Anglo-Saxon legal manuscript, was written in the first half of the twelfth century, presumably between 1110 and 1130.

e. The so-called Leges Edwardi Confessoris.3 This title has been used only since the seventeenth century for a legal treatise written from about 1130 to 1135, which in its introduction presents itself as the result of an inquest concerning the Anglo-Saxon law which William the Conqueror undertook in the fourth year of his reign, by summoning from each county twelve notable Anglo-Saxons as jurors, who were to give evidence regarding the law. The law thus alleged to be proven is taken to be the law of Edward the Confessor. But the author does not sustain his part, for in the course of the exposition he drops the form of the jury inquest. The chequered contents of the book show that we have before us a private treatise, which presents the law in force toward the end of the reign of Henry I, and attributes to Norman institutions an Anglo-Saxon origin. This abundant source of law has come down in two texts, one shorter, and one longer, the latter being an enlargement and explanation of the former.1 The work attained great and undeserved authority. In the more recent Anglo-Norman period it was considered as the chief source of Anglo-Saxon law.

f. The Constitutiones Cnuti regis de foresta,2 are a forgery. The name is assumed by a work prepared with the aid of the Instituta Cnuti. It claims to be a forest statute of Cnute. The forest law which it presents is not Anglo-Saxon, but the early Anglo-Norman established by William the Conqueror. Its counterfeit character is revealed by the employment of Anglo-Norman legal terms, by the Norman substance of its law, and by the deliberate alterations which disfigure the passages taken from the Instituta Cnuti. The fabrication dates from the twelfth century, probably toward the end of the reign of Henry II, about 1185, and is the work of a high forest official, who wished to cover the harsh and unpopular Norman forest law by the name of Cnute, and to produce the impression that it was customary Anglo-Saxon law.

Editions and Bibliography. The first collection of Anglo-Saxon laws was published by William Lambarde in 1568 under the title: Archaionomia sive de priscis Anglorum legibus. An enlarged and more critical edition, which in the older literature was used for references to Anglo-Saxon laws, was furnished by David Wilkins (Wilke), Leges Anglo-Saxonicae, 1721, reprinted in Canciani, Barbarorum leges, iv, and in Houard, Traités sur les coutumes Anglo-Normandes. This edition was superseded by the one arranged by the Record Commission: Ancient Laws and Institutes of England, London, 1840, begun by R. Price, after his death completed by Thorpe, in folio, and

also in two octavo volumes. Upon this is based the edition by Reinhold Schmid Gesetze der Angelsachsen, 2d ed., 1858, with German translation, excellent introduction on the history of the sources, and with a valuable glossary. The Alfred-Ine code was separately published by M. H. Turk (The legal code of Alfred the Great, 1893). The best critical edition, the only one that should now be used, was prepared with the aid of no less than 180 manuscripts, by F. Liebermann (Die Gesetze der Angelsachsen, i, 1903). The editor offers beside the Anglo-Saxon texts a literal German translation. Of the second volume so far only the dictionary has appeared (1906). The legal glossary, and a third volume to be devoted to comments, are still to be expected.

A collection of documents from the Anglo-Saxon times was furnished by Kemble, Codex diplomaticus aevi Saxonici, 6 vols., 1839-1846; also by Benjamin Thorpe, Diplomatarium Anglicum aevi Saxonici, 1874 (with a translation of the Anglo-Saxon texts). An enlarged edition, corrected in part from the manuscripts, but deficient in discrimination between genuine and spurious pieces, was prepared by W. de Gray Birch, Cartularium Saxonicum, i, 1885, ii, 1887, iii, 1893. Valuable from a philological point of view is John Earle, Hand-book to the Land Charters and other Saxonic Documents, 1888, a selection of Anglo-Saxon documents with introduction, glossary, and index; as a work of legal history it is not up to date, since it ignores the modern researches in Anglo-Saxon documents. Nineteen early charters and documents are excellently edited in the Anecdota Oxoniensia: The Crawford Collection, with instructive notes by Napier and Stevenson, 1895. Three unpublished Northumbrian documents of about 1100 were edited and commented on by Liebermann in the Archiv für das Studium der neueren Sprachen und Literaturen, 111, p. 175. Facsimiles of Ancient Charters in the British Museum were published by the order of the Trustees, 1873 sqq. Selected passages from the sources of legal and general history are given in English translation or the Latin original, by Stubbs, Select Charters and other Illustrations of English Constitutional History, 2d ed., 1874.

Bibliography. On Anglo-Saxon legal sources see the Introduction in Schmid, Gesetze der Angelsachsen. Especially as far as the Anglo-Latin books are concerned, it now needs some correction from the critical researches of Liebermann, which have been indicated above in the notes. See Liebermann's own announcement of the first instalment of his edition, in the Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, german. Abteilung, xix. 174. An inquiry concerning the Danelag, which throws new light upon the history of some sources, but on the whole overestimates somewhat the influence of the northern law, was given by Steenstrup, Normannerne, Vol. 4, 1882.

With reference to Anglo-Saxon documents see Heinrich Brunner, Zur Rechtsgeschichte der romischen und germanischen Urkunde, 1880, i. 149, sqq.: Das angelsächsische Landbuch. Some points are treated more fully by Aronius, Diplomatische Studien über die älteren angelsächsischen Urkunden, 1883.

For Anglo-Saxon legal history see the following:

Kemble, The Anglo-Saxons in England, 2 vols., 1849, revised by Birch, 1876, translated into German by Brandes, 1853-1854, 2 vols.—Konrad Maurer, Ueber

angelsächsische Rechtsverhältnisse, in the Kritische Ueberschau, i, ii, iii, 1853 sqq.—Phillips, Geschichte des angelsächsischen Rechts, 1825.—The chapters dealing with the subject in Gneist, Geschichte des englischen Verwaltungsrechts, 2d edition, 1867.—Geschichte und heutige Gestalt der englischen Communalverfassung oder das Selfgovernment, 2d edition, 1863.—Selfgovernment, Communalverfassung und Verwaltungsgerichte in England, 3d edition, 1871, and Englische Verfassungsgeschichte, 1882.—Sir Francis Palgrave, The Rise and Progress of the English Commonwealth, 1831, 1832, 2 vols.—Stubbs, The Constitutional History of England in Its Origin and Development, 3 vols., 1874-1878, based on thorough historical research, and incorporating the results of German studies in legal and general history.—Essays in Anglo-Saxon Law, Boston, 1876, containing: The Courts of Law by H. Adams; The Land Law by Cabot Lodge; The Family Law by E. Young; The Legal Procedure by L. Laughlin.—Pollock and Maitland, History of English Law before the Time of Edward I, 1895, 2 vols., an epoch-making work, which has placed the earlier English legal history upon a new foundation; see Political Science Quarterly, xi. 537, Sept., 1896.—H. Munro Chadwock, Studies on Anglo-Saxon Institutions, 1905.

B.

THE SOURCES OF THE ANGLO - NORMAN LAW

From William I to Henry II, 1066-1154.—The conquest of England was the result of the political as well as the military superiority of the Norman state over the declining Anglo-Saxon constitution. Just as the antiquated cuneiform battle order of the Anglo-Saxon infantry, of which the battle of Hastings saw the last attested application among West Teutons, could not cope with the then modern art of war of the Norman knighthood, so the feudal order of Normandy secured an ascendancy over the Anglo-Saxon polity, the communal foundations of which had been submerged by unfree estates and oppressive servitudes, while it was unable to develop into a proper feudal tenure, and so in the struggle between the two legal systems which the Conquest brought about, the Norman law proved the stronger. Principles of Franco-Norman constitutional and administrative, private, criminal, and procedural law gained an entrance into England, and in consequence of the free play which the king had there for systematic organization, were, like the feudal system, developed and accentuated to a degree which they did not attain on their native soil.

The Normans applied in their relations toward each other the Norman law. For the relations between Normans and Anglo-Saxons special provisions were made. To the Anglo-Saxons the unimpaired continuance of their own law was assured in principle, and at the very beginning William the Conqueror affirmed the laga Edwardi, the law existing under Edward the Confessor; but the result was as usual when a concession is made in principle. It was ignored in practice, for the force of circumstances was stronger than the rule laid down. Normans constituted the higher ranks of society and possessed themselves of the large estates. They thronged the court of the king, while the Saxon nobles sulkingly kept aloof from the new order and eventually perished in futile insurrections. Soon ecclesiastical and secular offices were filled with Normans.

Normans formed the curia regis, and thus the highest court was given over to the influence of the Norman law,—a fact all the more significant, as in England the practice of the King's Court, through the unexampled centralization of justice, completely dominated the development of the law.

This course did not appear in full clearness immediately after the Conquest. The Normanization of the country and of its law was gradual. Under William the Conqueror legislation still moved in the grooves of Anglo-Saxon tradition. The compilations of Anglo-Saxon law, prepared under Henry I (see *supra*) prove on the one hand the continued existence of Anglo-Saxon law, on the other the struggle in which it had been engaged, not always successfully, against its Norman transformation. First in part, and then altogether the Latin supersedes the Anglo-Saxon as the language of the law, alternating with French from the time of Edward I and yielding to it completely since Richard II.

Of William the Conqueror (1066-1087) we have only three short legislative acts: 1. Willelmes cyninges asetnysse of between 1067 and 1077, a law in the Anglo-Saxon language regulating the method of proof in trials between Anglo-Saxons and Normans. The Anglo-Saxon is called englisc man, the Norman frencisc man and his law nordhmandisc lagu. 2. The Espiscopales Leges (1070-1076), a statute concerning the separation of ecclesiastical from secular jurisdiction, whereby, contrary to Anglo-Saxon custom, Continental principles were introduced into this matter, and ecclesiastical causes (quae ad regimen animarum pertinent) were withdrawn from adjudication by the secular courts. 3. A charter for the portgerefa and the citizens of London (1066 to 1075), who are guaranteed the legal status which they had enjoyed under Edward III.

The so-called Leis Willelme[1] are not a code of William I, but a private treatise. They introduce themselves as the laws and customs, granted by King William to the English people after the Conquest of England, and as being the same as those which his cousin King Edward had administered before him. The book has come down to us in French and in Latin text, the latter being a translation from the French made about 1200. The first division (ch. 1-28) contains chiefly Anglo-Norman laws, based perhaps in part upon genuine statutes of William I; it takes some account of the Danelag, and among other things regulates the liability of the hundred for the killing of Normans. Some chapters may be traced back to Cnute's code. The second division (ch. 29-52) offers a selection of laws from Cnute's code, and besides rules of Roman law (ch. 33-38), borrowed directly or indirectly from the Digest and Code of Justinian. The author of the Leis Willelme sometimes estimates by shillings of Norman currency, and sometimes by solz engleis, Mercian shillings at four dimes (denars). The work was compiled between 1090 and 1135, probably in the first decades of the twelfth century, in East Mercia, for the purpose of giving an exposition of the law in force under William I.

The Articuli Willelmi are likewise a private compilation. They are ten articles under the heading: Hic intimatur quid Willelmus rex Anglorum cum principibus suis constituit post conquisitionem Angliae. They contain laws going back to William, and in part are based upon the Instituta Cnuti. The work was written in the years between

1110 and 1135. This part entitled "Hic intimatur" was under King Stephen joined together with the Leges Edwardi Confessoris retractatae (see A9,e *supra*) and with a Genealogia ducum Normannorum, into a larger compilation which may be designated as "Tripartita."[1] Under Richard I, in 1192-3, it was translated into old French. On the basis of the Tripartita, the Quadripartitus, and of other sources, a London author about 1210 made a compilation containing interpolations and falsifications in the interest of the city of London. The piece "Hic intimatur" is incorporated in this compilation with many additions in seventeen chapters.[2]

Toward the end of the reign of William I, an official inquest resulted in the production of the Domesday Book, a detailed record (descriptio) of the real property, its tenants, its burdens and its value. Drawn up as an assessment roll for fiscal purposes according to counties and manors, it contains together with statistical data valuable findings on local customs. It was officially edited in 1783, 2 vols. fol., to which were added two supplementary volumes of the Record Commission in 1816. See Sir H. Ellis, A General Introduction to Domesday Book, 2 vols., 1833. Lappenberg, Geschichte Englands, ii. 143 sqq. Gneist, Englisches Verwaltungsrecht, i. 122. In 1886 England commemorated the eighth centenary of its tax record by a series of lectures, which were edited with a bibliography under the title, Domesday Studies, by Edward Dove, in 1888. The most valuable contributions, from the point of view of legal and economic history, to the understanding of Domesday Book were made by Maitland in his profound treatise, Domesday Book and Beyond, three essays on the early history of England, 1897, and by Round, Feudal England, 1895.

We owe to the fiscal administration of the Normans in England another important legal monument, dominated by the fiscal point of view, but, considering the influence of fiscal considerations upon the whole political and legal constitution, also instructive as to the existence of legal rules and institutions, namely, the accounts of the Exchequer, which in England date farther back than in Normandy, though with a less degree of specialization of items. They are commonly called Rolls of the Pipe, Rotuli Pipae. The oldest dates from the reign of Henry I, and was edited by Jos. Hunter under the title: Magnus Rotulus Scaccarii vel Magnus Rotulus Pipae de anno 31 regni Henrici I (ut videtur), 1130-1131, 1833.

A useful compilation of older Anglo-Norman documents relating to procedure, a corpus placitorum for the time from William the Conqueror to 6 Richard I, is furnished by Bigelow, Placita Anglo-Normannica, law cases from William I to Richard I preserved in historical records, 1879. The collection, which is taken entirely from printed sources, is composed chiefly of accounts of lawsuits from English historians, of royal writs, and of procedural passages from Domesday Book and the Exchequer Rolls. See H. Brunner in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, ii. 202 sqq.

From Henry II to about 1300.—The development of the law received a strong impulse under Henry II (1154-1189), who had been Duke of Normandy since 1150, and Capitalis Justitiarius Angliae in the last years of Stephen. From his reign date the epoch-making constitutions of Clarendon, 1164, and of Northampton, 1176. It was Henry II who introduced the jury of inquest,[1] theretofore employed only in

exceptional cases, as a regular mode of trial in civil procedure, thereby laying the foundation stone of English procedure as well as of substantive private law. In connection with this reform he established a special procedure in possessory actions by an assise which was promulgated probably about 1166. Henry's reforms organized the procedure by writ (see 2 (a) *infra*), and probably also the practice of enrolling judgments; they inaugurated the absolute subordination of inferior jurisdictions to the royal judicial power. Renewing an earlier occasional practice, Henry established the institution of itinerant justices, justices in eyre, dividing the realm into large circuits, for the purpose of the delegated exercise of the prerogative royal jurisdiction, a measure to which we find a historical analogy in the organization of the regular missi by Charles the Great. From the time of Richard I, 1189-1199, we have the Capitula Itineris, the instructions given to the itinerant justices in 1194 and 1198, which in form and context recall the Karolingian Capitulare Missorum. This innovation did not disturb the unity of the curia regis as the centre of justice and administration, for the court held by the justices in eyre was likewise curia regis. Yet already Glanvill contrasts the justiciarii itinerantes with the capitalis curia regis (viii. 5 § 4). The latter is not yet outwardly separated from the scaccarium, but under Henry II there is differentiated from the officials of the curia regis a special group, the members of a board of judges residing "in banco." Later on the exchequer, as organ of fiscal administration and jurisdiction, is formally severed from the king's court, and the latter is divided into the Court of King's Bench and the Court of Common Pleas. This division exists in fact, though not as a matter of technical nomenclature, not later than the reign of John. At that time a distinction is made between (1) placita coram rege (ipso) or quae sequuntur regem, and (2) placita de banco, which are held at definite terms by the justiciarii de banco at Westminster (or London). The placita coram rege represent what is called later on King's Bench, the placita de banco, the later Common Bench, Court of Common Pleas. Under Henry II, we find also the beginnings of systematic exposition of the Anglo-Norman law, which in the subject-matters of its treatment, the fiscal administration of the scaccarium and the practice of the King's Court, reveals the sources from which it received its impulse.

The legal sources of this age may be divided into statutes, judicial sources, records of fiscal administration, and legal treatises.

1. *Statutes.*—English jurists divide the bulk of their law into statute law and common law, according to its derivation from legislative enactment or from custom. However, the division is not consistently maintained, and the term common law is used in distinction from other divisions. The older enactments of the Norman kings are regarded as common law. They are either Constitutions, Assises, promulgated by the king after consultation with the great men of the land (assisa means assembly, session, judgment, or statute as the result of session or assembly, and also a certain form of procedure introduced by royal statute), or charters which are royal grants to remedy grievances. The official edition of the statutes prints as charters those of Henry I of 1100, of Stephen de libertatibus ecclesiae anglicanae et regni of 1136 and sine dato, of Henry II without date, of John "ut liberae sint electiones [of prelates] totius Angliae" of 1214, the Articuli of the barons, the Magna Charta of John of June 15, 1215,[1] wrested from the king by the barons, and based on the Articuli, and its confirmations (in part modifications) of 1216, 1217, 1225, the latter furnishing the text for the

subsequent frequent confirmations; moreover the Charta de Foresta of 1217, confirmed in 1225.

The statutes proper begin with the Provisions of Merton of the 20th Henry III, 1236, in the statute books regularly preceded by the Magna Charta and the Charta de Foresta. Of the time of Henry III we should also mention the important Statutum of Marleberge, Statute of Marlborough, 1267.

Under Edward I (1272-1307), the English Justinian, the number of statutes increases so much that an enumeration of even the most important seems impracticable. Through the many reforms of the reign of Edward I, England obtained the essential foundations of her subsequent constitution and the organic forms of her legislation. A permanent or "continual" council, consisting of the highest officers of church and state (the later Privy Council) was formed as "the centre of government." By special royal summons prelates and barons were from time to time joined with this council, and with it formed the Magnum Concilium, the Great Council. Under Edward I it also became the custom to convene delegates of the communitates, representatives of counties and boroughs to consult on extraordinary contributions, and shortly after also to confirm laws and to remedy grievances, who since Edward III constituted a separate body. "And thus was formed the frame of an upper and a lower house, by the advice and consent of which the Crown worked out the organic legislation of the current period." (Gneist, Self-government, 2d edition, i. 146.)

Editions.—In the official English edition and in Schmid's book, and also in Liebermann's (who also gives the decrees of Henry I), the laws of William I are placed with the laws of the Anglo-Saxons. The subsequent laws up to the beginning of the collections of English statutes have been brought together by Henry Spelman in the Codex legum veterum statutorum regni Angliae ab ingressu Guilelmi I usque ad a. 9 Henrici III, a compilation of fragments from the scriptores, of royal ordinances, privileges, constitutions, etc., which have been reprinted from the posthumous papers of the author by Wilkins in his Leges Anglo-Saxonicae, and subsequently by Houard in the second volume of his Anciennes Loix. Better texts, but without critical notes, are now to be found in the more accessible compilation of William Stubbs in his Select Charters, 2d ed., 1874. Valuable as this handy collection is, it can still be considered only as a provisional means of information, and a critical edition of the older Anglo-Norman assises continues to be urgently needed.

The statutes proper down to 1714 appeared from 1810 to 1824 in an official edition: "The Statutes of the Realm from original Records and authentic MSS., printed by command of his Majesty King George the Third in pursuance of an address of the House of Commons of Great Britain, from the earliest times to the end of the reign of Queen Anne," 10 vols. fol., including an alphabetical index, also a chronological index, 1828.

The most important older statutes have received a famous commentary in Coke's Institutes of the Laws of England, Part II. Among the numerous editions for practical use which omit antiquated statutes may be mentioned: The Statutes at large from Magna Charta to the Union of the Kingdom of Great Britain and Ireland, first by

Ruffhead, in later editions by T. E. Tomlins and J. Raithby, London, 1811, 4°, 10 vols.

2. *Judicial Sources.* (*a*) Writs (Brevia). There arose in the English curia regis, as in Normandy, an official procedure (capable of taking the place of the old formal trial by duel and oath), which in principle was confined to the curia regis, and which was begun and in part carried on by royal mandates (writs, brevia). At first these writs were a favor granted for money by the king for each particular case. From the time of Henry II they became a generally available remedy, the royal chancery receiving permanent instruction to grant in certain cases these writs in fixed forms to the parties on demand. The legal import of writs was different according to their purpose. Where the purpose was to remove a suit to the king's court, the defendant was summoned by a writ which required the vicecomes to command the defendant to make restitution or to show cause before the king's court why not. Such a writ is called writ of praecipe and has its prototype in the Frankish indiculus commonitorius. Or the vicecomes was required by the writ to select and summon a jury (recognitio) to determine some question of fact (breve recognitionis). There are numerous other occasions for writs. It is a peculiarity of the English law that real actions even in a popular court could be started only by a royal writ; for from the time of Henry II it became settled, that in the manorial courts in controversies regarding land the defendant did not have to answer in the absence of a royal writ requiring the lord of the court to see that right be done, failing which the vicecomes would see to it (breve de recto, corresponding to the Frankish indiculus de justitia). In so far as writs served to start a suit, a procedure was developed in England which may be compared to the formulary procedure of the Roman law. The actions of the English law became specialized by the forms of the writs, so that Bracton was able to say: tot formulae brevium, quot sunt genera actionum. In the thirteenth century the king lost the right arbitrarily to create new writs. Even according to Bracton a writ is to be deemed void if obtained contra jus et regni consuetudinem. On principle, he says, the issue of novel writs requires the assent of the council, but it is sufficient if the great men offer no opposition. This view, which became more rigorous with the growing importance of Parliament and impeded the free development of writs, led to the distinction between brevia formata and brevia magistralia. For the former the forms are legally fixed, the latter are granted by the Chancery in consimili casu, i. e. in cases analogous to those already provided for, quia in novo casu novum remedium est apponendum, a sort of actiones utiles,—a procedure expressly sanctioned by the second statute of Westminster, 13 Edw. I, c. 24, 1285. Another distinction was made between brevia originalia, which started the lawsuit, and brevia judicialia, which intervened in its further course. Numerous forms of writs are found in Glanvill and in the law books of the thirteenth century; especially also in the Statutum Walliae of 1284, which introduced English procedure into Wales. As to the older writs, see H. Brunner, Entstehung der Schwurgerichte, 1872; as to the older register of writs see Maitland, the History of the Register of Original Writs in Harvard Law Review, ii, iii, 1888, 1889.

(*b*) Records, i. e. memoranda of the proceedings and decisions of courts (records proper: of royal courts), which were taken and kept in the several courts as authentic memorials of judicial acts. The systematic enrolment of the proceedings of the king's court seems to be one of the great reforms of the last years of Henry II (according to

Maitland). From the roturi placitorum we distinguish fines, documents regarding compromises entered into in the king's court with royal or judicial leave on the basis of an actual or fictitious lawsuit. They are also called finales concordiae (quae finem imponunt negotio) or pedes finium, a term explained by reference to the lower part of the instrument (the foot of the fine), but which is probably due to a mistranslation of the old French pees (pax). The rotuli placitorum of the time of Richard and John, without distinction of series, are known as coram rege rolls. The rotuli placitorum of the time of Henry III are divided into three groups: (1) coram rege rolls; (2) assise rolls; (3) Tower coram rege rolls and Tower assise rolls—a distinction based upon the fact that the rotuli of the first two series were preserved in Westminster, those of the third series in the Tower.[1]

Editions. An insufficient selection from the older records, much too meagre for legal historical investigations, was made from 1619 to 1626 and published in 1811 under the auspices of the government as "Placitorum in domo capitulari Westmonasteriensi asservatorum abbreviatio temporibus Ric. I, Joh., Henr. III, Edw. I, Edw. II." An edition of complete records was furnished 1835 by Palgrave: Rotuli Curiae Regis, Rolls and Records of the Courts held before the King's Justiciars, etc., vol. i: from the sixth year of King Richard I to the accession of King John; vol. ii: the first year of King John. Palgrave edited only a portion of the plea rolls of the time of Richard I. The Pipe Roll Society has undertaken to fill the gaps. Under its auspices Maitland published, 1891, "Three Rolls of the King's Courts in the Reign of King Richard the First, ad 1194-1195." We owe besides to Maitland the edition of the Select Pleas of the Crown, vol. i (1200-1205), 1888, in the publications of the Selden Society, vol. i, a collection of placita coronae, i. e. of criminal cases reserved to royal jurisdiction, with introduction and translation. Select civil cases from 1200 to 1203 were published by William Paley Baildon, Select Civil Pleas, vol. i, 1900, (Selden Society, vol. iii). We shall note below (4, *c*) as Bracton's Note-book a collection of cases of the time of Henry III, made on the basis of official rotuli for the personal use of the jurist Bracton. Pleas of the Crown for the County of Gloucester (1221) were edited by Maitland, 1884, Extracts from the Plea Rolls (1294-1307), by Wrottesley, 1888 (William Salt Archaeol. Society for Stafford). Select Pleas of the Forest, placita forestae, i. e. inquests and proceedings concerning hunting and forest offences of the 13th century, together with an introduction on forest law, forest administration, forest jurisdiction, and a glossary of technical terms, are given by G. I. Turner; Select Pleas of the Forest, 1901 (Selden Society, vol. xiii); Select Cases from Coroners' Rolls from the years 1265 to 1413, with a summary of the history of the office of coroner[1] are edited by Charles Gross, 1896 (Selden Society, vol. ix). The following are editions of the Fines: Fines sive pedes finium in turri Londinensi asservati (1216-1272), ed. Roberts, 2 vols., 1836; Feet of fines of the reign of Henry II and of the first seven years of the reign of Richard I (1182-1196), 1894 (Pipe Roll Society, vol. xvii); Feet of Fines of the reign of Richard I, years 7-10 (1196-1199), 1896-1900 (Pipe Roll Society, vols. xxi, xxiii, xxiv).

The manorial courts, too, began to keep records in the first half of the 13th century. Select Pleas in manorial and other seignorial courts of the time of Henry III and Edward I were edited in the publications of the Selden Society (vol. ii) by Maitland in 1889, with an introduction which is valuable for the history of manorial jurisdiction.

The publication, The Court Baron together with select pleas from the Bishop of Ely's Court of Littleport, edited by Maitland and Baildon, 1891 (Selden Society, vol. iv), contains in its fifth chapter selections from the rolls of the Curia episcopi Eliensis apud Littleport of the years 1285 to 1327. The first four chapters of this publication contain forms for proceedings and judicial acts in manorial courts.2

Numerous records in the English archives still await publication. The following may serve as guides to the mass of unprinted matter: Ewald, Our public records, a brief hand-book to the national archives, 1873; Rye, Records and record searching, 1888; Scargill-Bird, Guide to principal documents in Public Record Office 2. ed. 1896.

(*c*) Reports, i. e. professional memoranda, not, like the records, serving as official memorials of judicial acts, but giving only secondary attention to the concrete facts of a particular case, and intended to give information of points of interest to legal practitioners. They therefore contain only a brief narration of facts, upon which the records lay the principal stress, but give more fully the arguments of counsel and the grounds of decision.1 The Reports were written by officially appointed and paid reporters. It is uncertain when this was first done. The Reports from the time of Edward II to Henry VIII, barring several gaps, are printed under the name of Year Books.

Editions. The first collective edition appeared 1678. As to the defects of the earlier editions see Cooper, An Account of the most Important Public Records, 1832, ii. 391 sqq. Earlier reports of the reign of Edward I (20-22, 30-35) and Edward II (11-14) have been edited with an English translation of the Anglo-French texts in the Rerum Britannicarum medii aevi scriptores under the title: Year Books of the Reign of Edward I (or Edward II), edited and translated by Alfred J. Horwood (those of Edward II by L. O. Pike), 1863 sqq. A critical edition of the earlier Year Books has recently been undertaken by the Selden Society. Up to this time three volumes have appeared. They relate to the years 1, 2 and 3 Edward II (1307-1310), and were edited by Maitland, 1903-1905, vol. xvii, xix, xx of the Publications of the Selden Society.

3. The *Rotuli Scaccarii.* Of the above mentioned Exchequer Rolls there has been preserved a complete series from the reign of Henry II which affords valuable glimpses into the history of Henry's great legal reforms.

Editions. In part they are edited by the Record Commission, in part their publication has been undertaken by the Pipe Roll Society, which was organized for the purpose of publishing the Pipe Rolls and similar documents of the time before 1200. The following have so far appeared: The Great Rolls of the Pipe for 2, 3, and 4 Henry II, 1155-1158, ed. Hunter, 1844; The Great Rolls of 1158 to 1178, published 1884 to 1907 by the Pipe Roll Society (the third volume contains an Introduction to the Study of the Pipe Rolls); The Great Rolls of the Pipe for 1 Richard I, 1189-1190, ed. Hunter, 1844; Rotulus Cancellarii vel antigraphum Magni Rotuli Pipae de tertio anno regis Johannis (1201, 1202), 1833. Other rotuli are: The Rotuli de dominabus et pueris et puellis de donatione regis (concerning fees under the king's wardship), ed. Grimaldi, 1830; the Rotuli de Liberate ac de Misis et Praestitis regnante Johanne, cur. Th. Duffus Hardy, 1844; Rotuli de Oblatis et Finibus . . . Temp. Regis Johannis accur.,

Th. Duffus Hardy, 1835. The entries of the Liberate Rolls, which concern loans made by English kings of Italian merchants in the thirteenth and fourteenth centuries, are explained and collated in a treatise by E. A. Bond, Extracts from the Liberate Rolls, in the 28th volume of the Archaeologia published by the Society of Antiquaries of London (1840). The treatise gives valuable information regarding the loan system of the English kings and the history of securities.

4. *Legal Treatises.* (*a*) The Dialogus de Scaccario ("De necessariis observantiis scaccarii dialogus"), a treatise written in form of a dialogue concerning the constitution and administration of the Royal Exchequer, valuable also for private law and procedure. "It bears witness to the early maturity of administrative processes in the Norman constitution, a remarkable evidence of the spirit of centralization and the bureaucratic conception of the state, without a parallel in the Middle Ages" (Gneist, Verwaltungsrecht, i. 201). The Dialogus was written in 1178 or in the beginning of 1179 by Richard FitzNigel, Archdeacon of Ely, and later Bishop of London. As the son of a high treasury official, the author had grown up in the atmosphere of the Exchequer, in which for forty years he filled the office of treasurer. His statements are based upon an accurate knowledge of the practice of the scaccarium and are intended to serve as a guide to its officials. By his desire to systematize, however, and from political motives, the author was led to make statements not corresponding to the facts.

Editions. The Dialogus is printed as an appendix to Madox. The history and antiquities of the Exchequer of the Kings of England, London, 1711 and 1769. A reprint with somewhat amended text is found in Stubbs, Select Charters, p. 168 sqq. Much improved is the text in the recent critical edition by Arthur Hughes, C. G. Crump, and C. Johnson: De necessariis observantiis scaccarii dialogus, 1902, with introduction and copious commentary. A careful study regarding the author, and the origin and character of the work, with a summary of its contents, is Liebermann, Einleitung in den Dialogus de Scaccario, 1875.

(*b*) Glanvill's Treatise, the first classical law book of England, and at the same time "the first attempt at a scientific exposition of native law in modern Europe."[1] The commonly used title of the work: "Tractatus de legibus et consuetudinibus regni Angliae tempore Regis Henrici secundi compositus justitiae gubernacula tenente Ranulfo de Glanvilla" is not original, but dates from some time after the death of Henry II.[2]

The work was written some time between November, 1187, and July 6, 1189. The author, Ranulfus de Glanvilla, was from 1180 to 1189 Capitalis Justitia Angliae, and certainly not without some share in the reforms of Henry II.[3] The beginning of the prologue is modelled after that of the Institutes of Justinian. The treatise, which is divided into fourteen books, confines itself to an accurate and luminous exposition of the practice of the king's court, as it had been settled on the basis of those reforms. The author expressly declines, as beyond his task, to describe the law of the local (county and manorial) courts. In the beginning of the thirteenth century Glanvill's treatise was translated into French, and was revised as late as 1250 in view of recent

developments of the law.[4] On Glanvill is based the Scotch law book called from its initial words “Regiam Majestatem,” written between 1200 and 1230.

Editions. For Germany the most accessible edition is found in the second volume of Phillips’ History of the English law. It is also found in Houard’s Traités sur les Coutumes Anglo-Normandes, i. Separate editions appeared in England 1604, 1675, 1680. An English translation with notes was given by J. Beames, 1812, also 1900, with introduction by J. H. Beale, Jr. A new and critical edition is urgently needed, and one is being prepared by Leadam for the publications of the Selden Society.

(*c*) Henrici de Bracton de legibus et consuetudinibus Angliae libri quinque. The author, Henry de Bratton (from a village of Bratton in Devonshire), was a clergyman and royal judge under Henry III (1216-1272). We meet him first in 1245 as itinerant justice, from 1248 to 1267 as assise judge in the southwestern counties of England. His permanent office was that of royal judge in the Placita coram ipso rege (quae sequuntur regem), i. e. in the old curia regis proper. He never sat in the bancum regis at Westminster. He died in 1268. His name, the incorrect spelling of which he cites as an illustration of the invalidity of a writ, was frequently misspelled by copyists. As a consequence, he has come down to posterity as Bracton. The treatise has remained outwardly and inwardly unfinished. It breaks off in the midst of the account of the breve de recto; even as far as it goes it has not had the final revision which the author contemplated. Bracton must have practically completed his work before 1259. The pause then ensuing may have been due to the fact that from 1258 he no longer had at his disposal official court records which he had theretofore used. The decisions made use of in the treatise date almost exclusively from the time prior to 1240, and with few exceptions they are decisions of the royal judges, Martin Pateshull and William Raleigh, so that Bracton’s treatise was not incorrectly said to be an exposition of the English law as represented in the administration of justice by those two judges. Like Glanvill (whom he uses) Bracton purports to describe the law and practice of the king’s court and of the judicial commissions. He gives the fullest account of the English law of the Middle Ages, “the crown and flower of English mediaeval jurisprudence” (Maitland). The treatise is distinguished by a wealth of detailed application of principles and by careful treatment of cases, of which no less than 494 are cited. In both these respects English jurisprudence has found its first typical representative in Bracton, so also in the peculiarly precise but sound legal reasoning. In another respect, however, Bracton stands alone in English legal literature, and that is in the weight he gives to Roman influence in the exposition of his native law—especially in the first book of his treatise. The Roman law had received passing but careful attention in England during the twelfth century, especially through Vacarius. Its teaching unmistakably influenced the older English law books as to precision of legal thought and method of treatment. No English jurist shows as clearly as Bracton the first vigor of this impulse. The definitions of general legal concepts, the divisions, the terminology of Bracton, often point to Roman and canon law, the knowledge of which he obtained from the Corpus juris civilis, the Decretum and the Decretals, from Bernard of Pavia, and Tancred, and above all from Azo’s Summa to the Codex and to the Institutes.[1] It happens, however, very rarely that Bracton is led by Roman ideas to depart from the law in force in England.

Editions. An edition of the treatise appeared 1569 in folio and was reprinted 1640 in 4to without change. It intended to give the text as handed down in manuscript as completely as possible, and incorporated subsequent additions to Bracton's work without indicating them as such. A new edition, indicating sources, with cross references, and an English translation, was given by Sir Travers Twiss in 6 volumes, 1878 sqq. As regards text criticism, however, it did not fulfil legitimate expectations, since no use was made of some important manuscripts. Shortly after its appearance a discovery was made in the British Museum of about 2,000 cases of the time of Henry III, which Bracton had used in writing his treatise, and to which he made or dictated numerous marginal annotations. It was edited as Bracton's Note Book, 1887, by Maitland, with instructive notes and with an introduction giving excellent observations regarding Bracton's life and activity and the history of the origin of his treatise. See Vinogradoff (discoverer of the manuscript of the Note Book) in the Athenaeum of July 19, 1884, and in Law Quarterly Review, vol. i.; Güterbock, Henricus de Bracton und sein Verhältnis zum römischen Rechte, 1862 (English by Coxe, 1866); Scrutton, Roman Law in England, p. 79 sqq; Pollock and Maitland, History of English Law, i. 185 sqq.

(*d*) Fleta seu Commentarius Juris Anglicani, the work of an unknown jurist, getting its name from the fact that it was written in the so-called Fleet prison (tractatus . . . Fleta merito appellari poterit quia in Fleta . . . fuit compositus). It dates from about 1290. A large part is copied, often literally, from Bracton, whose bulk is reduced to about one-third. It makes use of laws enacted since Bracton, and supplements the latter in essential points.

Editions. The Fleta was printed 1647 and 1685. Both editions have as an appendix the valuable Dissertatio historica ad Fletam by Selden. See Twiss in Bracton, vi, introduction, p. 18; Nichols, Britton, i, introduction, p. 25. An incomplete reprint is found in Houard, Traités sur les Coutumes Anglo-Normandes, iii.

(*e*) The treatise by Gilbert of Thornton, "Summa de Legibus et Consuetudinibus Angliae," etc., of about 1292. The author was Chief Justice of the King's Bench from 1289 to 1295, and, as he says himself, desired to make a compendium of Bracton's elaborate treatise. The author promised to take into account the legislation enacted since Bracton, but failed to do so. The work was not printed and is lost. Our information regarding it is derived from Selden in his Dissertatio ad Fletam.

(*f*) More independent of Bracton than the two last named works is a treatise going by the name of Britton, which sometimes, but without reason, has been described as a condensation or revision of Bracton. According to the investigations of its latest editor it owes its origin to a project (which is historically verifiable) of Edward I to cause a compilation of the English law to be made after the manner of the Institutes. The work is not written in the style of a law book, but its propositions are couched in the authoritative language of the lawgiver (nous voloms, nous grauntoms, etc.). The author, Britton, was probably a clerk in the service of the Crown. Since the statute Quia emptores, 18 Ed. I, is cited as "une novele constitution," Britton must have been written soon after 1290, somewhat later than the Fleta, of which, as of Bracton, it makes use. It is the oldest English law book written in French.

Editions. Earlier editions of 1540 and 1640 have been superseded by the careful edition by Nichols, Oxford, 1865, 2 vols., with English translation, and references to Bracton, the Fleta, and the Statutes, and with glossary and index.

(*g*) A treatise of small compass is the Summa Magna et Parva of Ralph of Hengham, likewise of the time of Edward I, which is intended to supplement Bracton's work in the learning of defaults and essoins. It is reprinted as an appendix to the edition of Fortescue (see *infra*) of 1737.

(*h*) The editions of Fleta subjoin to the last chapter of that book a treatise in Anglo-French of fifty paragraphs relating to procedure. It begins with the words "Fet assaver," which also frequently recur at the head of the several paragraphs, and by which the work is cited.

(*i*) The Mirrour of Justices, also called Liber Justiciariorum, a curious legal monument, probably written between 1285 and 1290. The text is preceded by five Latin verses, in the last of which the writer calls himself Andrew Horn. Of one Andrew Horn, who was chamberlain of the city of London in 1320, we know that in 1328 he bequeathed to the London Guildhall together with other books his copy of the Liber Justiciariorum. We do not know the author, but he was hardly Andrew Horn. The manuscript to which all those now extant go back, is not the original, but a copy by the hand of a careless copyist who occasionally skipped an entire line.[1] The Mirrour contains a mixture of fiction and truth. It is the work of an amateur jurist, who, with the conceit of superior knowledge, represents the law such as in his opinion it ought to be, as being old law, giving his unbridled imagination full play, and inventing silly stories to explain the origin of legal institutions. How far the work contains useful data, especially in matters within the reach of a layman's comprehension, must be ascertained by further special studies, which might prove rather thankless. The Mirrour is divided into five books, of which the last, "De abusions," contains a criticism of legal abuses concerning the common law, the Magna Charta, the statutes of Merton and Marlborough and the statutes of Edward I down to 1285. Being taken seriously in its entire content by English jurists from Edward Coke down to the late editor of Reeves' History of English Law, it has done a good deal of mischief in the study of English legal history.

Editions. The Mirrour was printed in 1642. An English translation was offered by William Hughes, 1646, reprinted 1768 and 1840. Houard, in the fourth volume of his Traités, gives the first four books. The latest edition is that by W. I. Whittaker, 1895, in the Publications of the Selden Society, vol. vii. It contains a critical introduction by Maitland.

5. The sources of English *municipal or borough law* are bewildering in their wealth, only partly sifted, and a still smaller portion published. In them we meet not infrequently principles and ideas going back to Anglo-Saxon law which within the city walls escaped the inundation of England by Norman law. In their chequered diversity the sources of municipal law cannot be exhaustively arranged under the four heads above chosen. Nor is it within the compass of this sketch to enter upon the sources of local law. A systematic review of the principles of English law recognized

according to the sources in the municipal courts of England, Scotland, and Ireland during the Middle Ages is given by Miss Mary Bateson, Borough Customs, in two volumes of the Publications of the Selden Society, 1904, 1906 (vol. xviii, xxi). In vol. i, p. 18, sq., we find a list of printed and unprinted municipal sources. See also Gross, Bibliography of British Municipal History, 1897.

Bibliography Regarding the Sources of This Period: Matthew Hale, History of the Common Law, 2 vols., 8vo, an unfinished work, published from the author's posthumous papers by Runnington, 6th ed., 1820; as an appendix Hale's analysis of the civil part of the law is printed. J. Reeves, History of the English Law from the time of the Saxons to the end of Philip and Mary, 4 vols.; 3d ed., 1814, with a fifth volume, under the title History of the English Law from the time of the Saxons to the end of the Reign of Elizabeth, vol. v containing the reign of Elizabeth, 1829. This is the most thorough and comprehensive work of English legal history going beyond the Middle Ages. A recent edition was prepared by Finlason, 1869, in three volumes, who added worthless notes, and arbitrarily changed the arrangement of the material. (See as to this edition: H. Brunner in the American Law Review, Oct., 1873, vol. viii, p. 133.)—Phillips, Englische Reichs- und Rechtsgeschichte seit der Ankunft der Normannen, 2 vols., 1828, goes only to 1189.—Crabb, History of the English Law, 1829, translated into German by Schäffner, 1839, somewhat superficial.—Savigny, Geschichte des römischen Rechts im Mittelalter, 2d ed., 1850, iv, appendix, 24.—Stubbs, Constitutional History of England, ends in the third volume with the death of Richard III.—The sources of the common law are thoroughly treated with special reference to private law and procedure by Gundermann, Englisches Privatrecht, i. 1864 (Introduction).—From the point of view of public law the sources are grouped by Gneist in the notes on pp. 56 and 137 of his Geschichte . . . der englischen Communalverfassung oder das Selfgovernment, i, 1863.—Glasson, Histoire du Droit et des Institutions politiques civiles et judiciaires de l'Angleterre, 1882 sqq., 6 vols.—Above all for the age of Glanvill and Bracton the great History of English Law by Pollock and Maitland, 1895. Note also the historical studies by Maitland in the introductions of his editions in the Publications of the Selden Society.—A. T. Carter, Outlines of English Legal History, 1899.

As to Real Property see: K. E. Digby, An Introduction to the History of the Law of Real Property, 3d ed., 1884; Pollock, The Land Laws, London, 1896 (translated into German by E. Schuster, 1889). For Procedure: Bigelow, History of Procedure in England, the Norman Period, 1880; and H. Brunner, Entstehung der Schwurgerichte, 1872. A history of the courts and of the jurisdiction exercised by them down to the present time is given by W. S. Holdsworth, A History of English Law, vol. i, 1903. Useful notes are found in the Bibliotheca Legum Angliæ, part II, containing a general account of the laws and law-writers of England from the earliest times to the reign of Edward III; compiled by Edward Brooke, London, 1788. Valuable recent material for the history of sources is found in Cooper, An Account of the most important Public Records of Great Britain, and the publications of the Record Commission, London, 1832, 2 parts. A summary view is given by Stephen, New Commentaries on the Laws of England (partly founded on Blackstone), 13th ed., 1899.

C.

SOURCES OF ENGLISH LAW FROM THE FOURTEENTH CENTURY TO BLACKSTONE

From the time of Edward III, and beginning in 1340, the Chancery with its staff officials appears as a separate organ of equity, a remedial jurisdiction for cases in which the common law afforded no redress or no adequate redress. As the Anglo-Saxon king had the authority to temper the strict law,[1] as the Frankish king had the right to order the decision of controversies in the king's court secundum aequitatem, as the later Roman law had reserved the application of aequitas to the consistorium principis, so the Anglo-Norman king since the thirteenth century administered equity in the Council. This function of the Council gradually became vested in the Chancery, which long before had granted new writs in consimili casu, as a court of equity, which in course of time through the following of precedents (lex cancellariae) assumed definite form, and developed not merely a procedure without jury based upon the canon law, but a substantive private law of equity in contrast to the common law. "England thereby obtained the necessary supplement to its private law, which in Germany resulted from the reception of the Roman law"—an observation by Gneist (Engl. Verfassungsgeschichte, p. 335), which expresses a fundamentally correct idea.

Editions. The older records of the Chancery are printed in the first two volumes of the work: A Calendar of the Proceedings in Chancery in the Reign of Queen Elizabeth, to which are prefixed examples of earlier proceedings in that court, namely, from the reign of Richard II to that of Queen Elizabeth inclusive, 1827 sqq.; and in the publication (which supplements that work): Select Cases in Chancery, 1364-1471, ed. William Paley Baildon, 1896 (Selden Society, vol. x).

Toward the end of the fifteenth and beginning of the sixteenth century, when the reception of the Roman law occurred in Germany, it also seemed to ask for admission to the courts of England. Especially in the second quarter of the sixteenth century the continuity of the development of English law seemed seriously threatened. A number of causes, however, combined to make it possible to ward off the foreign law permanently. The English law, which had attained to a relatively high degree of technical perfection, found strong support in the schools of law with settled traditions of teaching.[1] The early reception of Roman ideas, especially in the age of Bracton, had "operated as a sort of prophylactic inoculation, and had rendered the national law immune against destructive infection."[2] It seemed to augur ill for the English law that in 1535 the Year Books were discontinued, the official reports, which had aided so strongly the continuity of English jurisprudence. But in the same year Henry VIII prohibited the study of the canon law, which in Germany had opened the path for the triumphant march of the Roman law.

As sources of the common law (as distinguished from equity) we should mention for this period the following:

A. *Statutes.* The series of statutes begins at a time when the principles of English law regarding the constitutional methods of legislation were not yet settled. Statutes are divided into statuta vetera and nova. The dividing line is the beginning of the reign of Edward III, 1327, it being assumed that by this time the essential elements of the modern idea of a statute are fixed. This assumption is incorrect, for the constitution of Parliament is settled as early as Edward I, while its rights with reference to legislation are expressly recognized only after Edward III. Since Edward III we have, however, a distinction between statutes and ordinances, based upon the fact, that parliamentary acts intended to be of permanent operation were entered in the official statute rolls. In default of such entry the act was an ordinance. What constitutes an ordinance, from the substantive point of view, is controverted, some regarding it as an imperfect statute, others as a temporary law. It is probably correct to assume that originally statute and ordinance served the same purpose. (See Gneist, Verwaltung, Justiz, Rechtsweg, 1869, p. 62). As in the German Empire down to 1654 the laws enacted at a diet were collected as “Reichsabschied,” recessus imperii, so in England the laws enacted at a session of Parliament were put together as a statute, the several legislative acts being designated as chapters. Each law is cited according to the king who enacted it, prefacing the year of his reign and adding the number of the chapter. So 18 Ed. III, c. 7. From the time of the Tudors the language of the statutes degenerates noticeably, and becomes more diffuse and slovenly as the number of statutes increases. From Henry VII on (1485-1509) the language of legislation is English exclusively.

Editions. To the Statutes of the Realm we should add for the time of the Commonwealth: Acts and Ordinances during the Usurpation from 1640 to 1656 by Henry Scobell, London, 1658, fol. The proceedings of the Council, above referred to, have been edited by Sir Harris Nicolas as Proceedings and Ordinances of the Privy Council of England, from 10 Ric. II, 1386, to 33 Henr. VIII, 1541, 7 vols., 8vo, 1834-1837. The Register of the acts and important proceedings of Parliament, the Parliamentary Rolls, are printed as Rotuli Parliamentorum ut et Petitiones et Placita in Parliamento (1278-1503), 6 vols., 1764 sqq. An index to this was published in 1832. The official journals of the House of Lords begin 1 Hen. VIII, those of the House of Commons, 1 Ed. VI. See Gneist, Selfgovernment, i. 256, and Gneist, Das englische Parlament vom neunten bis zum Ende des neunzehnten Jahrhunderts, 1886.—Continuing the above mentioned collection by Tomlins and others, the later statutes are contained in the Statutes of the United Kingdom of Great Britain and Ireland by Tomlins, Raithby, Simons, Bevan and Rickards, 29 vols. (to 32 & 33 Vict.), 1804-1869.

In 1860 a Commission was set to work to publish an abridged edition of the statutes, eliminating repealed and antiquated matter. The final result of this is the second revised edition of the statutes, prepared under the direction of the Statute Law Committee, 1888-1890. Of the editions for practical use should be mentioned Chitty’s Collection of Statutes of Practical Utility arranged in alphabetical and chronological order, re-edited and brought down to date by Lely, 5th ed., 1901.

B. *Judicial Sources.* The fourteenth century and the first half of the fifteenth lived on the rich legacy of the thirteenth. It was not until the second half of the fifteenth century that important law books reappeared which relegated the older ones to

oblivion. The development of the law at this time must be traced almost exclusively through the judicial sources.

Since the number of the regular writs (brevia de cursu) grew constantly, the need of a collection made itself felt. One made under Edward III at the same time illustrated their application: it is known as Old Natura Brevium. An official collection of forms appeared in 1531, known as Registrum Brevium omnium tam Originalium quam Judicialium. An extract from this is revised in the New Natura Brevium by Anthony Fitzherbert (many editions, first French, 1534; ninth edition, English, 1794, with a commentary by Lord Hale).

The records belonging to this period are as yet unprinted. Even the Abbreviatio closes with Edward II. The printing of the older records would be especially desirable in order to facilitate the understanding of the Year Books. The language of the records long remained Latin, even after French had in 1362 been superseded by English as the language of the courts.

The official reports close under Henry VIII (1535). Reports from the time of Edward III have been published by Pike in continuation of Horwood's edition of the Year Books. The official are replaced by private reporters, the reports in some instances being made primarily for the private use of the reporter, who was subsequently prevailed upon to publish them. The high value attached to precedents in England appears from the fact that the reports not only furnished the main material for independent legal treatises, but constituted themselves a most important form of legal literature. The number of reporters is large and the greatest names in English jurisprudence are found among them. Of the older reporters, Plowden (1578) and Dyer (1585) stand especially high. A conspicuous place belongs to Edward Coke who attained to such authority that his reports are cited without name—a distinction shared by no other English jurist. His reports comprise thirteen volumes, of which the last two appeared after his death. Of the reporters after Coke may be mentioned: Croke, Yelverton, Hobart, Saunders, Vaughan, and Levinz. The number of printed reports is very large. Sir Fred. Pollock estimates the number of printed reports for England alone at more than 1,800 volumes, the number of reports for Great Britain, the Colonies, and the United States at 8,000 volumes.[1]

Editions. A list of the reports and of the abbreviations by which they are cited, is given by Arthur Cane, Tables, Alphabetical and Chronological, of all Reports of Cases decided in England, Scotland and Ireland, . . . with a list of the usual modes of citation compiled under the direction of the Council [of Law Reporting], London, 1895. For the history of the reports see: Daniel, History and Origin of the Law Reports, 1884; J. W. Wallace, The Reporters, 1882; Sir Frederick Pollock, A First Book of Jurisprudence for Students of the Common Law, 1896, p. 274 sqq., and the sketch by Van Vechten Veeder, The English Reports, 1292-1865, in the Harvard Law Review, 1901.

C. *Legal Writings.*—After a long pause English legal science received a new lease of life with the work of Fortescue, De laudibus legum Angliae, and with Littleton's Tenures.

John Fortescue had first been attorney, and in 1442 under Henry VI had become Chief Justice of the King's Bench. Adhering to the House of Lancaster in the struggle between the Roses, he was convicted of high treason after the victory of Edward IV of York, in 1461, and fled from England. About 1463 he was with the Queen and Prince Edward in Barrois in Lorraine. Probably in this exile, from which he returned to England only in 1471, he wrote for the education of the successor to the crown his famous work, "De laudibus legum Angliae," to which he gave the form of a dialogue between prince and chancellor. (Fortescue had been nominally appointed chancellor by Henry VI. Edward IV pardoned him in 1473 and made him privy councillor.)

The book, which is written in popular style, pursues the double purpose of showing the peculiarities and advantages of the English law as compared with the Roman law, and to point out the good features of a constitutionally limited monarchy in contrast to a despotic government. Not a few of the propositions first enunciated by him later on became political axioms. For the Continent Fortescue is important as the precursor of those modern authors who by pointing out the advantages of English law prepared the way for the reception of English institutions by Continental Europe.

Editions. The most valued edition of the work is that of 1737 in folio. A later edition appeared, 1825, with notes by Amos, republished 1874 with an English translation by Francis Gregor (Cincinnati). Careful edition by Plummer, Oxford, 1885. All the works of Fortescue were published by Lord Clermont in 1869. As to Fortescue, see the article by Gundermann in Bluntschli and Brater's Staatsworterbuch, and Foss, The Judges of England with sketches of their lives, iv. 215, 308.

A contemporary of Fortescue, Thomas Littleton (died 1481), furnished an epoch-making exposition of private law by his Tenures, in which he discusses the law of real property on the basis of the material scattered through the numerous reports. According to Coke, the work was written after the fourteenth year of Edward IV (1461-1483), and attained such authority that Coke, who speaks of it as the most perfect and absolute work that was ever written in any human science, was able to say that he knew of no decision conflicting with any view of Littleton's.

Editions. Some place the oldest edition in the year 1481; according to this the Tenures were printed soon after the introduction of printing into England. Edward Coke furnished an English translation of the old French text, and a commentary, and in this form the Tenures dominated down to Blackstone like a code the practice and study of the English law. The old French text with English translation and notes was last edited by Tomlins in 1841. A new edition of the old English translation was prepared by Eugene Wambaugh, with valuable introduction and bibliography, Washington, 1903. Coke's edition will be referred to later on. See Foss, Judges, iv. 436.

A much read and often printed treatise, written under Henry VIII, was St. Germain's Dialogus de fundamentis legum Angliae et de conscientia. It contains a dialogue between a doctor of divinity and a student of English law, aiming at a philosophical justification of English legal institutions.

Editions. The earliest edition is of 1523. In English translation, under the title Doctor and Student, the book experienced many editions. That of 1787 is entitled: Doctor and Student; or dialogues between a doctor of divinity and a student in the laws of England concerning the grounds of those laws, together with questions and cases concerning the equity thereof. Eighteenth edition, corrected and improved, by William Muchall, 1815.

Anthony Fitzherbert, the author of the New Natura Brevium (died 1538), is also known for some special treatises on the courts, especially, however, by his Graunde Abridgement (printed 1514, 1516, 1565), a digest of the Year Books. The cases from the time of Henry III which are digested in the Abridgement, are almost exclusively taken from Bracton's Note Book.

Between 1554 and 1556 Sir William Staunforde (also spelled Staundford; died 1558), England's earliest scientific criminalist, wrote a highly valued work on criminal law and procedure, "The Pleas of the Crown," which makes good use of the treatise of the thirteenth century, in addition to the Reports. Staunforde was also the first to edit Glanvill's treatise, and he wrote a treatise, De prerogativa regis, which is generally subjoined to the editions of the Pleas of the Crown. (See Foss, Judges, v. 390. Reeves, History of the English Law, iii. 564 sqq.)

An excellent summary description of the English political and legal constitution at the time of Elizabeth was given in 1565 by Sir Thomas Smith in his little book. De Republica Anglorum, which among other things contains a summary of civil and criminal procedure. The vivid account, written in Toulouse without the aid of a library, is strongly spiced with classical quotations. Aiming at the utmost purity of Latin, Smith replaced English by classical terms, transformed the coroner into the quaestor homicidii, the justice of the peace into the eirenarches, the king's bench into the subsellia regis, and so on. His description was later on often enlarged by others. A new edition, with preface by Maitland, was published in Cambridge, 1906.

Edward Coke, whose works have in part been already referred to, became the most celebrated authority among English jurists. He was born in 1552, became attorney-general in 1594, Chief Justice of the Common Pleas in 1606, Chief Justice of the King's Bench in 1613, but lost the king's favor and his position in 1616, partly in consequence of the antagonism of his opponent, Sir Francis Bacon. His principal works are the above mentioned Reports and the Institutes of the Laws of England. The latter (very improperly so-called) appeared in 1628 and consist of four parts. The first contains a Commentary on Littleton's Tenures, which has frequently been edited and annotated. The notes by Hargrave and Butler are particularly valuable. Part II furnishes a copious commentary to Magna Charta and the older statutes, but without systematic arrangement. The third part gives an exposition of criminal law (Placita Coronae). The fourth treats of jurisdictions. The Institutes are cited by prefixing to "Inst." the number of the part, and adding the page. Coke accomplished all that is possible by the method of the commentary. His works are distinguished by thoroughness and learning, but not by a display of genius. (See Foss, Judges, vi. 108.)

Edition. The Institutes of the Laws of England . . . autore Edw. Coke, London, 1817, in 6 vols. Part I (2 vols.) with notes by Hargrave and Butler; last edition 1832 (19th ed.).

Of the jurists after Coke and before Blackstone it is sufficient to mention Matthew Hale, William Hawkins, and John Comyns. M. Hale (died 1676), who, although Royalist, became, under Cromwell, judge in the Court of Common Pleas on account of his eminence as a lawyer, wrote in addition to the above mentioned History of the Common Law, a work on criminal law: the History of the Pleas of the Crown (Historia Placitorum Coronae), first edited 1739, then in 1800 with notes by Dogherty, last in 1847 by Stokes and Ingersoll with a biography of the author (2 vols.); also, the Analysis of the Law which became the foundation of Blackstone's Commentaries. William Hawkins is to be noticed likewise for a work on criminal law and procedure: the Treatise of the Pleas of the Crown or a system of the principal matters relating to that subject, published by the author in 1716 (8th edition, 1824, revised by Curwood, with supplements by Leach). Sir John Comyns (died 1740) is noted for his Reports (1744), and still more for the Digest of the Laws of England (1762, 5th edition by Hammond, 8 vols., 1822), said to be distinguished for method, thoroughness and accuracy.

English legal literature entered upon a new era with the Commentaries on the laws of England by Sir William Blackstone (born 1723, died 1780). Blackstone was first lawyer, but subsequently entered upon the academic career, and in 1758 obtained the chair of English law endowed at the University of Oxford by the jurist Viner, author of a voluminous Abridgment of Law and Equity. Later on he was again active at the bar, and as a member of Parliament, and finally became judge in the Court of Common Pleas. His varied activities enabled him to combine in his works theoretical learning with practical judgment. The so-called Commentaries, which grew out of his academic lectures, are really a systematic exposition of the English law. In the plan of the work he followed Matthew Hale, the portions on public law betray the influence of Montesquieu. The first volume treats of the rights of persons, the second of the rights of things (including obligations), the third of private wrongs, the fourth of public wrongs (crimes, punishments, criminal procedure). The other departments of law (constitution, church, courts) are forced into this division. The first edition of the Commentaries appeared 1765: Blackstone himself altered little in the later editions. The lucidity and transparency of the style, the scientific thoroughness of the author, the repression of ponderous learning, the mastery of the enormous material, have given the work a world-wide reputation. Blackstone did not write primarily for lawyers, but for the educated public in general. He was the first who succeeded in raising English jurisprudence from its isolation to the level of general culture. The legal historian may find some of the historical expositions from the point of view of present knowledge shallow and incorrect: a Romanist will look in vain for a strict system. Those who desire a legislative transformation of the English law, such as was advocated later on by Blackstone's pupil, Bentham, may from their point of view not unjustly criticize his want of reformatory spirit and his adherence to legal traditions. Yet it can be boldly asserted that not one of the modern systems of law can boast of an exposition equal to that which the English law possesses in Blackstone. Abroad he has become almost the representative of English jurisprudence. The Continent of

Europe derived its knowledge of English law chiefly from him. In America he is regarded as the repository of the common law. In England the study of the law even to-day is chiefly based upon the Commentaries. The work has gone in England through more than twenty editions.[1] In the beginning the changes that were called for by the progress of the law were made through notes, addenda, and corrections. This was done especially by Christian, who brought out the twelfth to the fifteenth editions. But the radical legislative changes since 1815 necessitated a revision of the text of the Commentaries. The most important of these revisions is that by Stephen, whose New Commentaries on the laws of England (partly founded on Blackstone) afford the best view of the present state of the law in England (13th edition, 1899). The last English edition of the original text of Blackstone is that by Robert Malcolm Kerr (4 vols., 4th ed., 1876). The principal American editions are by Hammond, 1890, giving all American cases in which Blackstone is cited, and by Tucker, Sharswood, Cooley, and Lewis. Of the abridgments of Blackstone may be mentioned that which Foss published in 1820 under the name of John Gifford (translated into German by Colditz, Schleswig, 1822), a Blackstone abridged and adapted to the existing law by Samuel Warren (2d ed., 1856) and Kerr's Student's Blackstone (10th ed., 1887). Besides the Commentaries, Blackstone wrote a number of smaller treatises, of which a collective edition appeared under the name of Tracts, chiefly relating to the Antiquities and Laws of England (3d ed., Oxford, 1771), among them an Analysis of the Laws of England, an Essay on Collateral Consanguinity, Considerations on Copyholders, and an Introduction to Magna Charta. He also wrote Reports (edited with notes by Elseley, 1827), which are criticized as being not quite accurate. (As to Blackstone, see the article by Marquardsen in Blunstchli and Brater's Staatswörterbuch, ii. 157. Wilson, History of Modern English Law, hardly does him justice.)

The period of the undisputed rule of the common law ended in England in the past century. A complete break with the past, such as was demanded by the naturalistic radical theories of Bentham and Austin regarding the function of legislation, has been wisely avoided. Yet incisive reforms had become inevitable. The idea of codification, which emerged as early as the sixteenth century, assumed definite shape when the consolidation of statutes on special topics, especially in criminal law and procedure, was undertaken, and at the same time comprehensive reforms were introduced by legislation. The importance of the statutes as a source of law has greatly increased in the field of the common law. The great reorganization of the judiciary inaugurated by the Supreme Court of Judicature Act, gave the development of the English law an entirely new direction. The several courts at Westminster were replaced by one consolidated Supreme Court. By the transformation of the Court of Chancery into one of the Divisions of the High Court of Justice the traditional contrast between common law and equity lost much of its sharpness and the infusion of equity into the common law was made possible.

With the expansion of the territory of the realm, the English law has been extended in the main to Wales and Ireland, while Scotland remains legally distinct. Here there had been a reception of English law in Anglo-Saxon and still more in Anglo-Norman times, especially since Henry II; and English statutes and writs obtained force in Scotland. But from the time of Edward III the development of Scotch law pursued its

independent course, so that it differs now in many respects from the English common law. The sources of law for each country being almost equally comprehensive, it must suffice here to refer to the data given in Stephen-Blackstone, New Commentaries, i. Neither can the development of the English law in the British Colonies or in the United States be here considered.

Bibliography. Of Reeves, History of the English Law, part of vol. ii and vols. iii-v treat of the period here considered to the reign of Elizabeth inclusive. Crabb becomes very summary subsequent to the period covered by Reeves. The most recent development of the law is treated of by Wilson, History of Modern English Law, 1875, a zealous advocate of radical modernization of the English law through legislation (Benthamism), contrasting the common law with the recent changes. Full notes regarding the legal writers who were also judges are found in Edw. Foss, The Judges of England, with sketches of their lives, 9 vols., to 1864, and in his Biographia Juridica, a biographical Dictionary of the Judges of England, 1066-1870, 1870. Holmes, The Common Law, Boston, 1881, gives a very noteworthy account of civil and criminal institutions of the common law and their historic foundations. An excellent view of the English private law on a historical basis is afforded by Ernst Heymann, in Holtzendorff-Kohler: Encyclopaedie der Rechtswissenschaft, 6th ed., i (1904), p. 795. For a first introduction see Sir Fred. Pollock, A First Book of Jurisprudence for Students of the Common Law, 1896.

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23.

MATERIALS FOR THE HISTORY OF ENGLISH LAW[1]

By Frederic William Maitland[2]

A DISTINGUISHED English lawyer has recently stated his opinion that the task of writing a history of English law may perhaps be achieved by some of the antiquarian scholars of Germany or America, but that "it seems hardly likely that any one in this country [England, to wit] will have the patience and learning to attempt it."[3] The compliment thus paid to Germany and America is, as I venture to think, well deserved; but a comparison of national exploits is never a very satisfactory performance. It is pleasanter, easier, safer to say nothing about the quarter whence good work has come or is likely to come, and merely to chronicle the fact that it has been done or to protest that it wants doing. And as regards the matter in hand, the history of English law, there really is no reason why we should speak in a hopeless tone. If we look about us a little, we shall see that very much has already been achieved, and we shall also see that the times are becoming favorable for yet greater achievements.

Let us take this second point first. The history of history seems to show that it is only late in the day that the laws of a nation become in the historian's eyes a matter of firstrate importance, or perhaps we should rather say, a matter demanding thorough treatment. No one indeed would deny the abstract proposition that law is, to say the least, a considerable element in national life; but in the past historians have been apt to assume that it is an element which remains constant, or that any variations in it are so insignificant that they may safely be neglected. The history of external events, of wars and alliances, conquests and annexations, the lives of kings and great men, these seem easier to write, and for a while they are really more attractive; a few lightly written paragraphs on "the manners and customs of the period" may be thrown in, but they must not be very long nor very serious. It is but gradually that the desire comes upon us to know the men of past times more thoroughly, to know their works and their ways, to know not merely the distinguished men but the undistinguished also. History then becomes "constitutional;" even for the purpose of studying the great men and the striking events, it must become constitutional, must try to reproduce the political atmosphere in which the heroes lived and their deeds were done. But it cannot stop there; already it has entered the realm of law, and it finds that realm an organized whole, one that cannot be cut up into departments by hard and fast lines. The public law that the historian wants as stage and scenery for his characters is found to imply private law, and private law a sufficient knowledge of which cannot be taken for granted. In a somewhat different quarter there arises the demand for social and economic history; but the way to this is barred by law, for speaking broadly we may say that only in legal documents and under legal forms are the social and economic arrangements of remote times made visible to us. The history of law thus appears as means to an end, but at the same time we come to think of it as interesting in itself; it

is the history of one great stream of human thought and endeavor, of a stream which can be traced through centuries, whose flow can be watched decade by decade and even year by year. It may indeed be possible for us, in our estimates of the sum total of national life, to exaggerate the importance of law; we may say, if we will, that it is only the skeleton of the body politic; but students of the body natural cannot afford to be scornful of bones, nor even of dry bones; they must know their anatomy. Have we then any cause to speak despondently when every writer on constitutional history finds himself compelled to plunge more deeply into law than his predecessors have gone, when every effort after economic history is demonstrating the absolute necessity for a preliminary solution of legal problems, when two great English historians who could agree about nothing else have agreed that English history must be read in the Statute Book?1 In course of time the amendment will be adopted that to the Statute Book be added the Law Reports, the Court Rolls and some other little matters.

And then again we ought by this time to have learnt the lesson that the history of our law is no unique phenomenon. For a moment it may crush some hopes of speedy triumph when we learn that, for the sake of English law, foreign law must be studied, that only by a comparison of our law with her sisters will some of the most remarkable traits of the former be adequately understood. But new and robuster hopes will spring up; we have not to deal with anything so incapable of description as a really unique system would be. At numberless points our mediæval law, not merely the law of the very oldest times but also the law of our Year Books, can be illustrated by the contemporary law of France and Germany. The illustration, it is true, is sometimes of the kind that is produced by flat contradiction, teaching us what a thing is by showing us what it is not; but much more often it is of a still more instructive kind, showing us an essential unity of substance beneath a startling difference of form. And the mighty, the splendid efforts that have been spent upon reconstructing the law of mediæval Germany will stimulate hopes and will provide models. We can see how a system has been recovered from the dead; how by means of hard labor and vigorous controversy one outline after another has been secured. In some respects the work was harder than that which has to be done for England, in some perhaps it was easier; but the sight of it will prevent our saying that the history of English law will never be written.

And a great deal has been done. It is true that as yet we have not any history of our whole law that can be called adequate, or nearly adequate. But such a work will only come late in the day, and there are many things to be done before it will be produced. Still some efforts after general legal history have been made. No man of his age was better qualified or better equipped for the task than Sir Matthew Hale; none had a wider or deeper knowledge of the materials; he was perhaps the last great English lawyer who habitually studied records; he studied them pen in hand and to good purpose. Add to this that, besides being the most eminent lawyer and judge of his time, he was a student of general history, found relaxation in the pages of Hoveden and Matthew Paris, read Roman law, did not despise continental literature, felt an impulse towards scientific arrangement, took wide and liberal views of the object and method of law. Still it is by his *Pleas of the Crown* and his *Jurisdiction of the House of Lords* that he will have helped his successors rather than by his posthumous and

fragmentary *History of the Common Law.*[1] Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage; and just when one expects the book to become interesting, it finishes off with protracted panegyrics upon our law of inheritance and trial by jury. When, nearly a century later, John Reeves[2] brought to the same task powers which certainly were far inferior to Hale's, he nevertheless achieved a much more valuable result. Until it is superseded, his *History* will remain a most useful book, and it will assuredly help in the making of the work which supersedes it. Reeves had studied the Year Books patiently, and his exposition of such part of our legal history as lies in them is intelligent and trustworthy; it is greatly to his credit that, writing in a very dark age (when the study of records in manuscript had ceased and the publication of records had not yet begun), he had the courage to combat some venerable or at least inveterate fables. Still his work is very technical and, it must be confessed, very dull; it is only a book for those who already know a good deal about mediæval law; no attempt is made to show the real, practical meaning of ancient rules, which are left to look like so many arbitrary canons of a game of chance; owing to its dreariness it is never likely to receive its fair share of praise. Crabb's *History of English Law* is a comparatively slight performance;[1] it adds little if anything to what was done by Reeves.

But particular departments of law have found their historians. What we call constitutional history is the history of a department of law and of something more—a history of constitutional law and of its actual working. For men of English race, constitutional history has long had an interest; they can be stirred by the politics of the past, for they are "political animals" with a witness. It would be needless to say that in this quarter solid and secure results have been obtained, needless to mention the names of Palgrave, Hallam, Stubbs, Gneist. Still, for modern times, much remains to be done. In relation to those times "constitutional history" but too frequently means a history of just the showy side of the constitution, the great disputes and great catastrophes, matters about which no one can form a really sound opinion who is not thoroughly versed in the sober, humdrum legal history of the time. But this work will certainly be done; the "general historian" will see more and more clearly after every attempt that he cannot be fair, that he cannot even be very interesting, unless he succeeds in reproducing for us not merely the facts but the atmosphere of the past, an atmosphere charged with law.

Again, other parts of the law have been submitted to historical treatment; in particular, those which in early times were most closely interwoven with the law of the constitution, criminal law[1] and real property law,[2] while the history of trial by jury has a literature of its own and the history of some early stages in the development of civil procedure has not been neglected.[3] But every effort has shown the necessity of going deeper and deeper. Everywhere the investigator finds himself compelled to deal with ideas which are not the ideas of modern times. These he has painfully to reconstruct, and he cannot do so without calling in question much of the traditional learning, without tracing the subtle methods in which legal notions expand, contract, take in a new content, or, as is sometimes the case, become hide-bound, wither and die. This task of probing and defining the great formative ideas of law is one that

cannot be undertaken until much else has been done; it is only of late that the possibility and the necessity of such a task have become apparent, but already progress has been made in it. We are not where we were when a few years ago Holmes published a book which for a long time to come will leave its mark wide and deep on all the best thoughts of Americans and Englishmen about the history of their common law.4

And here let us call to mind the vast work done by our Record commission, by the Rolls series, by divers antiquarian societies, towards providing the historian of law with new materials. Let us think what Reeves had at his disposal, what we have at our disposal. He had the Statute Book, the Year Books in a bad and clumsy edition, the old text-books in bad and clumsy editions. He made no use of Domesday Book; he had not the *Placitorum Abbreviatio,* nor Palgrave's *Rotuli Curiae Regis;* he had no Parliament Rolls, Pipe, Patent, Close, Fine, Charter, Hundred Rolls, no Proceedings of the King's Council, no early Chancery Proceedings, not a cartulary, not a manorial extent, not a manorial roll; he had not Nichols' Britton, nor Pike's nor Horwood's Year Books, nor Stubbs' Select Charters, nor Bigelow's *Placita Anglo-Normannica;* he had no collection of Anglo-Saxon "land books," only a very faulty collection of Anglo-Saxon dooms, while the early history of law in Normandy was utter darkness. The easily accessible materials for that part of our history which lies before Edward I have been multiplied tenfold, perhaps twenty-fold; even as to later periods our information has been very largely supplemented. Where Reeves was only able to state a naked rule, taken from Bracton or the Statute Book, and leave it looking bare and silly enough, we might clothe that rule with a score of illustrations which would show its real meaning and operation. The great years of the Record commission, 1830 to 1840, the years when Palgrave and Hardy issued roll after roll, such years we shall hardly see again; the bill, one is told, was heavy; but happily the work was done, and there it is.1 A curious memorial it may seem of the age of "the radical reform," of the time when Parliament, for once in a way, was really showing some interest in the ordinary, every-day law of the realm, and was wisely freeing it from its mediæval forms. But in truth there is nothing strange in the coincidence; the desire to reform the law went hand in hand with the desire to know its history; and so it has always been and will always be.2 The commencement in 1858 of the Rolls series is, of course, one of the greatest events in the history of English history, and in that series are now to be found not only most of our principal chronicles, but also several books of first-rate legal importance, Year Books never before printed and monastic cartularies. The English Historical society published Kemble's collection of Anglo-Saxon charters, the Camden society published Hale's Domesday of St. Paul's and several similar works. More recently the Pipe Roll society started with the purpose of "dealing with all national manuscripts of a date prior to 1200," and the Selden society with the purpose of "printing manuscripts and new editions and translations of books having an important bearing on English legal history." Such work must chiefly be done in the old country, but it would be base ingratitude were an Englishman to forget that the Selden society owes its very existence to the support that has been given to it in America. And then again the original documents themselves are now freely and conveniently accessible to the investigator, and a very great deal has been done towards making catalogues and indexes of them. Our Public Record office, if I may speak from some little experience of it, is an institution of which we may justly be

proud; certainly it is a place in which even a beginner meets with courtesy and attention, and soon finds far more than he had ever hoped to find. Then, lastly, there has been a steady flow of manuscripts towards a few great public libraries. He who would use them has no longer to go about the country begging favors of the great; he will generally find what he wants at the British museum, at Oxford, or at Cambridge. No, most certainly we do not stand where Reeves stood.1

But perhaps we have not yet cast our eyes towards what will prove to be the brightest quarter of all, the study of our common law in the universities. Not only are there law schools, but (and this is more to our point) we on this side of the water have the pleasure of reading about schools of political science, schools in which law is taught along with history and along with political economy. Surely it cannot be very rash in us to say that the training there provided is just the training best calculated to excite an interest in the history of law. Possibly that interest may be sufficiently keen and sufficiently patient to tolerate the somewhat dreary information which it is the purpose of this article to afford. An attempt to indicate briefly the nature and the whereabouts of our materials may be of some use though it stops short of a formal bibliography. In the course of this attempt the writer may take occasion to point out not merely what has been done, but also what has not been done, and in this way he may perhaps earn the thanks of some one who is on the outlook for a task.

To break up the history of law into periods is of course necessary; but there must always be something arbitrary in such a proceeding, and only one who is a master of his matter will be in a position to say how the arbitrary element can best be brought to the irreducible minimum. It would be natural to make one period end with the Norman conquest; and though, if no line were drawn before that date, the first period would be enormously long, five or six hundred years, still we may doubt whether our English materials will ever enable us to present any picture of a system of English or Anglo-Saxon law as it was at any earlier date than the close of the eleventh century. By that time our dooms and land-books have become a considerable mass. If we stop short of that time, we shall have to eke out our scanty knowledge with inferences drawn from foreign documents, the *Germania* of Tacitus, the continental “folk laws,” notably the *Lex Salica.* In that case the outcome will be much rather an account of German law in general than an account of that slip of German law which was planted in England: a very desirable introduction to a history of English law it may be, but hardly a part of that history. Passing by for a moment the deep question whether the English law of later times can be treated as a genuine development of Anglo-Saxon law, whether the historian would not be constrained to digress into the legal history of Scandinavia, Normandy, the Frankish Empire, we shall probably hold that the reigns of our Norman kings, including Stephen, make another good period. The reign of Henry II there might be good reason for treating by itself, so important is it. “From Glanvill to Bracton” might be no bad title, though there would be something to be said for pausing at the Great Charter. The reign of Edward I, “the English Justinian,” has claims to be dealt with separately, or the traditional line drawn between the Old Statutes and the New might make us carry on the tale to the death of Edward II. “The period of the Year Books”—Edward II to Henry VIII—is, so far at least as private law is concerned, a wonderfully unbroken period. If a break were made in it, the accession of Edward IV, the beginning of “the new monarchy” as some call it, might be taken as

the occasion of a halt. The names of Coke and Blackstone suggest other halting places. After the date of Blackstone, the historian, if an Englishman dealing solely with England, would hardly stop again until he reached some such date as 1830, the passing of the Reform acts, the death of Jeremy Bentham, the beginning of the modern period of legislative activity; if an American, he would draw a marked line at the Declaration of Independence, and it would be presumption in an Englishman to guess what he would do next. But on this occasion we shall not get beyond the end of the middle ages, and for the sake of brevity our periods will be made few.

I.

England Before The Norman Conquest

The materials consist chiefly of (1) the laws, or "dooms," as they generally call themselves; (2) the "land books" and other diplomata; (3) the ecclesiastical documents, in particular canons and penitentials.

(1) We have first a group of very ancient Kentish laws, those of Ethelbert (*circa* 600), those of Hlothar and Eadric (*circa* 675), and those of Wihtred (696). A little earlier than these last come the dooms of the West-Saxon Ine (690). Then follows a sad gap, a gap of two centuries, for we get no more laws before those of Alfred; it is to be feared that we have lost some laws of the Mercian Offa. With the tenth century and the consolidation of the realm of England, legislation becomes a much commoner thing. Edward, Ethelstan, Edmund, Edgar issue important laws, and Ethelred issues many laws of a feeble, distracted kind. The series of dooms ends with the comprehensive code of Canute, one of the best legal monuments that the eleventh century has to show. Besides these laws properly so called, issued by King and Witan, our collections include a few documents which bear no legislative authority, namely, some statements of the *wergelds* of different orders of men, a few procedural formulas, the ritual of the ordeal, and the precious *Rectitudines Singularum Personarum,* a statement of the rights and duties of the various classes of persons to be found on a landed estate, a document the date of which is at present very indeterminate. Some further light on the law of the times before the conquest is thrown by certain compilations made after the conquest, of which hereafter; to wit, the so-called *Leges* of the Confessor, the Conqueror, and Henry I. With scarce an exception these dooms and other documents are written in Anglo-Saxon. An ancient Latin version [*vetus versio*] of many of them has been preserved, and testifies to the rapidity with which they became unintelligible after the conquest.[1]

The dooms are far from giving us a complete statement of the law. With possibly a few exceptions there seems to have been no attempt to put the general law in writing; rather the King and the Wise add new provisions to the already existing law or define a few points in it which are of special importance to the state. Hence we learn little of private law, and what we learn is implied rather than expressed; to get the peace kept is the main care of the rulers; thus we obtain long tariffs of the payments by which offences can be expiated, very little as to land-holding, inheritance, testament, contract, or the like. We have no document which purports to be the *Lex* of the

English folk, or of any of the tribes absorbed therein; we have nothing quite parallel to the *Lex Salica* or the *Lex Saxonum.* Again, we cannot show for this period any remains of scientific or professional work, and we have no reason to suppose that any one before the conquest ever thought of writing a text-book of law.

(2) The diplomata of this age consist chiefly of grants of land ("land books"), for the more part royal grants, together with a comparatively small number of wills. The charters of grant are generally in Latin, save that the description of the boundaries of the land is often in English; the wills are usually in English. The latest collection of them will contain between two and three thousand documents.[1] If all were genuine, about one hundred of them should come from the seventh century, and about two hundred from the eighth; of course, however, many of them are not genuine, or but partially genuine, and perhaps the history of law presents no more difficult problem than that of drawing just inferences from documents which have either been tampered with or very carelessly copied. Invaluable as these instruments are, the use hitherto made of them for the purpose of purely legal history is somewhat disappointing. The terms in which rights are transferred are singularly vague and the amount of private law that can be got out of them is small. However they have only been accessible for some forty years past and their jural side[1] has not yet been very thoroughly discussed. A few of the land books contain incidental accounts of litigation, but for the oldest official records of lawsuits we must look to a much later age.

(3) Besides these we have ecclesiastical documents, canons and penitentials[2] which must not be neglected. During this period it is impossible to draw a very sharp line between the law of the church and the law of the realm. It is highly probable again that the penitential literature had an important influence on the development of jurisprudence, and it often throws light on legal problems, for instance the treatment of slaves.

Materials being scanty, all that is said by the chroniclers and historians of the time and even by those of the next age will have to be carefully weighed; use must be made of Beda's works and of the Anglo-Saxon Chronicle. But the time had not yet come when annalists would incorporate legal documents in their books or give accurate accounts of litigation.

For the continental history of this same period there are two classes of documents which are of great service, but the like of which England cannot show: namely, formularies, that is, in our modern language, "precedents in conveyancing," and estate registers, that is, descriptions of the manors of great landowners showing the names of the tenants and the nature of their services. We have, as it seems, nothing to set beside the *Formulae Marculfi* or the *Polyptyque* of the Abbot Irmino. The practice of conveying land by written instrument seems never to have worked itself thoroughly into the English folk-law, and the religious houses and other donees of "book-land" seem to have been allowed to draw up their own books pretty much according to their taste, a taste inclining towards pompous verbosity rather than jurisitic elegance. Still, it is possible that a very careful comparison of the most genuine books would lay bare the formulas on which they were constructed and show a connection between those formulas and the continental precedents. That we should have no manorial registers or

"extents" from this period is much to be regretted; it suggests the inference, very probable for other reasons, that the manorial system formed itself much more rapidly in France than in England.

That we shall ever be able to reconstruct on a firm foundation a complete system of Anglo-Saxon law, of the law of the Confessor's day, to say nothing of Alfred's day or Ethelred's, may well be doubted; the materials are too scanty. The "dooms" are chiefly concerned with keeping the peace; the "land books," considering their number and their length, tell us wonderfully little, so vague, so untechnical, is their wording. Still the most sceptical will not deny that within the present century a great deal of knowledge has been secured, especially about what we may call the public law of the time. And here of course it is important to observe that the old English law is no unique system; it is a slip of German law. This makes permissible a circumspect use of foreign materials, and it should be needless to say that during the last fifty years these have been the subject of scientific research which has achieved very excellent results. The great scholars who have done that work have not neglected our English dooms; these indeed have proved themselves invaluable in many a controversy. The fact that they are written, with hardly an exception, in the native tongue of the people, whereas from the first the continental lawgiver speaks in Latin; the fact that they are almost absolutely free from any taint of Roman law; the fact that their golden age begins with the tenth century, when on the continent the voice of law has become silent and the state for a while seems dissolved in feudal anarchy,—these facts have given our dooms a high value in the eyes even of those whose primary concern was less for England than for Germany or France. There is good reason then to hope that the main outlines of the development even of private law will be drawn, although we may not aspire to that sort of knowledge which would have enabled us to plead a cause in an Anglo-Saxon hundred moot.

How much law there was common to all England, or common to all Englishmen, is one of the dark questions. After the Norman conquest we find a prevailing opinion that England is divided between three great laws, West-Saxon, Mercian, Danish, three territorial laws as it would seem. On the surface of the documents the differences between these three laws seem rather a matter of words than a matter of substance; but neither by this nor by the universality of the later "common law" are we justified in setting aside a theory which writers of the eleventh and twelfth centuries regarded as of great importance. In earlier times the various laws would be tribal rather than territorial; but we have little evidence that the Kenting could carry with him his Kentish law into Mercia in the same way that the Frank or Bavarian could preserve his national law in Lombardy; the fact that there was not in England any race or class of men "living Roman law," may have prevented the development of that system of "personal laws" which is a remarkable feature in the history of the continent. There is much evidence, however, that in the twelfth century local customs were many and important. The difficulty of reconstructing these will always be very great unless some new materials be found; still, work on Domesday Book and on the later manorial documents may succeed in disclosing some valuable distinctions.

In noticing what has been done already, it should be needless to mention Kemble's *Saxons in England* or his introductions to the various volumes of the *Codex*

Diplomaticus. It will be more to the point to mention with regret that Konrad Maurer's *Angelsächsische Rechtsverhältnisse* is to be found only in the back numbers (volumes i, ii, iii) of the *Kritische Ueberschau* published in Munich. The *Essays in Anglo-Saxon Law* (Boston, 1876), by Adams, Lodge, Young, and Laughlin, should be well known in America. The public law is dealt with in the constitutional histories of Palgrave, Gneist, Stubbs; also by Freeman, in the first volume of his *Norman Conquest.* To name the books of foreign writers in which Anglo-Saxon law has been touched incidentally would be to give something like a catalogue of the labors of the "Germanists." The influence of the Danes in the development of English law has until recent years been too much neglected. It is the subject of an elaborate work by Johannes C. H. R. Steenstrup, *Danelag* (Copehagen, 1882). This constitutes the fourth volume of the *Normannerne* (1876-82).

II.

Norman Law

If the history of the law which prevailed in England from 1066 to, let us say, 1200 is to be written, the history of the law which prevailed in Normandy before 1066 will have to be studied. Such study will always be a very difficult task, because, unless some great discovery remains to be made, it will be the reconstruction of law which has left no contemporary memorials of itself. We have at present hardly anything that can be called direct evidence of the legal condition of Normandy between the time when it ceased to be a part of the West-Frankish realm and a date long subsequent to the conquest of England. It is only about the middle of the twelfth century that we begin to get documents, and even then they come sparsely. What then we shall know about the period in question will be learnt by way of inferences, drawn partly from the time when Normandy was still a part of Neustria, when its written law consisted of the *Lex Salica* and the capitularies; partly from the Normandy of Henry II's reign and yet later times; partly again from what we find in England after the Norman conquest. Much will always remain very dark, and there is reason to fear that a perverted patriotism will give one bias to English, another to continental writers—an American might surely afford to be strictly impartial. But enough has happened of late years to show that if historians will go deeply enough into legal problems a substantial accord may be established between them. The extreme opinions are the superficial opinions, and they are falling into discredit. The doctrines of Stubbs, Gneist and Brunner have a great deal in common. It is impossible now to maintain that William just swept away English in favor of Norman law. It is quite undeniable that new ideas and new institutions of far-reaching importance "came in with the Conqueror." Hale made a good remark when he said:

"It is almost an impossible piece of chymistry to reduce every *Caput Legis* to its true original, as to say, this is a piece of the Danish, this is of the Norman, or this is of the Saxon or British law."

But even the chemical metaphor is inadequate, for the operation of law on law is far subtler than any process that the world of matter has to show. It is not that English law

is swept away by any decree to make room for Norman law; it is much rather that ideas and institutions which come from Normandy slowly but surely transfigure the whole body of English law, especially English private law. Much evidently remains to be done for Norman law, much that will hardly be done by an Englishman; but already of late years a great deal has been gained, and the student of Glanvill must have the coæval *Très ancien Coutumier* constantly in his hand.

In three very accessible places Heinrich Brunner has sketched the history of law in Normandy: (1) *Das anglonormannischeErbfolgesystem* (Leipzig, 1869); (2) *Die Entstehung der Schwurgerichte* (Berlin, 1871); (3) *Ueberblick über die Geschichte der französischen, normannischen und englischen Rechtsquellen,* in Holtzendorff's *Encyklopädie der Rechtswissenschaft* (1882), page 297. In his view, Norman law is Frankish: Frankish institutions take out a new lease of life in Normandy, when they are falling into decay in other parts of the quondam Frankish Empire.

The chief materials[1] for Norman legal history are:

(1) *Exchequer Rolls.* We possess, in whole or in part, rolls for the years 1180, 1184, 1195, 1198, 1201-03.[2] They answer to the English Pipe Rolls.

(2) *Collections of judgments.* We have several private collections of judgments of the Exchequer in the thirteenth century, beginning in 1207,[3] drawn from official records not now forthcoming.

(3) *Law books.* We have to distinguish:

(i) A compilation, of which both Latin and French versions exist, known as *Statuta et Consuetudines Normanniae,* or *Établissements et Coutumes de Normandie;*[4] but this compilation proves to be composed of two different works: (*a*) a treatise which Brunner gives to the last years of the twelfth or the first years of the thirteenth century, and which Tardif dates in 1199 or 1200; and (*b*) a later treatise compiled a little after 1218 according to Brunner, about 1220 according to Tardif.

(ii) Then comes the *Grand Coutumier de Normandie.* The Latin version of this, which is older than the French, calls itself *Summa de Legibus Consuetudinum Normanniae,* or *Summa de Legibus in Curia Laicali,* and was composed before 1280 and probably between 1270 and 1275.[1]

There are a few later law-books of minor importance.

(4) *Diplomata.* Normandy is poor in diplomata of early date and, according to Brunner, many of those that exist are still unprinted; but in the *Collection de Documents Inédits* is a small but ancient (1030-91) *Cartulaire de la Sainte Trinité du Mont de Rouen,* edited by Deville in 1841; Leopold Delisle has published a *Cartulaire Normand de Philippe Auguste, Louis VIII, Saint Louis, et Philippe le Hardi* (Caen, 1852); and there exists in the English Record office a manuscript collection made by Léchaudé d'Anisy, entitled *Cartulaire de la Basse Normandie, from various Norman Archives.*[2]

III.

From The Norman Conquest (1066) To Glanvill (Circa 1188) And The Beginning Of Legal Memory (1189)

We may classify the materials thus: (1) laws; (2) private collections of laws and legal text-books; (3) work done on Roman and Canon law; (4) diplomata; (5) Domesday Book, surveys, public accounts, etc.; (6) records of litigation.

(1) *Laws.* It is, as we shall see, a little difficult to draw the line between the first two classes of documents. No one of the Norman Kings was a great legislator; but we have one short set of laws which may in the main be considered as the work of the Conqueror; besides these we have his ordinance separating the ecclesiastical from the temporal courts and another ordinance touching trial by battle. Henry I's coronation charter (1100) is of great value, and Stephen's second charter (1136) is of some value. Henry II was a legislator; we have from his day the Constitutions of Clarendon (1164), the Assize of Clarendon (1166), the Assize of Northampton (1176), the Assize of Arms (1181) and the Assize of the Forest (1184); but we have reason to fear that we have lost ordinances of the greatest importance, in particular the Grand Assize and the Assize of Novel Disseisin, two ordinances which had momentous results in the history of private and even of public law.

(2) *Private collections of laws and legal text-books.* Our first class of documents shades off into the second class by the intermediation of the so-called *Leges Edwardi, Willelmi, Henrici Primi.* A repeated confirmation of the Confessor's law (*lagam* not *legem* or *leges Edwardi*) apparently led to several attempts at the reproduction of this "good old law." First we have an expanded version of the code of Canute (Schmid's *Pseudoleges Canuti*); then we have the *Leges Edwardi Confessoris,* a document which professedly states the result of an inquiry for the old law made by the Conqueror in the fourth year after the conquest; but the purest version that we have alludes to the doings of William Rufus. Then we have a highly ornate and expanded version of the probably genuine laws of the Conqueror mentioned above: it looks like work of the thirteenth century. Then there is another set of laws attributed to the Conqueror, which as it appears both in French and Latin may be conveniently called "the bilingual code;" its author made great use of the laws of Canute; its history is in some degree implicated with the forgery of the false Ingulf. These various documents demand a more thorough criticism than any to which they have as yet been subjected.[1] Of much greater importance is the text-book known as the *Leges Henrici Primi.* Until lately it was usual to give this work to the reign of Stephen or even of Henry II, on the ground that the author had used the *Decretum Gratiani;* but his last critic, Liebermann, says that this is not so, and dates the work between 1108 and 1118; this earlier date seems for several reasons the more acceptable.[1] The writer has made a large use of the Anglo-Saxon laws, which in general he treats as still in force, but on occasion he stops gaps with extracts from the *Lex Salica, Lex Ripuaria,* the Frankish capitularies and some collections of canons; he has one passage which comes by a round-about way from Roman law; it is taken from an epitome of the Breviary of Alaric. Altogether he gives us a striking picture of an ancient system of

law in course of dissolution and transformation; a great deal might yet be done for his text, which in places is singularly obscure.

The end of Henry II's reign is marked by the *Tractatus de Legibus et Consuetudinibus Angliae,*2 usually, though on no very conclusive evidence, attributed to Ranulf Glanvill, who became chief justiciar in 1180, and died a crusader at the siege of Acre in 1190. This book, always referred to as "Glanvill," was apparently written at the very end of Henry's reign, and was not finished until after 1187. It is the first of our legal classics, and its orderly, practical brevity contrasts strongly with the diffuse, chaotic, antiquarian *Leges Henrici.* This is due in part to the fact that the author deals only with the doings of the King's Court, which is now beginning to make itself a tribunal of first instance for all England at the expense of the communal and seigniorial courts partly also to the fact that he knew some Roman law and made good use of his knowledge in the arrangement of his matter. The great outlines of our land law have now taken shape and many of the "forms of action" are already established.

The *Dialogus de Scaccario,* written, as is supposed, by Richard Fitz Neal, bishop of London, between 1178 and the end of Henry II's reign, is hardly a "law book," but is an excellent and valuable little treatise on the practice of the Exchequer and the whole fiscal system, the work of one very familiar with his subject. This book, written by an administrator rather for the benefit of the intelligent public than for the use of legal practitioners, stands alone in our mediæval literature and must be invaluable to the historian of public law.1

(3) *Work upon Roman and Canon law.* In dealing with any century later than the thirteenth, the historian of English law could afford to be silent about Roman and Canon law, for, though these were studied and practised in England, and in particular many of the ordinary affairs of life, testamentary and matrimonial cases, were governed solely by the Canon law, still these laws appear in a strictly subordinate position, are administered by special courts, and exercise very little, if any, influence on the common law of England. But a really adequate treatment of the period which lies between the Norman conquest and the accession of Edward I would require some knowledge of Roman law and its mediæval history, also some knowledge of the earlier stages in the development of Canon law. Lanfranc, the right-hand man of the Conqueror, was trained in the Pavian law school, where Roman doctrines were already leavening the mass of ancient Lombard law; his subtle arguments were long remembered in Pavia. The influence of the Lombard school on Norman and English law is a theme worthy of discussion.1 Then in Stephen's reign, as is well known, Vacarius2 lectured in England on Roman law; it has even been conjectured that the youth who was to be Henry II sat at his feet.3 Vacarius wrote a book of Roman law, designed for the use of poor scholars, a book that is extant, a book that surely ought to be in print. His school did not perish, his scholars glossed his work. There are extant, again, several books of practice of the twelfth century and the first years of the thirteenth, which good critics believe to have been written either in Normandy or in England. Among them is one that has been ascribed to William of Longchamp, who became chief justiciar of England. In many quarters there are signs that an acquaintance with Roman law was not uncommon among cultivated men. Glanvill's work was influenced, Bracton's work profoundly influenced, by Roman law. Some of

Henry II's most important reforms, in particular the institution of definitely possessory actions, may be traced directly or indirectly to the working of the same influence. The part played by Roman and Canon law in this critical stage of the formation of the common law deserves a minuter examination than it has as yet received.1

(4) *The diplomata* of this period are numerous and of great interest; they are brief, formal documents, contrasting strongly with the lax and verbose land books of an earlier age; they are for the more part charters of feoffment and grants or confirmations of franchises; they have never been properly collected. Charters of liberties granted to towns should perhaps form a class by themselves, but those coming from this age are not numerous.2

(5) *Domesday Book, surveys, public accounts, etc.* By far the greatest monument of Norman government is Domesday Book, the record of the survey of England instituted by the Conqueror and effected by inquests of local jurors; it was completed in the summer of 1086.3 The form of this document is generally known; it is primarily a fiscal survey; the liability for "geld" in time past, the capacity for paying "geld" in time to come are the chief points which are to be ascertained; it has been well called "a great rate book." Incidentally, however, it gives us a marvellously detailed picture of the legal, social and economic state of England, but a picture which in some respects is not easily interpreted. Of late it has become the centre of a considerable literature;1 but the historian of law will have to regret that a great deal of labor and ingenuity has been thrown away on the impossible attempt to solve the economic problems without first solving the legal problems.

The other public records of this period consist chiefly of Pipe Rolls, that is, the rolls of the sheriffs' accounts as audited by the Exchequer. Chance has preserved one very ancient roll, now ascribed to 31 Henry I. No other roll is found until 2 Henry II, but thenceforward the series is very continuous.2 These rolls throw light directly on fiscal machinery and administration, indirectly on numberless points of law. The feudal arrangement of England, the distribution of knights' fees and serjeanties, the obligation of military service and so forth are illustrated by documents of Henry II's reign contained in the Black Book of the Exchequer.1

(6) *Records of litigation.* Though we have evidence that before the end of Henry II's reign pleas before the king's court were enrolled, we have no extant plea rolls from this age. Accounts of litigation must be sought for in the monastic annals; when found they are too often loose statements of interested parties. However, a good many transcripts of procedural writs have been preserved and these are of the highest value. Before our period is out we begin to get a few "fines" (*i. e.* records of actions brought and compromised, already a common means of conveying land); in four cases the original documents are preserved, in other cases we have copies.2

In passing we should note that the chronicles of this age are fruitful fields. Not only do they sometimes contain documents of great importance, laws, ordinances, diplomata, but they also supply many illustrations of the working of law and from time to time give us contemporary criticism of legal measures and legal arrangements.

On the whole we have no reason to complain of the tools provided for us. We cannot say of England, as has been said of France and Germany, that between the period of the folk laws and the period of the law books lies a dark age which has left no legal monument of itself. In particular the *Leges Henrici* serve to mediate between the dooms of Canute and the treatise of Glanvill. The lack is rather of workmen than of implements. But it is to be remembered that it is only of late years that those implements have become generally accessible; also that we have had not only to learn but also to unlearn many things, for the whole of the traditional treatment of the legal history of the Norman time has been vitiated by the great Ingulfine forgery, one of the most splendidly successful frauds ever perpetrated. A great deal of what went on in the local courts we never shall know; but in Henry II's day the practice and procedure of the king's court become clear to us, and subsequent history has shown that the king's court, becoming in course of time the king's courts, was to have the whole fate of English law in its hands. Towards the end of the period the history of law begins to be, at least in part, a history of professional learning.

There is no very modern work devoted to the legal history of this age as a whole, but it is the subject of Georg Phillips' *Englische Reichs- und Rechtsgeschichte* (1827-28). M. M. Bigelow's *History of Procedure* (London, 1880) has provided for one important department. Of course constitutional history has had a large share of attention, and books have collected round Domesday and round two other points, namely, frankpledge and trial by jury. As to the former of these two points, it will only be necessary to mention Heinrich Marquardsen's *Haft und Bürgschaft bei den Angelsachsen* (Erlangen, 1852), as this will put its reader in the current of the discussion. As to the latter, Brunner's brilliant book, *Entstehung der Schwurgerichte,* has already been named; William Forsyth's *History of Trial by Jury* (1852), and Friedrich August Biener's *Das Englische Geschwornengericht* (Leipzig, 1852) are useful, though chiefly as regards a somewhat later time.

IV.

From The Coronation Of Richard I To The Death Of Edward I

Our sources of information now begin to flow very freely, and so much has already been printed that very probably the historian would find it easier to paint a life-like picture of the thirteenth century than to accomplish the same task for either the fourteenth or the fifteenth. We may arrange the materials under the following heads: (1) laws; (2) judicial records; (3) other public records; (4) law books; (5) law reports; (6) manorial law; (7) municipal and mercantile law.

(1) *Laws.* For reasons which will soon appear, we use the untechnical term "laws" rather than any more precise term. Neither Richard nor John was a legislator; they give us nothing that can be called laws except a few ordinances touching weights, measures, money, the prices of victuals. At the end of his reign, however, John was forced to grant the Great Charter (1215); this, if it is a treaty between the various powers of the state, is also an act declaring and amending the law in a great number of

particulars; to use terms familiar in our own day, *Magna Carta* is an act for the amendment of the law of real property and for the advancement of justice. The various editions (1215-16-17-25) of the charter being distinguished, we note that it is the charter of 1225 which becomes the *Magna Carta* of subsequent ages and which gets to be generally considered as the first "statute." The term "statute" is one that cannot easily be defined. It comes into use in Edward I's reign; supplanting "provisions," which is characteristic of Henry III's reign; which had supplanted "assize," characteristic of Henry II's, Richard's, John's. Our extant Statute Rolls begin with the statute of Gloucester (1278), and it is very doubtful whether before that date any rolls were set apart for the reception of laws. Some of the earlier laws of our period are to be found on other rolls, Patent, Close, *Coram Rege* Rolls: others are not to be found on any rolls at all, but have been preserved in monastic annals or other private manuscripts.[1] In later times of course it became the settled doctrine that in a "statute" king, lords and commons must have concurred, and that a rule laid down with such concurrence is a "statute." But with our improved knowledge of the history of Parliament we cannot insist on this doctrine when dealing with the thirteenth century. Some of the received "statutes" even of Edward I's day, to say nothing of Henry III's, were issued without any participation by the commons in the legislative act. After the charter of 1225 we have the statute (or provisions) of Merton (1236), the provisions of Westminster (1259), the statute of Marlborough (1267), all of the first importance; and upon these follows the great series of Edward I's statutes, a most remarkable body of reforming laws. Hale's saying about Edward I was very true:

"I think I may safely say, all the ages since his time have not done so much in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign; especially about the first thirteen years thereof."

(2) *Judicial records.* The extant Plea Rolls (rolls of pleadings and judgments) of the king's courts begin in 1194 (6 Richard I), and though we have by no means a complete series of them, we have for the thirteenth century far more than any one is likely to use. These rolls fall into divers classes; there are *Coram Rege* (King's Bench) Rolls, *De Banco* (Common Pleas) Rolls, Exchequer Rolls, Eyre Rolls, Assize Rolls, Gaol Delivery Rolls. The enormous value of these documents to the historian is obvious; they give him a very complete view of all the proceedings of the royal tribunals.[1] The rolls of the thirteenth century are in one respect better material than those of later times, since they frequently give not merely the judgment but the *ratio decidendi* expressed in brief, neat terms. We also begin to get by the thousand "feet of fines," *i. e.* records of actions brought and compromised as a means of conveying land. The light which these hitherto neglected documents throw upon the history of conveyancing will some day be appreciated.[2]

(3) *Other public records.* The Pipe Rolls continue to give us the sheriff's accounts; but their importance now becomes much less, since they are eclipsed by far more communicative rolls, namely, the Rolls of Letters Patent and Letters Close, the Fine Rolls and the Charter Rolls. These enable us to study in minute detail the whole of the administrative machinery of the realm; and, owing to the publication of those belonging to John's reign, the governmental work of that age can be very thoroughly

understood and illustrated. The Charter Rolls contain copies of the royal grants made to municipalities and to individuals, and thus to some extent they supply the place of a *Codex Diplomaticus.* Then from Edward I's reign we have parliamentary records, a broken series of Rolls of Parliament, of Petitions to Parliament, and Pleas in Parliament.[1]

(4) *Law books.* In England as elsewhere the thirteenth century might be called "the period of the law books;" that is to say, the historian of this period will naturally reckon text-books, notably one text-book, as among the very best of his materials.

(*a*) Bracton's *Tractatus* (or *Summa*) *de Legibus et Consuetudinibus Angliae* is by far the greatest of our mediæval law books. It seems to be the work of Henry of Bratton, who for many years was a judge of the king's court and who died in 1268. It seems also to be an unfinished book and to have been composed chiefly between the years 1250 and 1256. It covers the greater part of the field of law. In laying out his scheme the author has made great use of the works of Azo, a Bolognese civilian, and thence he has taken many of the generalities of law; he may also have made some study of the Roman books at first hand; but he was no mere theorist; at every point he appeals to the rolls of the king's court, especially to the rolls of two judges already dead, Martin of Pateshull and William of Raleigh; his law is English case law systematized by the aid of methods and principles which have been learnt from the civilians. A *Note Book* full of cases extracted from the rolls has recently been discovered, and there is some reason for thinking that it was made by or for Bracton and used by him in the composition of his treatise.[2]

(*b*) "Fleta" is the work of an anonymous author, seemingly compiled about 1290. It gets its name from a preface which says that this book may well be called Fleta since it was written "in Fleta," *i. e.* in the Fleet gaol. In substance it is an edition of Bracton much abridged and "brought up to date," by references to the earlier statutes of Edward I. It has however some things that are not in Bracton, notably an account of the manorial organization; this the writer seems to have obtained from what we may call "the Walter of Henley literature," to which reference will be made below.

(*c*) Bracton and Fleta are Latin books: "Britton" is our first French text-book. It seems to have been written about 1290. The writer made great use of Bracton and perhaps he used Fleta also; but he has better claim to be treated as an original author than has the maker of Fleta. He arranges Bracton's material according to a new plan, and puts his whole book into the king's mouth, so that all the law in it appears as the king's command. Who he was we do not know; he has been identified with John Le Breton, a royal judge and bishop of Hereford; but the book, as we have it, mentions statutes passed after the bishop's death. To judge by the number of existing manuscripts, Bracton and Britton both became very popular, while Fleta had no success.[1]

(*d*) Selden had a manuscript purporting to contain Bracton's treatise abridged by Gilbert Thornton in the twentieth year of Edward I; Thornton was chief justice. Selden's manuscript is not forthcoming and he did not know of any other like it. Possibly, however, Thornton's abridgment is represented by some of the existing manuscripts which give abbreviated versions of Bracton's book.

(*e*) Works of minor importance are two little treatises on procedure by Ralph Hengham, known respectively as *Hengham Magna* and *Hengham Parva;* a small French tract of uncertain date, also on procedure, known from its first words as *Fet assavoir;* and various little tracts found in manuscripts under such titles as *Summa ad cassandum omnimoda brevia, Summa quae vocatur Officium Justiciariorum, Summa quae vocatur Cadit Assisa, Placita placitata,* and the like. They are of an intensely practical character, but deserve to be collected.1

(*f*) To Edward II's reign, or perhaps to the end of his father's, we must attribute the interesting but dangerous *Mirror of Justices* of Andrew Horne, fishmonger and town clerk of London.2 It is the work of one profoundly dissatisfied with the administration of the law by the king's judges. As against this he appeals to myths and legends about the law of King Alfred's day and the like, some of which myths and legends were perhaps traditional, while others may have been deliberately concocted. Intelligently read it is very instructive; but the intelligent reader will often infer that the law is exactly the opposite of what the writer represents it to be. It has done much harm to the cause of legal history; it imposed upon Coke and even in the present century has been treated as contemporary evidence of Anglo-Saxon law.

(*g*) There is hardly any book more urgently needed by the historian of English law than one which should trace the gradual growth of the body of original writs, *i. e.* of the writs whereby actions were begun; such writs were the very skeleton of our mediæval *corpus juris.* The official *Registrum Omnium Brevium* as printed in the sixteenth century (1531, 1553, 1595, 1687) is obviously a collection that has been slowly put together. It is believed that extant manuscripts still offer a large supply of materials capable of illustrating the process of its growth. Some of the manuscript collections of writs go back to Henry III's reign, and occasionally have notes naming the inventors of new writs.1 Here is a field in which excellent work might be done.

(5) *Law reports.* Just at the end of the thirteenth century there appear books of a new kind, books whose successors are to play a very large part in the legal history of all subsequent ages; we have a few Year Books of Edward I's reign.2 These are reports in French by anonymous writers of the discussions which took place in court between judges and counsel over cases of interest; whether they bore any official sanction we do not know. They are of special value as showing the development of legal conceptions, which is better displayed in the dialectic process than in the formal Latin record which gives the pleadings and judgment in their final form; we learn what arguments were used and also what arguments had to be abandoned. But for the period now in question we can only give the Year Books a secondary place among our materials.

(6) *Manorial law.* Of late years our horizon has been enormously extended by the revelation of vast quantities of documents illustrative of manorial law and custom, a department of law which has hitherto been much neglected, but which is of the very highest interest to all students of economic and social history.

(*a*) In the first place we have numerous "extents" of manors, *i. e.* descriptions which give us the number and names of the tenants, the size of their holdings, the legal

character of their tenure and the kind and amount of their service; the "extent" is a statement of all these things made by a jury of tenants. Such extents are found in the monastic cartularies and registers. Among these we may mention the Boldon Book, which is an account of the palatinate of Durham, the Glastonbury Inquisitions, the Cartulary of Burton Abbey, the Domesday of St. Paul's, the Register of Worcester Priory, the Cartularies of Gloucester, Ramsey and Battle. A few of those mentioned at the head of our list take us back into the twelfth century. There are still several cartularies which ought to be printed. The "Hundred Rolls" compiled in Edward I's reign give us the results of a great inquest prosecuted by royal authority into "the franchises," *i. e.* the jurisdictional and other regalia which were in the hands of subjects; we thus obtain an excellent picture of seignorial justice. But for certain counties and parts of counties these Hundred Rolls give us far more, namely, full "extents" of all manors. They thus serve to supplement and correct the notions which we might form if we studied only the ecclesiastical manors as displayed in the cartularies.1

(*b*) Almost nothing has yet been done towards the publication of a class of documents which are quite as important as the "extents," namely, the earliest rolls of the manorial and other local courts. We have a few older than 1250, a considerable number older than 1300.2 They show the manorial system in full play, illustrate all its workings and throw light on many points of legal history which are not explained by the records of more exalted courts.1

(*c*) Little known to the world, there is a small but complicated literature of tracts on "husbandry" and the management of manors. In whole or in part it is often associated with the name of a certain "Walter of Henley." The author of Fleta has made use of it in his well-known chapter on the manorial system. Further investigation will perhaps distinguish between two or three tracts that are intertwined in the manuscripts and presented in varying forms. An edition of all or some of these tracts has been projected. They bear directly rather on agricultural and economic than on legal history; but the historian of manorial law cannot afford to neglect them.2

This department of mediæval law, concerning as it does the great mass of the population, is beginning to attract the attention that it deserves. The traditional learning of lawyers about the manorial system went back only to comparatively recent times and their speculations about earlier ages had been meagre and fruitless. A new vista was opened by Erwin Nasse's *Ueber die mittelalterliche Feldgemeinschaft in England* (Bonn, 1869), which was translated into English by H. A. Ouvry (1871). H. S. Maine's *Lectures on Village Communities in the East and West* (1876) drew the attention of Englishmen to the work that had been done in Germany. Frederic Seebohm's *English Village Community* (1883) came into sharp conflict with what were coming to be accepted doctrines and must lead to yet further researches. In 1887 Paul Vinogradoff published at St. Petersburg a Russian treatise in which much use was made of our manorial extents and rolls; a larger work in English by the same hand is expected. This of course is a department in which legal and economic history meet; and it has become clear that the historian of law must realize the economic meaning of legal rules while the historical school of economists must study mediæval law.

(7) *Municipal and mercantile law.* The growth of municipal institutions, the development of guilds and corporations, are now recognized topics of "constitutional history." But a great deal remains to be done towards the publication of documents illustrating the laws and customs administered in the municipal courts. In particular there is much to be discovered about "the law merchant." Before the end of the thirteenth century the idea had been formed of a *lex mercatoria,* to be administered between merchants in mercantile affairs, which differed in some respects from the common law. Throughout the middle ages the merchants had special tribunals to go to, and consequently very few of their affairs are noticed in the Year Books. Whether very much of this law merchant can be recovered may be doubtful, but until the archives of our cities and boroughs have been thoroughly explored by some one who knows what to look for, we shall do well to believe that something may yet be learned.1

V.

From Edward III To Henry VIII

About the remainder of the middle ages we must speak more briefly. On the whole the law has no longer to be sought in out of the way or but newly accessible sources; it may be found in books which lawyers have long had by them and regarded not merely as evidence of old law but as authority, namely the Statute Book, the Year Books and the very few text-books which this age presents. It would be a great mistake, however, to suppose that these sources should be exclusively used or that they are in the state in which they ought to be.

After Edward the Third's accession we can insist on a strict definition of a statute. The more important laws of a general character are placed on the Statute Roll and about their text there can seldom be any dispute; we have a good official edition of them. But the Parliament Rolls, an unfortunately broken series, also should be studied, as they often show the motives of the legislators and also contain some of those acts of Parliament which were not thought of sufficient general and permanent importance to be engrossed on the Statute Roll; a great deal that concerns trade and agriculture and villainage and the working of the inferior organs of the constitution, in particular the new magistracy, the justices of the peace, must be sought rather in the Parliament Rolls than among the collections of statutes. Again, most of the other series of non-judicial rolls mentioned above are continued; and though they are not of such priceless value for this as for former periods, they should certainly not be neglected by any one who wishes to make real to himself and others the working of our public law. A great deal of that law never comes into the pages of the Year Books and for that reason has remained unknown to us.

We turn to the law reports. A series of Year Books extends from Edward II to Henry VIII, from 1307 to 1535. They got into print piecemeal at various times; the most comprehensive edition is one published in ten volumes, 1678-80. This edition has about as many faults as an edition can well have; it teems with gross and perplexing blunders. Happily it is not complete, and we have thus been enabled to contrast a

good with a bad edition. It leaves a gap between the tenth and the seventeenth years of Edward III. This gap is being gradually filled up in the Rolls series by L. O. Pike, who has already given the books for the years 11-14 Edward III; but there are several other considerable gaps to be filled, one for instance between the thirtieth and thirty-eighth years of the same reign, another representing the whole reign of Richard II. Henry VIII's long reign is scurvily treated, and though we begin now to get a little help from reporters whose names are known, from Dyer and others, still it is true that we have singularly few printed memorials of the law of this important time. An edition of all the Year Books similar to that which we now have in the Rolls series for a few lucky years of Edward III would be an inestimable gain, not merely to the historian of law but to the historian of the English people.

One of the many excellent features of these newly published Year Books of Edward III's reign consists of further information about the cases there reported, which information has been obtained from the Plea Rolls. Often the report of a case in the Year Books is but partially intelligible to modern readers until they are told what are the pleadings and the judgment formally recorded on the official roll of the court. The Plea Rolls are extant. To print even a few rolls of the fourteenth or fifteenth century would be a heavy task, so copious is the flow of litigation, so lengthy have the pleadings by this time become.[1] Still, in that new edition of the Year Books which is urgently needed, a brief statement of the recorded pleadings and judgment ought to be frequently given. But this is not the only use that should be made of the rolls. The Year Books, invaluable though they be (or would be were they made legible), are far from giving us a complete view even of the litigation of the period, to say nothing of a complete view of its law. They are essentially books made by lawyers for lawyers, and consequently they put prominently before us only those parts of the law which were of immediate interest to the practitioners of the time; an exaggerated emphasis is thus laid on minute points of pleading and practice, while some of the weightiest matters of the law are treated as obvious and therefore fall into the background. If anything like a thorough history of "the forms of action" is to be written, the Plea Rolls as well as the Year Books must be examined. The work of turning over roll after roll will be long and tedious, but greater feats of industry have been performed with far less gain in prospect. To give one example of the use of the Plea Rolls, let us recall Darnel's Case, the famous case of Charles I's day, about the power of the king and the lords of the council to commit to prison. The question what were the courts to do with a man so committed could not be answered out of the Year Books, it had to be answered out of the Plea Rolls. These rolls contain an exhaustive history of the writ of *habeas corpus,* the Year Books have little about it, for cases about "misnomer" and the like had been far more interesting to lawyers than "the liberty of the subject." And so it is be suspected that the new principles of private law which appear in the Year Books of Edward IV—the rise of the action of assumpsit, the doctrine of consideration, the protection of copyholders, the conversion of the action of ejectment into a means of trying title to lands, the destruction of estates tail by fictitious recoveries—that all these and many other matters of elementary importance might be fully illustrated from the Plea Rolls, whereas the Year Books give us but dark hints and unsolved riddles.

The manor becomes steadily of less importance during this period; but that is no reason why the manorial rolls, of which we have now an ample supply, should be neglected; but neglected they have hitherto been. The historian should take account not only of growth but of decay also, and the records of this time should give the most welcome evidence as to the effect of great social catastrophes, the black death, the peasants' revolt, the dissolution of the monasteries, and also as to the formation of what comes to be known as copyhold tenure. And again, turning from country to town, we shall not believe that the development of the law merchant has left no traces of itself until some one has given a few years to hunting for them.

Still more important, at least more exciting, is the history of the jurisdiction of the Council and of the new courts which arise out of it, the Court of Star Chamber, the Court of Chancery. Much has been recovered, but assuredly much more can be recovered. There are large quantities of Chancery proceedings to be examined; and it is impossible to believe that we shall always be left in our present state of utter ignorance as to the sources of that equitable jurisprudence which in course of time transfigured our English law, be left guessing whether the chancellors trusted to natural reason, or borrowed from Roman law, or merely developed principles of old English law which had got shut out from the courts of common law by the rigors of the system of writs.[1]

With a few, and these late exceptions, the text-books of the time are of little value; with the thirteenth century died the impulse to explain the law as a reasonable system and give it an artistic shape. Still that is no reason why such books as there are should be left in their present dateless, ill-printed or even unprinted condition; the *Old Tenures,* the *Old Natura Brevium,* the *Novae Narrationes* want editors; and towards the end of our period we get some "readings" which should be published, such as Marrow's *Reading on Justices of the Peace,* a work which Fitzherbert and Lambard treated as of high authority. Littleton's *Tenures,* which marks the revival of legal and literary endeavor under Edward IV, has had enough done for it by its great commentator, in some respects more than enough, for the historian will have to warn himself against seeing Coke in Littleton.[1] Needless to say it is a very good book; and the last parts of it, now little read, are a most curious monument of the dying middle ages. They only become really intelligible and lifelike in the light of the Paston Letters and similar evidence, a light which reveals the marvellous environment of violence, fraud and chicane in which an English gentleman lived. Under Henry VIII, Fitzherbert begins the work of summing up our mediæval law in his *Abridgement* and his *New Natura Brevium.* Sir John Fortescue's works give excellent illustrations of several legal institutions, notably of trial by jury, though as a whole they are rather concerned with politics than with law.[2]

Here I must stop, without of course intending to suggest that history stops here. The historian of modern law—the historian, let us say, who should choose as his starting point the reign of Elizabeth—would have before him an enormously difficult task. The difficulty would lie not in a dearth but in a superabundance of materials. To trace the development of the leading doctrines at once faithfully and artistically would require not only vast learning but consummate skill, such a combination of powers as is allowed to but few men in a century. But the result might be one of the most

instructive and most readable books ever written, one of the great books of the world. However, no one who feels the impulse to undertake such a work will need to be told how to set about it or whither to look for his materials. It is somewhat otherwise as regards the middle ages; those who have seen a little of our records printed and unprinted may be able to give a few acceptable hints to those who have seen less, and it is with some vague hope that the above notes may be of service to beginners that they have been strung together; may they soon become antiquated, even if they are not so already! They should at least convey the impression that there is a great deal to be done for English mediæval law; much of it can only be done in England, for we have got the documents here; but there is no reason why it should not be done by Americans. We have piles, stacks, cartloads of documents waiting to be read—will some one come over into England and help us?[1]

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24.

THE YEAR BOOKS[1]

By William Searle Holdsworth[2]

THE Year Books are the Law Reports of the Middle Ages, written by lawyers for lawyers. From the reign of Edward I to the reign of Richard III they stretch in a series which is almost continuous. In the reigns of Henry VII and VIII they become more and more intermittent; and the last printed Year Book is of the Trinity term 27 Henry VIII. During the terms and years of these centuries they give us an account of the doings of the King's Courts which are either compiled by eye-witnesses or from the narratives of eye-witnesses. They are the precursors of those vast libraries of reports which accumulate wherever the common law, or any legal system which has come under its influence, is studied and applied. If we except the plea rolls they are the only first-hand account we possess of the legal doctrines laid down by the judges of the fourteenth and fifteenth centuries, who, building upon the foundations which had been laid by Glanvil and Bracton, constructed the unique fabric of the mediaeval common law. Because they are contemporary reports they are of the utmost value, not only to the legal historian, but also to the historian of any and every side of English life. Just as the common law is a peculiarly English possession, so these reports of the doings of the Courts which constructed this common law are a peculiarly English source of mediaeval history. No other nation has any historical material in any way like them. Yet, until well on into the last century, they existed only in black letter books, published in the seventeenth century, and printed in contracted law French so carelessly as to be in many instances unintelligible; and the greater part of them are still in this condition. No one had cared to study the manuscripts upon which these printed books were based; and the tale told by tradition as to their origin was accepted without question and without verification. For about the last forty years their unique historical importance has been gradually arousing some interest in them. The work done upon them by the late Mr. Horwood and by Mr. Pike for the Rolls Series, and, above all, the work done upon them by Professor Maitland for the Selden Society, has taught us much of their origin, of the language in which they are written, and of their meaning and importance in the history of England and of English law. It is proposed in this paper to say something of the results which have been reached in ascertaining the position which the Year Books hold among the sources of English legal history, and to indicate the manner in which they illustrate certain aspects of the development of English law.

We shall consider (1) the manuscripts and printed editions of the Year Books, (2) the origin and characteristics of the Year Books, and (3) the Year Books and the development of English law.

(1)

The Manuscripts And Printed Editions Of The Year Books

Until the publication of some of the unpublished Year Books in the Rolls Series practically no attention at all had been paid to the MSS. of the Year Books. The legal profession and even the legal historians never went beyond the printed books, or the Abridgements which had been published in the sixteenth century. No doubt many of these MSS. are lost, superseded by the printed page.[1] Like the works of the lawyers who lived before the age of Justinian they became useless and disappeared. But when in the last half of last century the work of editing the Year Books began again it appeared that many still survived.

Mr. Horwood, describing a large MS. in the Cambridge University library, from which he took the text of the Year Book 20 & 21 Edward I, tells us that, besides the reports of those years, "there is a large body of cases illustrative of pleadings in various writs, and nearly forty consecutive folios (370-409) of cases which, from the names of the judges, must have occurred in or before 18 Edward I" (1290).[1] Fitzherbert also used for his Abridgements not only Bracton's Note Book, but also reports which came from 12 & 13 Edward I (1284-5), as well as a number of undated cases of the time of Edward I.[2] Professor Maitland says that there are numerous cases which come from a period before the dismissal of the judges in 1289; "and," he says, "we may add that one of our manuscripts contains a few cases which, unless we are much mistaken, belong rather to the seventies than to the eighties of the thirteenth century: cases decided by men who were on the bench in Henry III's day, and who must have known Bracton."[3] Some of these MSS. give very concise notes of cases. They are rather head notes than reports.[4] Altogether the number of MSS. containing reports of cases of the reign of Edward II and earlier which have come before Professor Maitland is thirteen;[5] they all present striking differences from each other.[6] "We are tempted," he says, "to say that whereas an investigator of manuscript literature can generally assume that every codex has only one parent, the ordinary laws of procreation hold good among these legal volumes, and that each of them has had two parents—two if not more. We could not explain this intimacy, were it not that we have before us the work of men who live in close fellowship with each other."[7] The number of MSS. which Mr. Pike has used is smaller; but here again the differences between the MSS. are very considerable, and no one MS. can be considered as preëminent.[1] The marginal notes which their owners have fixed to them show that they have been extensively used.[2]

Until we get a modern edition of the whole of the Year Books it is impossible to say much of the MSS. of later years. Perhaps these MSS. will tell us something of the mode in which the later reports were made, and the manner in which they were circulated among the members of the legal profession—matters about which we are still very ignorant. For the present we have only the old printed editions, in which the whole of the reign of Richard II and some of the years of Henry V and VI's reigns are omitted;[3] and the new printed editions of some of the years of the three Edwards,

published in the Rolls Series and by the Selden Society. Of these printed editions, old and new, we must now say something.

It was not till seven or eight years after the introduction of printing into England that the Year Books began to get into print;4 and it was only gradually and by degrees that some of the many existing MSS. attained to this dignity. From the end of the seventeenth century to the middle of the nineteenth century no new MSS. were printed.

Probably the earliest printer of Year Books was William de Machlinia (1481 or 1482). He is thought to have printed Y. B. 30-37 Henry VI, and possibly Y. B. 20 Henry VI. Pynson (1493-1528) was their earliest systematic publisher. Fifty editions certainly, and perhaps five more, bear his name. Sixteen others are also attributed to him. His editions published between 1510 and 1520 cover 40-50 Edward III, most of the years of Henry VI and Edward IV, and the almost contemporary years of 9 & 12 Henry VII and 14 Henry VIII. Rastell, Redman, Thomas Berthelet, William Myddelton, Henry Smyth, and William Powell were their chief publishers during the first half of the sixteenth century.1 They published them in separate years separately folioed and dated. At most two were bound together. The booksellers or the lawyers bound these parts together in chronological order.2

In 1553 Richard Tottell began his publications of the Year Books. During the thirty-eight years of his activity he succeeded in driving out all his rivals. “There are,” says Mr. Soule, “about 225 known editions of separate years or groups of years which bear his imprint or can be surely attributed to his press.” Early in his publishing career Tottell began to publish the separate years in groups. Thus in 1553 he printed the years 1-14 Henry IV as one book; so, in 1555 he printed the years 1-21 Henry VII, in 1556 the years 40-50 Edward II, in 1562 the years 1-10 Edward III, and in 1563 the years of Henry V.3

From 1587 to 1638 onwards the Year Books were published in parts; and these parts are known as the quarto edition—though really they consisted of small folio volumes. The parts were published as follows:—

I. 1587. The long report of the fifth year of Edward IV’s reign known as the “Longo Quinto.” This was republished in 1638.
II. 1596. Years 1-10 of Edward III’s reign.
III. 1597. The Year Books of 1 Edward V, 1 & 2 Richard III, 1-21 Henry VII, and the years 12, 13, 14, 18, 19, 26, 27 of Henry VIII.
IV. 1599. Years 1-22 of Edward IV.
V. 1600. Years 40-50 of Edward III, known as “Quadragesms.”
VI. 1601. Years 21-39 of Henry VI, omitting years 23-26 and 29.
VII. 1605. Years 1-14 of Henry IV, and years 1, 2, 5, 7, 8, 9 of Henry V.
VIII. 1606. The Liber Assisarum, i. e. a selection of cases taken from all years of Edward III’s reign, and chronologically arranged. They are reported more concisely than the cases in the other collections; but at greater length than the cases in the Abridgements.
IX. 1609. Years 1-20 of Henry VI, omitting years 5, 6, 13, 15, 16, 17.

X. 1619. Years 17-39 of Edward III, omitting years 19, 20, 31-37.

Thus it is only in the first part of this so-called “Quarto” edition that the original plan of publication in separate years survives.

Between 1638 and 1679 there was a cessation in the publication of the Year Books. They grew so scarce that in 1678 a complete collection was said to have been sold for £40.1 In 1679 there appeared the standard edition of the Year Books. It consists of eleven parts, the first only of which is new. The first part purports to be the Year Books of Edward I and II’s reign, “selonq les ancient Manuscripts ore remanent en les Maines de Sir Jehan Maynard Chevalier Serjeant de la ley.” It consists of Memoranda in Scaccario only of 1-29 Edward I, and Year Books of 1-19 Edward II. The other ten parts are substantially a reprint of the quarto edition arranged chronologically. The edition is in large folio. Two sides of the leaf of the older edition are contained on one page—a letter B in the margin marking the reverse of the sheet.

This edition therefore for the most part simply reprints those of the Year Books which had been already collected by the industry of the law publishers of the end of the sixteenth and the beginning of the seventeenth centuries. Neither the older editions nor the later show any signs of careful editing. In some cases, where two reports of the same case were found in different MSS., “the second report is dissociated from the first, and either made to appear as a report of a different case, or else labelled as a *residuum* or continuation.”1 It is true that Tottell takes credit to himself for having done something in the way of correction;2 and there are a few signs that in some cases more than one MS. has been consulted.3 The edition of 1679 also claims to be corrected and amended; but in the opinion of those most competent to judge this claim is not justified. Professor Maitland has collected crushing evidence of the carelessness with which it has been printed.4 He shows that the MS. which Maynard lent, and the table of matters which he furnished, have been so printed that it is almost impossible to make sense of the greater part of the cases. “Of mere, sheer nonsense those old black letter books are but too full.”5 And at the present day the books which served lawyers “steeped in the old learning of real actions” will not serve us, because “we have not earned the right to guess what a mediaeval law report ought to say.”6 Probably Maynard, whose life covered nearly the whole of the seventeenth century,7 was the last who had thus earned the right to guess what the report ought to have said. The other ten parts of the standard edition are not perhaps so bad as the first part. The printer had a printed text before him and not merely a MS.; but even so, Mr. Pike says that the earlier editions are preferable to the later editions. The truth is that the same causes which caused the Register of Writs to become an obsolete book caused the Year Books to become obsolete reports. A large, perhaps the largest, part of the cases reported turned upon the management of a system of procedure which had practically come, with the disuse of many of the older writs, to belong to the past; and the language in which these cases were reported gradually grew more and more unlike that which the lawyers used. What was valuable in the Year Books had passed into the printed Abridgements. For the new law there were modern reports written in modern style.

From 1679 to 1863 nothing was done for the Year Books. The Select Committee on Public Records reported in 1800 that the series of Year Books should be completed by publishing those hitherto unpublished, and by reprinting from more correct copies those which were already in print.1 This recommendation was not followed till 1863, when a series of unpublished Year Books of Edward I's reign and one year of Edward III's reign were edited for the Rolls Series by Mr. Horwood between the years 1863 and 1883. In 1885 Mr. Pike took up Mr. Horwood's work upon the Year Books of Edward III's reign. He was the first to begin the practice of collating the Year Books with the plea roll—the formal record of the case—and he thereby has shown us, "who have not earned the right to guess," the way to verify.2 "The process," says Mr. Pike, "of comparing a report with a record serves a double purpose. On the one hand it gives an authority to the text which would otherwise be wanting, it furnishes a means of deciding between conflicting MSS., and it affords a key to the correct translation of doubtful passages. On the other hand it supplies a ready mode of extracting, from a very valuable but extremely bulky and much neglected class of records, precisely that kind of information which is of the highest value and of the greatest interest. The Year Books are, in fact, to those who know how to use them, the most perfect guides to almost all that is important in the rolls."1 It has been truly said that this step "will hereafter be regarded as an important advance in the study of English history."2 Professor Maitland has followed Mr. Pike's lead in the edition of the Year Books of Edward II's reign which the Selden Society is publishing under his editorship. The excellence of the editing, the introductions and the notes will, if the series continue, go far to justify Professor Maitland's assertion that "our formulary system as it stood and worked in the fourteenth century might be known so thoroughly that a modern lawyer who had studied it might give sound advice, even upon points of practice, to a hypothetical client."3 But to understand the full force of this saying we must pass to our second section—the origin and characteristics of the Year Books.

(2)

The Origin And Characteristics Of The Year Books

Till quite recent years it was believed that the Year Books, at all events the Year Books from Edward III's reign down to Henry VII's reign, were compiled by official reporters paid by the Crown. This belief, which was shared by Coke,4 Bacon,5 and Blackstone,6 ultimately rests upon some words used by Plowden in the preface to his reports. "As I have been credibly informed," he says, "there were anciently four reporters of cases in our law who were chosen and appointed for that purpose, and had a yearly stipend from the King for their trouble therein; which persons used to confer together at the making and collecting of a report, and their report being made and settled by so many, and by men of such approved learning, carried great credit with it." It is clear that Plowden's statement rested merely upon report; and the statements of later authorities are merely amplifications of his words.

Sir Frederick Pollock has suggested to me that Plowden's words do not necessarily refer to the Year Books at all. He thinks that they may refer simply to legends of good old days which never had any historical existence. Plowden is not, as Sir Frederick

Pollock suggests, writing history: he is simply finding a rhetorical excuse for his shyness in publishing his own reports. If, in fact, any regular system of reporting by official reporters had been in force in the latest period of the Year Books he might well have known men who had personal knowledge of it; and surely both his praise of its merit and his regret for its discontinuance would have been more definite. Sir Frederick Pollock, therefore, inclines to the view that the tale of the official origin of the Year Books is pure fiction. Additional probability is lent to this view by the following passage which occurs later in Plowden's preface:—

"And (in my humble Apprehension) these Reports [i. e. his own] excell any former Book of Reports in Point of Credit and Authority, for other Reports generally consist of the sudden sayings of the Judges upon Motions of the Serjeants and Counsellors at the Bar, whereas all the Cases here reported are upon Points of Law tried and debated upon Demurrers or special Verdicts, Copies whereof were delivered to the Judge, who studied and considered them, and for the most part argued in them, and after great and mature Deliberation gave Judgment thereupon, so that (in my opinion) these Reports carry with them the greatest Credit and Assurance."

The reports to which Plowden considers his own to be superior cannot well be the same as those of the four men; for he evidently considered his own to be inferior to them. On the other hand these reports which he considered to be inferior to his own are very probably the Year Books. They answer to his description of these inferior reports; and they are in fact inferior to his own reports in exactly the points which he notes. If this suggestion be true the whole foundation for the belief in the official origin of the Year Books is destroyed. But however this may be, the three most recent editors of Year Books, Mr. Horwood,[1] Mr. Pike,[2] and Professor Maitland,[3] are inclined, for the following reasons, to think that there is very little ground for the traditional belief—that it is certainly not true of the earliest Year Books, and probably not true of any. (1) We do not find any official record of the appointment of such reporters, nor are payments to them anywhere enrolled. (2) If the reports were made by royal officials we should expect to find official copies preserved for the use of the Court; but, says Professor Maitland, "so far as we are aware our manuscript Year Books always come to us from private hands."[4] (3) As we have seen, the MSS. are so markedly different from one another that it is difficult to suppose that they spring from one official original.[5] (4) We shall see that the varied and picturesque nature of their contents forcibly suggest that they owe their origin to the enterprise of private members of the legal profession. Even the judges come in for their share of criticism; and in one case the reporter hints that the dissent of a judge from his brethren arose from the fact that he had just been raised to the bench, and had argued the case at the bar.[6] That an official reporter should thus have imputed motives is almost inconceivable. In one early MS. there are notes of conversations between the writer and his friends or pupils.[7] We naturally think of those associations of students living together in hostels from which sprang the Inns of Court. (5) Further probability is given to this view by the fact that "we see a most remarkable contempt for the non-scientific detail of litigation: especially for proper names. These very often are so violently perverted that we seem to have before us much rather the work of a man who jotted down mere initials in court, and afterwards tried to expand them, than the work of an official who had the faithful plea rolls under his eye."[1] The divergent

versions of the same case which the manuscripts present to us make it probable that their authors were men writing for themselves, who not only simplified facts, but also expanded arguments, and even invented both facts and arguments.[2] It is useful perhaps to remember that Plowden—one of the earliest of our modern reporters—called his reports commentaries. (6) At the end of Edward I's reign there was no up-to-date textbook extant embodying the results of Edward I's legislation. The only ways in which the student or the practitioner could learn modern law was by attending court, taking or borrowing notes, and discussion. For these reasons the weight of evidence is all against the old belief in the official origin of the Year Books. The earliest of them, Professor Maitland thinks, are "students' notebooks."[3]

In course of time the system of reporting gradually developed to meet the obvious needs of a legal profession engaged in administering a system of law, the principles of which depended almost entirely upon the practice of the Court. Just as books of precedents of writs and pleadings were necessary in order that the lawyer might present his case in proper form to the Court, so reports of decided cases were necessary if he was to know the principles which the Court would apply to decide the case. Indeed it is probable that it was only gradually that these books of precedents were differentiated from the law report.[4] The book of precedents occasionally borrows from the Year Book;[1] and the Year Book sometimes gives us extracts from the pleadings, and thus serves the purpose of a book of precedents. The two things came, however, to be entirely distinct. Broadly speaking, the book of precedents deals with the formal and the procedural side of legal practice, while the Year Book deals chiefly with the application of the principles which underlie, not only the procedural rules, but also the rules of substantive law. Thus for an intelligent understanding, an intelligent application of the precedents, the reports in the Year Books were essential; and perhaps to many practitioners this consideration was a greater incentive to the study of the Year Books than the fact that it was only through them that a knowledge of the principles of the law could be attained. "The spirit of the earliest Year Books," says Professor Maitland, "will hardly be caught unless we perceive that instruction for pleaders rather than the authoritative fixation of points of substantive law was the primary object of the reporters."[2] But though the needs of the pleader may have been the paramount consideration in the minds of the earliest reporters, though such needs always continued to be an important consideration, it had been clear, since the days of Bracton, that without a knowledge of the doings of the Courts there could be no knowledge of English law. His treatise could not have been written if he had not had access to such information through the records which he had retained for a period.[3] But records were valuable things. By a lucky chance perhaps a lawyer might get access to a few of them;[4] but neither the mere apprentice, nor even the serjeant, could be sure of getting the constant access to a series of such documents which would be necessary if they were to be used for purposes of instruction or as aids to practice. Moreover much pleading took place, and much argument thereon, which never appeared on the roll; and this was often as interesting to lawyers as the matters which appeared there.[1] The legal profession was obliged to supply its own peculiar wants for itself; and thus the report of the doings of the Court made by lawyers for lawyers arose.

We cannot give the exact date when to some lawyer "the happy thought"[2] first came of noting down the proceedings of the Court. The earliest printed Year Book in the Rolls Series is of the year 1292; but there are, as we have seen, earlier manuscripts.[3] Their writers, Professor Maitland thinks, are persons who are noting down the latest points for the use of themselves or their friends. They give no dates. Often they do not arrange their matter chronologically. Rather they distribute it under suitable heads after the manner of the writers of the later printed Abridgements. Thus, "it is only by degrees that the oldest law reports become 'Year Books,' and even when the purely chronological scheme has obtained the mastery, we may see that for a while the men who write the manuscripts or have the manuscripts written for them are by no means very careful about assigning the cases to the proper years and terms."[4] In later times the "chronological scheme" does obtain the mastery. No doubt as the years went on reporting became a more regular pursuit. Still it was an open pursuit.[5] The Books of Assizes are reports in a style very different from that of the other Year Books of Edward III's reign. They are more concise than the Year Books usually are, giving rather the gist of the argument and the decision than a report of the actual proceedings. The Longo Quinto represents a more elaborate effort of reporting than had yet been seen. Often it seems to be more impersonal, and to give the gist of several reports rather than the actual account of the eye-witness. No doubt, too, the reporters became more skilful, more professional as time went on; they allowed themselves fewer scattered notes, fewer personal details. The report of the case is the main thing; and the report grows fuller. Perhaps it may be allowable to conjecture that, with the growing organization of the legal profession, there grew up some sort of organized system of reporting. With the more frequent citation of cases in court, and the greater authority attached to them, the need for reports grew more pressing. We really have no positive evidence at all as to the conditions under which the Year Book was published to the profession. No doubt, as in later times, there was extensive borrowing, and hasty copying of borrowed materials as and when they could be got.[1] It is, however, difficult to suppose that a profession so well organized as that of the law did not devise or encourage some sort of informal organization for the production of reports. It is perhaps more than a coincidence that the serjeant's chief practice was in the Common Bench, and that the greater number of cases reported in the Year Books are common pleas. If there was some sort of organization for the production of reports, and if the legal profession exercised some control over it, we can easily see how the tale of their official origin arose. Such a tale would be the more readily believed by an age which had had time to forget the conditions which had prevailed before the introduction of printing. We sometimes speak of "the Law Reports" as official; but the historian of our age will search the national accounts in vain for information as to the sums paid to the reporters.

A reliance on cases was, as we have said, as old as Bracton; and we can see from the early Year Books that a considered decision was regarded as laying down a general rule for the future. "The judgment to be given by you," said Herle in argument in 1304, "will be hereafter an authority in every *quare non admisit* in England."[1] This does not of course mean that all the cases to be found in the lawyer's notebooks were regarded as authoritative.[2] Still cases are cited even in the early Year Books.[3] The judges when pressed by the authority of precedents were sometimes restive, as the following dialogue shows. "*R. Thorpe.* If it so seems to you, we are ready to say what

is sufficient; and I think that you will do as others have done in the same case, or else we do not know what the law is. *Hillary J.* It is the will of the Justices. *Stonore C. J.* No; law is that which is right."[4] And in Edward III's reign we see a more frequent citation of and reliance upon cases. In Henry VI's and Edward IV's reigns, if we make allowance for the differences between the manuscripts and the printed book, and the differences between the Year Book and the modern report, we see cases cited and distinguished much in the same way as they are cited and distinguished in modern times. This would seem to show that the later Year Books are something very much more than students' notebooks. Just as the voluntary associations of students for the purposes of legal education won their way to the position of the Honourable Societies of the Inns of Court, so these students' notebooks became those Reports which Burke called the sure foundation of English law, and the sure hold of the lives and property of all Englishmen.

The introduction of printing directly affected the accustomed modes of publishing the reports. Men would no longer pay large sums to obtain a MS. or to get the power to copy it, when they could buy a printed report, or an abridgement of the reports. A severe shock was therefore given to the production of the Year Books upon the old lines; and the severity of the shock was aggravated by the fact that the same extensive changes in law and practice which were diminishing the importance of the Register of Writs were rendering many of the old cases obsolete. Material changes in the law assisted the mechanical change in the mode of production. The Year Books, as we have seen, ceased to appear in Henry VIII's reign. Perhaps some sanguine men considered that there were reports enough.[1] But it soon became apparent that the professors and practitioners of a growing system of law, developed by the means of decided cases, could not dispense with reports. Dyer[2] and Plowden begin the long list of modern reports.

For many years to come the printed Year Books were absolutely necessary to all students of the law; and the printed Abridgements of the Year Books were useful indices to the Year Books themselves, and gradually became the only authorities for the reigns and years which did not get into print.[3] Just as the Year Books are the best indices to the records, so the Abridgements are our only index and guide to the Year Books.

Therefore before going on to speak of the characteristics of the Year Books we shall say something of these abridgments, by means of which the learning of the Year Books was made accessible to future generations of lawyers.

The three abridgments of the Year Books are written by Statham, Fitzherbert, and Broke. Statham's[4] name does not appear in the Year Books; but he was a reader of Lincoln's Inn in the Lent term of 1471. His abridgment was printed by Pynson somewhere about the year 1495, under the title, Epitome Annalium Librorum Tempore Henrici Sexti. The title is misleading, seeing that the book includes extracts from the Year Books of preceding reigns up to and including the reign of Henry VI. Later editions were published in 1585 and 1679. Its popularity doubtless suffered from the more complete work of Fitzherbert.[1] His work, Le Graunde Abridgment, was first printed in 1514. It is remarkable not only for its accuracy but also for its

research. It contains extracts from many still unprinted Year Books, and also from Bracton's Note Book.[2] It was a model to future writers of Abridgments; and was extensively used by Staunforde for his treatise on the Prerogative, and by Bellew for his collection of reports of the years of Richard II's reign. Its popularity is attested by the fact that it was reprinted in 1516, 1565, 1573, 1577 and 1586. The last of the famous abridgments of the Year Books is that of Broke.[3] Broke filled the offices of common serjeant and recorder of London. He was Speaker of the House of Commons in 1554, and was made Chief Justice of the Common Pleas in the same year. He died in 1558; and his work was published posthumously in 1568. It is based on Fitzherbert's Abridgment, but it contains much new matter. In particular it abridges fully the Year Books of Henry VII's and VIII's reign. "He observes," says Reeves,[4] "one method, which contributes in some degree to draw the cases to a point; he generally begins a title with some modern determination, in the reign of Henry VIII, as a kind of rule to guide the reader in his progress through the heap of ancient cases which follow." The book was republished in 1570, 1573, 1576, and 1586.[5]

Broke's abridgment is the last of the abridgments which deal wholly with the Year Books. Others followed and gradually superseded them, just as the more modern reports gradually superseded the Year Books.[1] The later abridgments deal principally with these modern reports. It is not till quite recently that we have got an abridgment which attempts to epitomize under alphabetical headings the principles of the law, and not merely to catalogue the result of the cases.[2]

We must now turn to the characteristics of the Year Books.

There are many mediaeval records of various kinds which record contemporary events. There are no other mediaeval records except the Year Books which photograph the actual words, and actions, and idiosyncrasies of the actors as they were bringing these events to pass. When we read the official record we think of a machine, which automatically eliminates all the human dramatic element, and describes events and results in one impersonal, accurate, stereotyped form of words. When we read the Year Book we think of a human reporter, mainly interested it is true in law, but, for all that, keenly alive to the exciting incidents of the trial which is proceeding before his eyes—to judicial wit, and criticism, and temper, to the shifts and turns of counsel, to the skilful move or the bungling omission, even to the repartee and the exclamations which the heat of a hardly contested fight evoke. Though therefore the Year Books are valuable because they tell us much of the development of law, they are unique because they picture for us days in court in successive terms and years through these two centuries. Because they do this faithfully, not neglecting that human element which to-day is and to-morrow is not, they supply just that information which is omitted by those who record with mechanical correctness merely the serious business done. We see not only the things done; we see also the men at work doing them, the way these men did them, and how they came to be done in that particular way. It is for this reason that the Year Books are valuable documents not only to the historian of English law, but also to the historian of any part of English life. They create for us the personal element, the human atmosphere, which makes the things recorded in the impersonal record live again before our eyes.

There is a dramatic scene in Parliament in Edward I's reign, related by Bereford C. J. in a style very different from that of any formal record:—

"In the time of the late King Edward a writ issued from the Chancery to the Sheriff of Northumberland to summon Isabel Countess of Albemarle to be at the next Parliament to answer the King 'touching what should be objected against her.' The lady came to the Parliament, and the King himself took his seat in the Parliament. And then she was arraigned by a Justice of full thirty articles. The lady, by her serjeant, prayed judgment of the writ, since the writ mentioned no certain article, and she was arraigned of divers articles. And there were two Justices ready to uphold the writ. Then said Sir Ralph Hengham to one of them: 'Would you make such a judgment here as you made at the gaol delivery at C. when a receiver was hanged, and the principal [criminal] was afterwards acquitted before you yourself?' And to the other Justice he said: 'A man outlawed was hanged before you at N., and afterwards the King by his great grace granted that man's heritage to his heir because such judgments were not according to the law of the land.' And then Hengham said: 'The law wills that no one be taken by surprise in the King's Court. But, if you had your way, this lady would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land.' Then arose the King, who was very wise, and said: 'I have nothing to do with your disputations, but, God's blood! you shall give me a good writ before you arise hence.' "1

The following dialogue between Roubury J. and the assise illustrates forcibly the relations between Judge and Jury:

"*Roubury.*—How do you say that he was next heir? *The Assise.*—For the reason that he was son and begotten of the same father and mother, and that his father on his deathbed acknowledged him to be his son and heir. *Roubury.*—You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning. And then the Assise said that he was born before the solemnization of the marriage, but after the betrothal."1

The reasonableness of the borough customs is not always apparent to the royal Judges. In answer to a plea of Parning, that the usage of Hereford was that a man could sell his land when he could measure an ell and count up to twelve pence, Schardelowe J. said, "the usage is contrary to law, for one person is twenty years old before he knows how to measure an ell, and another knows how when he is seven years old."2 We get a glimpse at the actual working of the common field system in the following answer to a plea which set up common as a defence to an action of trespass:—

"Whereas they have said that this field should lie fallow every third year, and has always done so, Sir, we tell you that that field has always by the custom of the vill, and by the agreement of those therein, been sown in such manner as they chose to agree upon, sometimes for three years, sometimes for one year; and we tell you that it was agreed by all the tenants of the vill who had land in the field whereof we have complained, that the field should be sown."3

We see, too, the tax collectors at work setting upon each vill a definite quota of the tax granted by Parliament; "and afterwards each man was apportioned by his neighbours according to the goods and chattels which he had in the same vill."1 We see an allusion to that uncertainty in the measures of land, and the causes for that uncertainty, which makes so much of our earlier history obscure.2 The difficulties of travel which made it necessary for the process of the Court to be slow if it was to be fair are forcibly illustrated by many cases.3 We see the Judges like other people anxious for the beginning of the vacation. Catesby was arguing for a certain form of plea. Danby told him that he must plead specially, and that he had better plead in this way at once "because we can't stay to argue matters of law at the very end of the term."4

The Year Books are thus valuable in many ways to historians, other than the legal historian, for the glimpses which they give us of many sides of English life. But even from this more general point of view it is to the legal historian that they are chiefly valuable, because they contain a first-hand, and sometimes critical, account of the doings and sayings of the Court as they passed under the reporter's eye. As we have before hinted, it is this characteristic of the Year Books which is the strongest evidence against their official origin. We shall here give one or two illustrations of the scenes in court thus described and of the reporter's doubts and criticisms thereon. For convenience we shall group them under the following heads:—Manners and Wit of the Bench and Bar; the relations of Bar and Bench; the reporter's notes.

The Manners And Wit Of The Bench And Bar

Both Judges and Counsel are fond of swearing, by God, by St. James, or by St. Nicholas. Even in that age, John of Mowbray's direction to the defendant, the Bishop of Chester, to "go to the great devil," is not easily surpassed.5 The satisfaction of Counsel when the Judge had given a ruling in their favour sometimes found odd expression. Mutford had recourse to his Vulgate. "Blessed is the womb that bare thee," he said to Metingham J. when he had given a a ruling in his favour.1 Their dissatisfaction, too, is clearly marked:

"*Toudeby.*—Sir, we do not think that this deed ought to bind us, inasmuch as it was executed out of England. *Howard J.*—Answer to the deed. *Toudeby.*—We are not bound to do so for the reason aforesaid. *Hengham C. J.*—You must answer to the deed; and if you deny it, then it is for the Court to see if it can try, etc. *Toudeby.*—Not so did we learn pleading."2

The reporters had a keen eye for the pithy saying, the apposite anecdote, or a wrangle on the bench. "You cannot deny," said Howard J., "that the tenements as well in one vill as in the other were holden by one and the same service; and you are seised of the tenements in one vill; will you then have the egg and the halfpenny too."3 In a case of Edward III's reign, Willoughby J. was laying down the law. "That is not law now," said his brother Sharshulle. "One more learned than you are adjudged it," retorted Willoughby.4 The clergy of the province of Canterbury, argued Counsel, do not meddle with the clergy of the province of York, and neither is bound by a grant made by the other—"Because the Jews have no dealings with the Samaritans."5

The Relations Of Bar And Bench

The relation between the Serjeants and the Judges was not quite the same as the relation between the Bar and Bench in modern times. The Judges and the Serjeants together formed the highest branch of the legal profession—the order of the coif; so that to become a Serjeant was a more solemn and important step than to become a Judge. Traces of this old fellowship long survived in the common life of the Serjeants and Judges in the Serjeants Inns, in the rule that all Judges must be chosen from the Serjeants, and in the practice of addressing a Serjeant from the Bench by the title of "brother." The Year Books testify to the fact that the Serjeants and Judges are brothers of one order. The Court asks them for their opinion.1 Resolutions are come to with their consent.2 Their dissent or approval is recorded; and the reporter regards their opinions with more respect sometimes than the dicta of the Judges. "Judgment is pending," says the reporter, "but all the countors say the writ was invalid."3 A demandant was nonsuited, "because all the Serjeants agreed that the writ could not be supported in this case."4 "And this was the opinion of *Herle* and, for the greater part, of all the Serjeants, except *Passeley,* who told *Hedon* boldly to stick to his point. And so [*Hedon*] did."5 After a dispute on the Bench it is noted that the common opinion is against the view of Parning.6 Even a dictum of the apprentices is noted,7 and sometimes conversations out of court.8 At the same time the intimacy of the relations between Bar and Bench did not prevent the Judges from speaking their minds very freely to the Bar. "We forbid you on pain of suspension to speak further of that averment;" "leave off your noise and deliver yourself from this account;" "that is a sophistry and this is a place designed for truth"—are remarks attributed to Hengham.9 "Are not the tallies sealed with your seal? About what would you tender and make law? For shame!"; "get to your business. You plead about one point, they about another, so that neither of you strikes the other;" "these seven years I never was put to study a writ, so much as this; but there is nothing in what you say"—are remarks attributed to Bereford.1 "Shame to him who pleaded this plea," said Malore J.2 "This is not the first time we have heard a plea of this kind," sarcastically remarked Sharshulle J.3 "I am amazed," said Honore C. J., "that *Grene* makes himself out to know everything in the world—and he is only a young man."4 Pulteney had said, "We do not see what will become of the first plea if this issue be entered." "It will go to the winds as does the greater part of that which you say," brutally remarked the same Judge.5 A somewhat neater score was made by one of Edward IV's Chancellors. The plaintiff has no remedy, argued Counsel, because he has made no deed; and if a man is so simple that he enfeoffs another on trust without a deed he has no remedy and has only himself to blame. Not so, said the Chancellor, he will have a remedy here in Chancery, for God protects the simple.6

The Reporter'S Notes

The reporters were quick to note a quick retort, a foolish argument or a bungling plea. "My client is a poor man and knows no law," argued Toudeby. "It is because he knows no law that he has retained you," was Herle's reply.7

We hear of the laughter in court occasioned by a foolish answer;[8] and we sometimes get criticism of the rulings or manners of the Judges. A ruling is noted as "marvellous."[9] "Your answer is double," said Brumpton, J., "and cannot be received," but, adds the reporter, "he did not assign the reason."[1] Hervey le Stanton gets nick-named Hervey le Hasty.[2] Thirning said to Counsel that he had spoken with his fellow Justices and that he (Counsel) must answer. Upon which Hull (another Counsel) remarked aside that he had never before seen that laid down for law, and, sympathetically added the reporter, "I myself have seen the contrary adjudged by the same Judges."[3] Mr. Justice Rickel had been a plaintiff together with some others in a plea of trespass. The writ was abated, "with the assent of all the Justices except the plaintiff," drily observes the reporter.[4] He notes, too, the smile with which Paston J. pointed what he considered to be a mildly humorous illustration.[5] Similarly we get extraneous facts noted which struck the reporter's fancy. He is reporting a case in the Exchequer Chamber, and notes that it was heard by the new Treasurer, about whom he gives us a few details.[6] In the Year Book of the same year he gives us, at the close of the reports for the Easter term, a narrative of the battles of Hedgeley Moor and Hexham and of the events which had happened after the battle of Towton, leading up to an account of the execution of Sir John Grey, "because of his perjury and double dealing as well to King Henry VI as to King Edward IV the present king."[7] He tells us that other arguments were used on another day "when I was not present."[8] Often his notes express his doubts or queries on points of law—and sometimes they are of a lengthy and argumentative kind.[9] Such notes show us the court at work, and something of the minds of the lawyers. But the Year Books are not primarily collections of pithy sayings, and picturesque incidents. The teaching and the publishing of the law is their object.

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25.

THE ENGLISH REPORTS, 1537-1865[1]

By Van Vechten Veeder[2]

FROM the last Year Book, in 1537, to the year 1865, there were no official reports. This important work was dependent for more than three centuries upon private enterprise. Toward the end of the eighteenth century these private reports become fairly accurate and complete, but the long period from 1537 to 1785 is precariously covered by more than one hundred reporters of various degrees of merit. A few of them, such as Plowden, Coke, and Saunders, have long enjoyed an intrinsic authority; others are quite worthless; all are subject to limitations which should never be lost sight of in relying upon their authority as judicial precedents.

During the century following the abandonment of the Year Books private reports multiplied slowly. Down to the time of the Commonwealth the only reports in print, besides certain Year Books, were Plowden, Dyer, Keilway, Benloe and Dalison, the first eleven parts of Coke, Davies, Hobart, and Bellewe's collection from the Year Books. But during the forty years of political strife from the Commonwealth to the Revolution more than fifty volumes of so-called reports were published; twenty-three of them appeared during the short life of the Commonwealth.[3] As a class these reports are accurately described by Sir Harbottle Grimston, afterward master of the rolls, in an "Address to the Students of the Common Laws of England," published in 1657:—

"A multitude of flying reports, whose authors were as uncertain as the times when taken, have of late surreptitiously crept forth. We have been entertained with barren and unwarranted products, *infelix folium ex steriles avenae,* which not only tends to the depraving of the first grounds and reason of the young practitioner, who by such false lights are misled, but also to the contempt of divers of our former grave and learned justices, whose honored and revered names have in some of said books been abused and invocated to patronize the indigested crudities of these plagiaries; the wisdom, gravity, and justice of our present justices not deeming or deigning them the least approbation or countenance in any of their courts."

"The press," says the reporter Style in his preface, "hath been very fertile in this our age, and hath brought forth many, if not too many, births of this nature, but how legitimate most of them are let the learned judge. This I am sure of: there is not a father alive to own many of them."

The license of the press prompted the enactment soon after the Restoration of a licensing act, requiring, among other things, that all books concerning the common law of the realm should be printed only upon the special allowance of the lord chancellor or the judges, or by their appointment. This act undoubtedly accounts for

the prefatory passports to some of the subsequent reports. There is a significant difference in their phraseology. The Year Books are not only “allowed” by the twelve judges, but also “recommended to all students of the law.” Sir Matthew Hale adds to the license for Rolle’s reports that they are “very good.” While the judges often certify to the learning and skill of the reputed author, they seldom state that they have examined the work, or express any opinion upon its authenticity. At all events, this licensing act, which expired in 1692, did not materially improve the standard of reporting; some of the eighteenth century reports are quite as bad as any of their predecessors. “See the inconveniences of these scambling reports,” said Chief Justice Holt in Slater *v.* May,[1] referring to the fourth Modern; “they will make us to appear to posterity for a parcel of blockheads.” And the best that the author of the fifth Modern could say of the post-Revolutionary reports was that “though some of them, as Justice Shelley merrily said, might be compared to Banbury cheeses, whose superfluities being pared away there would not be enough left to bait what my Lord Hale called the mouse-trap of the law; yet, to speak still in the language of a judge, ‘I think the meanest of them may, like the little birds, add something to the building of the eagle’s nest.’ ”

The most superficial examination of the contents of these volumes reveals the defects which justify such an arraignment. These reports, bearing the names of various judges, sergeants, prothonotaries and lawyers of less character, had their beginnings in every instance in the needs of actual practice. A lawyer would preserve in his common-place book notes of the cases cited by him in an argument, and this would be followed by a memorandum of the case in which they were used. He would also add, from time to time, other cases which he happened to hear, or notes of which were shown to him by his professional brethren. If he subsequently attained a judicial station he would of course take notes of the cases argued before him, and, very likely, of cases cited in argument with which he was not already familiar. Such notes were prepared for personal use and without any thought of publication. Their subsequent publication was almost always posthumous. With the exception of Plowden, Coke, Saunders, and a few others, very few of the reports prior to the Revolution were published in the lifetime of their authors. Bulstrode, Cromwell’s chief justice of Wales, was the first lawyer after Coke to publish his own reports. Obviously these manuscripts would vary in accuracy and value with the capacity of their authors. The note-book of a reputable judge, containing a report of litigation over which he presided, would possess all the elements of authenticity. But it also happened that lawyers of inferior acquirements, often youthful students, employed their leisure in accumulating private collections of cases. Lord Mansfield relates that the reporter Barnardiston often slumbered over his note-book, and wags in the rear would scribble nonsense in it. Whatever the merits of an original manuscript might be, in passing from hand to hand, for the purpose of copying, additions were made by various hands. When, therefore, a manuscript was finally published it would often be difficult, if not impossible, to ascertain how much of it, if any, represented first-hand work. The contents of New Benloe and Anderson extend over a period of one hundred and thirty years; Owen, Saville, Brownlow, Gouldsborough, Popham, and Lane, from fifty to one hundred years. Down to Hanoverian times the same cases are constantly reported by different persons, sometimes by half a dozen at once. By comparing them some idea may be obtained of the careless and slovenly methods of copying in vogue. For

instance, the case of Clerk *v.* Day is reported by Croke,[1] by Owen,[2] by Moore,[3] and is also printed in Rolle's Abridgment; yet Lord Raymond asserts that it is not accurately reported in any of the books named, even as to the names of the parties.[4] Sometimes an author purports to give a case in full; at other times only in part; and to obtain the whole case the scattered fragments must be traced and put together. Thus the leading case of Manby *v.* Scott is reported in a way in Siderfin and in Levinz;[5] the opinion by Sir Orlando Bridgman may be found in Bridgman's collection of his own opinions, Justice Hyde's in 1 Modern, Chief Baron Hale's in Bacon's Abridgment, while parts of the case are scattered through Keble and Modern. One reporter will give the decision in the form of an abstract principle, another will state the facts upon which it was founded, a third will report the arguments of counsel, while a fourth may supply parts omitted by the others.

There were, moreover, other elements of confusion. Many manuscripts belonging to lawyers of high standing were published without authority, and consequently without any revision. In at least two instances the manuscripts were stolen by servants and published as mere booksellers' speculations, with various additions from unknown sources. At best, posthumous publication, involving the deciphering of a strange manuscript, was attended with serious risks. An original manuscript was apt to be vitiated long before publication by repeated and careless copying. The editor of Dyer's reports refers to numerous errors "religiously preserved and carried on without the least attention to sense." Then many of these volumes are translations of Latin or French originals never published. In cases like Dyer, the first eleven parts of Coke, Yelverton, Saunders, and a few others, where the work was first printed in the original and subsequently translated, we have means of verification. But during the Commonwealth period, English having been made the court language and reports in Latin and French prohibited, editors at once translated their manuscripts into English. Thus Croke, Winch, Popham, Owen, Leonard, Hetley, J. Bridgman, and some others, though originally written in Latin or French, first appeared in English. Considering the cryptographic abbreviations which abounded in the handwriting of former times, the fact that the original manuscript, having been designed for private use, was likely to be filled with symbols understood by the writer alone, and the fact that the translator was exempt from comparison, the probable extent of the errors and imperfections is apparent. "I have taken upon me," says Croke's editor, "the resolution and task of extracting and extricating these reports out of their dark originals, they being written in so small and close a hand that I may truly say they are *folia sybillina,* as difficult as excellent." A score or more of the early reports have never been translated from the Latin or French in which they were originally published.

The classical repositories of the old common law are the reports of Plowden and Coke. Their work maintained pre-eminence for more than a century, and exercised a profound influence upon early English law. Plowden was our first private reporter, and in many respects his work has not been surpassed by any of his successors. "The Commentaries or Reports of Edward Plowden of the Inner Temple, An Apprentice of the Common Law," extend from Edward III. to Elizabeth (1550-1580). They are the result of actual attendance in court, and are among the few old reports prepared for the

press and published under the direction of their author. Plowden states in his preface, under date of 1571, the circumstances under which the work was undertaken:—

"When I first entered upon the study of the law I resolved upon two things which I then purposed earnestly to pursue. The first was to be present at, and to give diligent attention to, the debates in law, and particularly to the arguments of those who were men of the greatest note and reputation for learning. The second was to commit to writing what I heard, which seemed to me to be much better than to rely upon treacherous memory, which often deceives its master. These two resolutions I pursued effectually by a constant attention at the moots and lectures, and at all places in court and chancery to which I might have access where matters at law were argued and debated. And finding that I reaped much profit and instruction by this practice, I became at last disposed to report the arguments and judgments made and given in the king's courts upon demurrers in law, as abounding more copiously in matters of improvement, and being more capable of affecting the judgment, than arguments on other occasions. Upon this I undertook first one case and then another, by which means I at last accumulated a good volume. And this work I originally entered upon with a view to my own private instruction only, without the least thought or intention of letting it appear in print."

Although often solicited by "some of the judges and other grave and learned men" who had seen his work to allow it to be made public, he modestly declined, "being conscious of the simpleness of his understanding and of the small spark of reason with which he was endued." He was at length led to alter his resolution by the following circumstances:—

"Having lent my said book to a few of my intimate friends, at their special instance and request, and but for a short time, their clerks and others knowing thereof got the books into their hands and made such expedition, by writing day and night, that in a short time they had transcribed a great number of the cases, contrary to my own knowledge and intent, or of those to whom I had lent the book; which copies at last came to the hands of some of the printers, who intended (as I was informed) to make a profit of them by publishing them. But the cases being transcribed by clerks and other ignorant persons who did not perfectly understand the matter, the copies were very corrupt, for in some places a whole line was omitted, and in others one word was put for another, which entirely changed the sense, and again in other places spaces were left where the writers did not understand the words, and divers other errors and defects there were which, if the copies so taken had been printed, would have greatly defaced the work and have been a discredit to me."

Plowden took infinite pains to render his work accurate and complete. "In almost all of the cases, before they came to be argued, I had copies of the records, and took pains to study the points of law arising thereupon, so that oftentimes I was so much master of them that if I had been put to it I was ready to have argued when the first man began; and by this method I was more prepared to understand and retain the arguments and the causes of the judgments. And besides this, after I had drawn out my report at large, and before I had entered it into my book, I shewed such cases and arguments as seemed to me to be the most difficult and to require the greatest

memory, to some of the judges or sergeants who argued in them, in order to have their opinion of the sincerity and truth of the report, which, being perused by them, I entered it into my book."

The result of such care is a report which presents with absolute clearness the points at issue, the arguments urged by the respective counsel, and the grounds of the judgment rendered by the court. Moreover, in publishing his work he placed a title at the head of each case, together with the date, the nature of the action, the names of the parties, etc. Beyond their excellent form and arrangement the great authority of Plowden's cases has a substantial basis. Many of the early reports, particularly the Year Books, contain the off-hand opinions of the judges upon motions; whereas all of Plowden's cases are "upon points of law tried and debated upon demurrers or special verdicts, copies whereof were delivered to the judges, who studied and considered them, and after mature deliberation gave judgment thereon." This fact also explains the great esteem in which Plowden's work has always been held as a book of entries.

Although Plowden called his work a commentary he was sparing in comment. When he undertakes a full discussion of a topic[1] he is very instructive; but he is always careful to separate his own views from the opinion of the court. His work is therefore really a report, although called a commentary. It remained for Sir Edward Coke to publish under the title of reports an elaborate commentary, in which the opinion of the court was often edited in accordance with the reporter's personal views.

The estimation in which Coke's reports were held by his contemporaries is indicated by their citation simply as "The Reports." While they were being issued no others appeared, "as it became all the rest of the lawyers to be silent whilst their oracle was speaking."[2] Coke began as early as 1580 to take notes of the legal transactions of the day, perfecting his information during hours of leisure. At length in 1600 he published his first volume, and shortly afterward, while he was attorney-general, the second and third. In 1603 the fourth part appeared, and the fifth about two years later. The remaining six parts were issued between the years 1607 and 1616, while he was successively chief justice of the Common Pleas and of the King's Bench. These eleven parts or volumes constituted all that were published during his life-time, and, apparently, all that were designed for publication. In 1634, however, twenty-one years after his death, a twelfth part was printed, and about three years later the thirteenth and last. These last two parts had been left by Coke in an unfinished state, and are inferior in authority to their predecessors.[1] Besides reports of cases much more loosely stated than in the prior reports, they contain accounts of conferences in the Privy Council, of consultations among the judges, and notes of legal points in general. The fact that they deal largely with questions of prerogative is probably the reason why they were not published in the author's life-time. The earlier parts had given offense to James I., who deemed certain doctrines contained therein injurious to his royal authority. Coke's ultimate suspension from judicial office was accompanied by a command to consider and revise his reports, and his "scornful treatment of this order" in reporting only five trivial errors was one of the reasons given for his subsequent dismissal.

In method Coke's reports are unique. They are not reports at all in the strict sense of the term. He says in his preface that he prepared his reports not merely for citation in court but also for educational purposes; and to a large extent, though just how far it is impossible to say, they contain his own statement of the law. Accordingly, they are much more elaborate than other early reports. Since, to Coke's mind, the art of pleading was the necessary foundation of all accurate knowledge of the common law, the pleadings are fully set out, not only for a proper understanding of the case but for the instruction of students as well. The reasons of the judgment are thrown into the form of general propositions of law, in the exposition of which earlier cases are collected with laborious care. Hence the report of each case forms a treatise on the point at issue. The arrangement of the cases, moreover, is not chronological, but more or less according to subjects.

Coke's reports are therefore summary in character. Without tracing any form of argument, he usually gives a statement of the case, following with the substance of all that was said in argument, and concluding with the resolutions of the court. He describes his method in Calvin's case:1 —

"And now that I have taken upon myself to make a report of their arguments, I ought to do the same as fully, truly, and sincerely as possibly I can; howbeit, seeing that almost every judge had in the course of his argument a particular method, and I must only hold myself to one, I shall give no just offense to any if I challenge that which of right is due to every reporter, that is, to reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reason and causes of the judgment and resolution of the case in question."

His method of presenting what was decided is, however, disorderly in the extreme. Throughout all parts of the report, but particularly in giving the resolutions of the judges, his inexhaustible learning breaks forth; "one case is followed by another, quotation leads to quotation, illustration opens to further illustration, and successive inference is made the basis for new conclusion; every part, moreover, being laden with conclusions and exceptions, or protected in a labyrinth of parentheses, until order, precision, and often clearness itself is lost in the perplexing though imposing array." How animating, therefore, is his assurance to the reader that "although he may not, at any one time, reach the meaning of his author, yet at some other time and in some other place his doubts will be cleared."2

In connection with his habit of editing the conclusions of the court in accordance with his own views of the law, it may be added that Coke is not always accurate. Sometimes, as in Gage's case,3 he gives a wrong account of the actual decision. Moreover the authorities which he cites do not always sustain his conclusions.4 This fault, indeed, runs through all his writings and has carried in its train some unfortunate consequences. For instance, in Pinnell's case, by giving a mere dictum the form and effect of an actual decision upon a point in issue he fixed upon English law the rule that a creditor who, on the day his debt falls due, accepts a smaller sum in satisfaction of the whole, but executes no deed of acquittance, is not bound by his agreement.1 The result has been, as Sir George Jessel ironically said in Couldery *v.* Bartrum,2 that

according to English law "a creditor might accept anything in satisfaction of a debt except a less amount of money. He might take a horse or a canary or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of English law he could not take 19s 6d in the pound." Yet the House of Lords in 1884 held that the error was so firmly established that it did not come within their province to correct it. It may be added in further elucidation of the effect of such errors that the resolution of the judges in Pinnell's case as reported by Coke is not as absurd as some of the distinctions that have been engrafted upon it from time to time by judges who sought to limit the operation of what they believed to be an erroneous principle. Many questionable doctrines have in this way become firmly imbedded in the law. "I am afraid," said Chief Justice Best, "we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law."[3] Still, it is less true now than formerly that his works have, as Blackstone said, "an intrinsic authority in courts of justice, and do not entirely depend on the strength of their quotations from older authorities."

The basis of the vast reputation that Coke's reports enjoyed for centuries is readily apprehended. The only other reports available in his time were Dyer, Plowden, and parts of the Year Books; in the preface to the third part of his reports Coke gives their number as fifteen. Coke's extensive reports, covering a period of nearly forty years, not only give a fairly complete account of the law during the reigns of Elizabeth and James I., but they made accessible most of the older learning which till then had to be laboriously gathered from the Year Books and the unsatisfactory abridgments. Lord Bacon admitted no more than the bare truth when he said, "To give every man his due, had it not been for Sir Edward Coke's reports (which, though they may have errors and some peremptory and judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over cases), the law by this time had been almost like a ship without ballast, for that the cases of modern experience are fled from those that are adjudged and ruled in former time." Moreover, his careless and disorderly mixture of things great and small is balanced by the grasp of his intellect and the often inimitable effect of his quaint style.[1]

There are several other brief collections of cases from Tudor times, chief among which is Dyer's (1513-82). Sir James Dyer presided in the Court of Common Pleas for more than twenty years, and his accurate, concise and businesslike notes have always been regarded as among the best of their class. Although these notes were taken by Dyer for his own use and without any thought of publication, they were edited from a genuine manuscript by his nephew, and were subsequently annotated by Chief Justice Treby. Moore's reports (1521-1621), the work of Sir Francis Moore, the supposed author of the Statute of Uses and inventor of the conveyance known as lease and release, were edited from a genuine manuscript by Sir Geoffrey Palmer, a distinguished lawyer of the Restoration, with the assent of Sir Mathew Hale, who married Moore's granddaughter. Anderson's Common Pleas Reports (1534-1604), the work of a prominent judge, are quite full and circumstantial for their time. Jenkins's so-called "Centuries," a brief but accurate collection of notes of Exchequer decisions, contains some cases as early as the thirteenth century. Leonard's reports (1540-1613), dealing mostly with cases subsequent to the reign of Henry VIII., have been commended by Nottingham and St. Leonards. Benloe and Dalison (1486-1580),

Keilway (1496-1531), Brooke (1515-58), and Benloe (1531-1628) are all of secondary value. The only connection between Benloe and Dalison is the fact that their reports were edited by John Rowe. The later Benloe, which is mainly a compilation, is often called New Benloe, to distinguish it from the former; Brooke is likewise called Little Brooke to distinguish it from the same author's abridgment. Although Keilway's reports are of uncertain value, they record many cases not included in other reports of this period. The volume bearing the name of Noy (1559-1649) is a collection of mere scraps of cases and dicta, with only an occasional statement of the facts involved. Noy was attorney-general under Charles I., and one of the six persons recommended by Bacon in connection with his plan for official reporting as being "learned and diligent and conversant in reports and records." This volume was probably an unauthorized transcript from his note-book. The reports of Brownlow and Gouldsborough (1569-1625) are the work of two prothonotaries of the Common Pleas; they are mostly practice cases. Owen (1556-1615), Goldbolt (1575-1638), Saville (1580-94), and Popham (1592-1627) are of little, if any, value.

Many of the reports just mentioned extend into the seventeenth century. On the other hand, there are several reports dealing principally with the reign of the first two Stuarts, whose earlier cases date, like Coke's, from Elizabeth's reign. Of these the reports of Sir George Croke, edited by his son-in-law, Sir Harbottle Grimston, master of the rolls, are of most general interest and value. Croke served with credit in a judicial capacity until his eightieth year, when, upon his petition that he might "retire himself and expect God's pleasure," Charles I. granted him a pension. His work is of the first importance whenever he reports a case fully; but the value of his reports as a whole is affected by the fact that he gives not only cases in which he participated or which he heard, but many others not reported elsewhere, which were merely cited in argument or which were shown to him. However, when he takes a case at second-hand he generally states somewhere that he does so, and the discredit into which some of his work has fallen is due to some extent to his practice of printing a case in instalments, and the consequent difficulty of reading him aright. As a rule his reports are too brief to be perfectly clear. These reports are always cited by the names of the sovereigns in whose reign the cases were determined.

In addition to the standard authorities, Coke and Croke, the first half of the reign of James I. is covered by Yelverton (1603-13), the second half by Rolle (1614-25), and the whole reign by Hobart (1603-25). Yelverton's small volume ranks with the best of the old collections of notes. Yelverton was one of the ablest lawyers of his time, and although his notes are not presented with technical precision, having been prepared for his own use, they are known to be authentic. Rolle's report is a genuine work by Cromwell's able chief justice. Hobart's collection, published several years after the Chief Justice's death by a careless editor, but improved in a subsequent edition by Lord Nottingham, was a standard work of its day. Yet these reports are still very defective in method and precision, and are replete with legal disquisitions which have not served in modern times to add to their usefulness. Hobart includes some cases from the Star Chamber. There are several minor reports of this reign: Davies (1604-12), Lane (1605-12), Ley (1608-29), Calthrop (1609-18), Bulstrode (1609-39), Hutton (1612-39), J. Bridgman (1613-21), Palmer (1619-29), and Winch (1621-25). Davies was a well-known poet and a friend of Selden and Ben Jonson. Ley prints

some cases from the Court of Wards. Calthrop deals mainly with cases concerning the customs and liberties of London; Winch, principally with declarations.

Beginning in the last years of James I., but dealing mainly with the succeeding reign, is the collection by Sir William Jones (1620-41). These are accurate reports, from a genuine manuscript, of cases decided during this distinguished judge's tenure of office. They are among the most interesting of the old reports. In this reign, also, is the volume bearing the name of Littleton (1626-32); but the cases were probably not reported by him. They are concerned largely with applications for prohibitions. Latch (1625-28), Hetley (1627-32), and March (1639-43) are of minor importance. Clayton's assize reports (1631-51) throw some light on early practice. Aleyn (1646-49) contains loose notes of cases decided during the last years of the reign of Charles I., when judicial proceedings were disturbed by the turbulence of approaching civil war.

There are few reliable records of litigation during the Commonwealth period. Style's reports (1646-55), which were published by the author himself, are valuable as our sole record of the decisions of Rolle and Glyn, the able chief justices of the Commonwealth. Hardres' Exchequer reports (1655-69) cover part of this period. They were printed from a genuine manuscript, and give fair reports of the arguments, but very brief reports of the judicial opinions, which are usually by Sir Mathew Hale. Siderfin (1657-70), who gives some cases from this time, is of small consequence.

Within the first decade after the Restoration there are several new reports, extending for the most part over the remainder of the Stuart period. Chief among them is Saunders (1666-73), who is universally conceded to be the most accurate and valuable reporter of his age. His work is confined to the decisions of the King's Bench between the eighteenth and twenty-fourth years of the reign of Charles II. Saunders participated as counsel in most of the cases, and he reports them with admirable clearness. In general his reports resemble Plowden's; but they are much more condensed. He gives the pleadings and entries at length, and follows in regular order with a concise statement of the points at issue, the arguments of counsel, and a clear statement of the grounds of the judgment. The work was subsequently enriched by the learned annotations of Sergeant Williams. Thomas Raymond's notes (1660-84) bear a good reputation. T. Jones (1667-85) and Ventris (1668-91) are of fair authority; about Levinz (1660-96), and especially Keble (1661-79), opinion is conflicting. It is unfortunate that we have no better record than these volumes afford of Sir Mathew Hale's decisions. The manuscript of Freeman's notes (1670-1704) was stolen by a servant and published without authority.

The so-called Modern reports (1669-1732), which begin in the first decade after the Restoration and cover a period of more than sixty years, are of considerable importance when due allowance is made for certain serious limitations. This work, originally composed of five volumes, was formed by combining in a series the work of different hands. It was subsequently revised and remodeled by Leach, who published a definitive edition in twelve volumes (1793-96). Leach made many improvements in the text; he corrected the headings, inserted the names of the judges at the beginning of each term, and modernized the references. In former editions a

variety of cases without any names were often crowded together in such a confused mass as to be practically undistinguishable. Leach separated these cases under the title "Anonymous." Besides contributing many notes and references he added a large number of cases. As thus corrected the work was much improved; but the volumes are still wanting in accuracy and completeness, and, moreover, vary greatly in value. The second, sixth, and twelfth, for instance, have often been cited with commendation, while the reputation of the fourth, eighth, and eleventh is particularly bad. The arrangement of the contents of the work is disorderly and confusing in the extreme. The first two volumes, containing both law and equity cases, deal with the reign of Charles II.; the third mainly with the reign of James II.; the fourth and fifth, during William III.'s reign, and the sixth, during Anne's, are made up of decisions by Chief Justice Holt; volume seven completes Anne's reign and contains decisions of Chief Justices Hardwicke and Lee in the King's Bench from the sixth to the eighteenth years of George II.; volume eight contains King's Bench decisions from the eighth to the twelfth years of George I., during the service of Chief Justice Pratt; the ninth volume is made up entirely of chancery cases, containing Lord Chancellor Macclesfield's decrees from the eighth to the eleventh years of George I., and Hardwicke's from the tenth to the twenty-eighth years of George II.; the tenth, extending from the eighth year of Anne to the eleventh year of George I., is made up of decisions by Macclesfield in law and in chancery; the eleventh gives Holt's decisions during the first eight years of Anne's reign, and Chief Justice Pratt's from the fourth year of George I. to the fourth year of George II.; and the last volume is given to Holt's cases in the reign of William III. This collection of reports, notwithstanding its deficiencies, has perhaps been cited oftener in modern times than other seventeenth century report. Many of the best known early cases are scattered through these volumes.

The inaccuracies of Shower (1678-94), who gives some good cases, have been somewhat remedied in subsequent editions. Some of Sir Orlando Bridgman's excellent opinions in the Common Pleas are preserved in the reports bearing his name (1660-67). Vaughan's reports (1665-74) from the same court deal principally with the labors of the judge of that name; Lutwyche (1683-1702) also records some Common Pleas cases from the latter part of the seventeenth century. Among the minor reports of this time, besides J. Kelyng's brief collection of criminal cases (1662-69), are several of little, if any, value: Carter (1664-85), Comberbach (1685-99), and Carthew (1686-1701). Since almost all the cases printed by Skinner (1681-98) had appeared in prior reports his work is seldom cited.

Some of the ante-Revolutionary reports exhibit technical learning of a high order; but it must be admitted that they are not easy reading. The cumbersome system of feudal tenure, with which the vast proportion of the cases prior to the Restoration are concerned, was at best unpromising material.[1] After the Restoration the reports increase in interest. The radical reforms in the law of real property, and the slow but steady amelioration during the latter half of the seventeenth century of common law doctrines and procedure, in consequence of the interference of the chancellor, gradually brought within the purview of the common law remedial measures which had theretofore been recognized only in equity. For instance, the introduction in the reign of Charles II. of new trials with reference to the evidence obviated recourse to

equity in cases like that which had brought about the conflict between Coke and Ellesmere.

Although these early reports, with few exceptions, are now seldom cited in practical work, their historical value can hardly be overestimated. Reports that are almost worthless as judicial records often throw valuable side-lights upon early practice and procedure;[1] not infrequently they supply interesting illustrations of the social life of the time.[1]

The Revolution forms almost as distinctive an epoch in legal as in political history. In the passing of the despotism of the Stuarts, and the consequent acknowledgement and definition of civil and political liberty, the judiciary acquired a stability which has never been shaken. The judges have ever since held their office during good behavior instead of at the sovereign's pleasure, and their removal could only be effected by the crown upon the address of both houses of Parliament. The turning point in judicial affairs at the Revolution is clearly marked. Of the notorious instruments of usurpation and violence, the dethroned king's chancellor was in the Tower and his chief justice in Newgate. On the other hand, the new era was opened by the appointment of one of the ablest and best of chief justices, Sir John Holt, to succeed Wright, one of the worst; and from that time no address has ever been voted by either house of Parliament with a view to the displacement of an English judge.

From the Revolution the reports increase in value and importance; they deal more with modern conditions. The development of commerce, and the consequent variety and importance of personal property and of contracts, the growth of maritime jurisprudence, the development of equity, and the general introduction of more liberal and enlightened views of justice and public policy, all combined to give a new tone and impulse to the common law.

It is a great misfortune that the labors of the distinguished jurist whose character and career exemplified the best features of the new era should have been so inadequately preserved. Reference has already been made to the reports of Chief Justice Holt's cases in Modern. Holt's term is covered, in addition, by Salkeld (1689-1712), Lord Raymond (1694-1734), and Comyns (1695-1741). The first two volumes of Salkeld (the third volume being a mere collection of detached notes of cases from other reports) were published under the supervision of Lord Hardwicke, and enjoy a good reputation; yet the reports are too brief to be clear, and many of the cases are taken at second hand. Lord Raymond's reports of Holt's decisions are of excellent authority. After Holt's death Raymond seems to have relaxed his efforts. His third volume contains the pleadings at large. Comyn's reports are posthumous, and are not as reputable as his digest. In addition to the volumes above mentioned, some of Holt's cases may be found in Carthew (1686-1700), and Levinz (1660-97), both of poor reputation, and in the appendix to Kelyng's criminal cases. The volume entitled Temp. Holt (1688-1710) is mainly an abridgment of Holt's decisions by Giles Jacob, Pope's "blunderbus of the law."

During the first dozen years of George II.'s reign we have several new reports: Barnardiston (1726-35), Fitzgibbon (1727-32), W. Kelynge (1731-36), Barnes

(1732-60), Ridgeway (1733-37), Lee (1733-38), Cunningham (1734-36), Andrews (1737-39), and Willes (1737-60),—most of them, unfortunately, of inferior workmanship. Most of the cases in Cunningham, Ridgeway, 7th Modern, and Lee's Cases Temp. Hardwicke, are apparently all taken from the same manuscript; yet they are our main reliance for Hardwicke's services in the King's Bench.

Fortescue (1695-1738) and Strange (1715-48) are of fair repute. Fortescue is partial to his own opinions, which are characterized by more solicitude for taste than power of thought. Strange was master of the rolls and the colleague of Hardwicke, some of whose arguments at the bar and common law decisions he reports. His reports are quite modern in form. Cooke's Common Pleas reports, which are frequently cited, are mostly practice cases. Gilbert's Cases in Common Law and Equity (containing, however, no equity cases) cover the term of Chief Justice Parker. Bunbury (1713-42) and Parker (1743-67) together form a consecutive chronicle of the Exchequer under George I., George II., and the first seven years of George III. Bunbury's reports are mere notes, but they were taken in court by Bunbury himself, and were afterward edited by his son-in-law, Sergeant Wilson.

Willes's reports of his own opinions as chief justice of the Common Pleas are highly authoritative. Although published after Willes's death, they appear to have been carefully prepared by this learned judge, and they were afterward revised and edited by Durnford, the editor of the Term Reports. This volume also contains some cases in the House of Lords. Willes's excellent reports are little if at all superior to those prepared by Wilson (1743-74). This very accurate work records the labors of such distinguished judges as Wilmot, Willes, and De Grey, and is of great value. Sir William Blackstone's miscellaneous collection of cases (1746-79), extending over a period of thirty-three years, do not display the care that we should expect from the celebrated commentator. Wilmot's opinions (1757-70) contain decisions by this learned judge not reported elsewhere. Foster's small collection of criminal cases (1743-61), the work of a very eminent authority in criminal law, is of the highest authority as far as it goes. The collection of notes published in Kenyon's name (1753-60) came from a genuine manuscript, but was probably not designed for publication.

Burrow's reports (1757-71), beginning in the year following Mansfield's appointment as chief justice of the King's Bench and just prior to the accession of George III., mark an epoch in law reporting. Burrow was led to publish his work by the same circumstances that had overcome Plowden's modesty two centuries before. When it became known that he had for many years preserved some account of the decisions of the courts, he was subjected, he says, to "continual interruption and even persecution by incessant application for searches into my notes, for transcripts of them, sometimes for the note-books themselves (not always returned without trouble and solicitation), not to mention," he feelingly adds, "frequent conversations upon very dry and uninteresting subjects, which my consulters were paid for considering, but I had no sort of concern in." Burrow's published reports date only from the time of his appointment as master of the crown office, when personal charge of the court records and regular attendance in court gave him superior opportunities to render his work accurate and complete. Beyond their substantial accuracy, these reports are

characterized by clearness of statement and lucid arrangement of the materials of a case. Burrow was the first reporter to appreciate the advantage of prefixing to the report of each case a statement of the facts and issues separate from the opinion of the court, and following in regular order with the arguments, the opinions of the judges, and the judgment of the court. As he did not write short-hand, the opinions of the judges are not given in the exact language in which they were delivered; nor were they revised by the judges. The consequent limitations of all such reporting is analyzed by Burrow in terms which should always be borne in mind in citing the early reports.1

"I do not take my notes in short-hand. I do not always take down the restrictions with which the speaker may qualify a proposition to guard against its being understood universally, or in too large a sense, and therefore I caution the reader always to imply the exception which ought to be made when I report such propositions as falling from the judges. I watch the sense rather than the words, and therefore may often use some of my own. If I chance not fully to understand the subject, I can then only attend to the words, and must in such cases be liable to mistakes. If I do not happen to know the authorities shortly alluded to, I must be at a loss to comprehend (so as to take down with accuracy and precision) the use made of them. Unavoidable inattention and interruptions must occasion chasms, want of connection, and confusion in many parts; which must be patched up and connected by memory, guess, or invention, or those passages totally struck out which are so inextricably puzzled, in the original rough note, that no glimpse of their meaning remains to be seen."

"I pledge my character and credit," he says in conclusion, "only that the case and judgment and the outlines of the ground or reason of decision are right." Their accuracy to this extent has never been questioned.

These reports, of the utmost value in themselves as a record of the services of Mansfield, Foster, Wilmot, and Yates, exercised, moreover, a most beneficial influence upon subsequent reporting. Burrow's immediate successors, Cowper (1774-78) and Douglas (1778-84), who give a consecutive chronicle of Mansfield's work from 1774 to the beginning of the Term Reports, follow the same plan and are of similar excellence. Although Burrow had something to say of his vocation, Douglas's reports contain the first deliberate discussion of the reporter's art. "My utmost aim will be attained," he says at the close of his preface, "if I shall be found to have merited in any degree the humble praise of useful accuracy." Such praise he unquestionably deserves. He edited the opinions of the judges as his predecessors had done, but his statement of the facts, pleadings, and arguments is more concise than Burrow's, and his work as a whole is less scholastic and technical.

Substantial accuracy and a uniform arrangement of the materials of a case having been attained, the next step in the progress of reporting was the prompt and regular publication of judicial decisions from term to term. This was accomplished in the King's Bench with the Term Reports, edited by Durnford and East, which were originally published in parts at the end of each term of court. From this time forward the proceedings of the King's Bench have been regularly and systematically reported. Until 1865 reporting was carried on by private enterprise in each court separately. It

often happened that there was more than one reporter from the same court; but some one reporter was understood to be specially authorized by the judges and to have an exclusive, or at least prior, claim to the opinions of the judges as settled and revised by them. Some of the most distinguished of modern English judges, such as Alderson, Cresswell and Blackburn, served an early apprenticeship in reporting, and we have in consequence thoroughly reliable reports of the labors of those great jurists by whom the common law was developed and applied to the needs of modern times.

The Term Reports (1785-1800) cover the term of Chief Justice Kenyon, when Ashhurst, Buller and Lawrence were among the puisnes. The services of Lord Ellenborough and his associates, Lawrence and Bayley, are recorded by East (1801-12) and Maule and Selwyn (1813-17). Barnewall, in association successively with Alderson, Cresswell and Adolphus, reports the decisions of this court from 1817 to 1834, when Lord Tenterden presided over such puisnes as Bayley, Holroyd and Littledale.

The legal reforms contemporaneous with the Reform Bill of 1832 were instrumental in effecting some important changes in the relative value of the different reports. By the Uniformity of Procedure Act the concurrent jurisdiction of the three superior courts of common law was officially established. At the same time, the Exchequer Chamber was reorganized as a regular court of appeal from the three common law courts. The decisions of this appellate tribunal, which was composed on appeals from one court of the judges of the other two, were thereafter included in the reports of the court from which the appeal was taken; and this interchange of judges tended to equalize the standing of the three courts. Aside from this fact, moreover, there was a noticeable revival in the Common Pleas and Exchequer during this period.

Brief reference has already been made to some of the eighteen volumes of decisions of the Court of Common Pleas prior to 1785, chief among which were the individual collections of Chief Justices Orlando Bridgman, Vaughan and John Willes. This court, although a closed court (*i. e.* only sergeants could argue cases there) until far into the nineteenth century, became very efficient in the last decade of the eighteenth century through the services of several able lawyers who sat on this bench for short periods on their way to scenes of more distinguished labor. The excellent reports of Henry Blackstone (1788-96), recording the services of Loughborough, Eyre, Lawrence, Buller and others, are equal to the best of the King’s Bench reports. From this time the proceedings of the Common Pleas have been regularly reported. But after the retirement of the judges just named the court declined in authority. This falling off is observable during the period covered by Bosanquet and Puller (1796-1807). Taunton’s reports (1808-19) as a whole have never been very highly esteemed. The Common Pleas probably reached its lowest standing in the first five volumes of Bingham’s reports. But the reputation of the court rose rapidly under Chief Justice Tindal (1829-46). The services of this eminent judge, together with his associates, Bosanquet, Maule, and Cresswell, have given deserved repute to the later volumes of Bingham and the reports of Manning and Granger (1840-44). The two series of Common Bench reports (1845-65) represent the highest standard attained by this court. These thirty-nine volumes (particularly the last twenty-five) may be numbered among the classical repositories of the common law, recording as they do

the distinguished labors of Jervis, Maule, Cresswell. Vaughan Williams, Willes, Cockburn, Erle and Byles, and the decisions of the Exchequer Chamber on appeal.

Five small volumes comprise our record of the Court of Exchequer prior to 1792. During all this time the Exchequer was hardly regarded as a superior court. Sir Mathew Hale lent distinction to the court after the Restoration, but it was not until far into the nineteenth century that it ranked on an equality with the other two common law courts. The twenty volumes of reports of its proceedings between 1785 and 1830, mostly by Messrs. Anstruther and Price, are seldom cited. Lord Lyndhurst's acceptance of the chief baronetcy in 1831, after having held the chancellorship, attracted some attention to the court, but it was not until Sir James Parke took his seat upon this bench that its reputation was assured. During the period of Baron Parke's service (1834-56) the Exchequer exercised an almost dominant authority. The twenty-seven volumes of reports by Messrs. Crompton, Meeson, and Welsby (Crompton and others, 1830-36; Meeson and Welsby, 1836-47; Exchequer Reports, 1847-56), containing the decisions of Parke, Alderson, Pollock, Rolfe and Martin, together with the decisions of the Exchequer Chamber on appeal, have always been highly esteemed for their vast, though for the most part very technical, learning. During the next decade the court, as reported by Hurlstone, was not so effective, in consequence of the habitual conflict of opinion among the barons. Of a bench including Pollock, Martin, Bramwell and Channel, Bramwell was easily the most distinguished.

Notwithstanding the rapid rise in authority of the Common Pleas and Exchequer toward the middle of the last century, the King's Bench, if it failed to maintain its former preeminence, sustained at all events a corresponding standard of excellence. As a record of the labors of Denman, Littledale, Patteson, and the early services of Coleridge, Wightman, Erle and Campbell, the two series of reports by Adolphus and Ellis (1834-52) have always been held in high esteem. The court attained its highest standing, however, during the period from 1852 to 1865 under Campbell, Coleridge, Wightman, Erle, Cockburn and Blackburn. This period is reported by Messrs. Ellis, Blackburn, Best and Smith.

The chancery reports are of comparatively recent origin. It is not until the last years of the seventeenth century that we have any satisfactory reports of the chancellors' determinations. Sir John Mitford (afterward Lord Redesdale), writing at the end of the eighteenth century, could still complain of the extreme scarcity of authority; and Lord Eldon, some years later, described Mitford's book as "a wonderful effort to collect what is to be deduced from authorities speaking so little that is clear." This slow development was the natural result of the auxiliary nature of the equitable jurisdiction and of the discretionary character of its early administration.

During all these centuries of development we have only a dozen small volumes of so-called chancery reports; in reality they are little more than brief notes on procedure. Of this sort are the cases collected by William Lambert and published under the name of Carey, their editor (1557-1604), which are mostly mere extracts from the registrar's books, and the so-called Choyce Cases in Chancery (1557-1606), consisting of a collection of notes of cases (mostly between 1576 and 1583), together with a brief treatise on chancery practice. These two volumes contain brief records of many of

Ellesmere's decrees. Tothill's meagre and imperfect notes extend from Elizabeth to Charles I. (1559-1646). These three collections, which are concerned principally with the reign of Elizabeth, give some idea of the matters dealt with in chancery; but they are extremely brief and unsatisfactory, often giving merely a bare statement of the facts of a case and the final decree, without any indication of the grounds of the judgment.

The seventeenth century reports are not much better. The volume known as Reports in Chancery (1615-1710) is made up mostly of notes of special cases from the reign of Charles I. Nelson (1625-93) records several cases decided by Lord Keeper Coventry, and a few by Littleton and the Parliamentary commissioners. The so-called Cases in Chancery (1660-90) is the best of the earlier reports; it gives in most cases a fair abstract of the chancellor's judgment, and a few cases are reported quite fully. Dickens's reports, which extend over a period of more than two hundred years, include some notes of cases as early as the sixteenth century. Freeman's notes (1676-1706) are unimportant.

In fact, the chancery reports prior to the Restoration are of secondary importance. The official records of the chancery, which begin in the seventeenth year of the reign of Richard II., afford a much more satisfactory and reliable guide to the early history of equity. A selection of these early records, from Richard II. to Elizabeth, has been published by the Record Commission under the title of "Calendar of Proceedings in Chancery."[1] The Selden Society proposes to carry on the work thus begun, and has already published its first volume, "Select Cases in Chancery, 1364-1471."[2] A collection of abstracts from the masters' reports and from the registrars' book, published by Cecil Monro under the title, "Acta Cancellariae, 1545-1624," further illustrate early practice, and serve to correct and supplement many of the reported cases.

Lord Nottingham's very important chancellorship is covered by the folio volume entitled Reports temp. Finch (1673-80), which is made up of cases in which the reporter was counsel. The work is miserably executed; the statement of facts is defective, and there is only an occasional statement of the arguments; the report concludes with a mere abstract of the decree, without any reference to the reasoning upon which it is based. The only reports at present available that do any sort of justice to the great chancellor's reputation are those published by Swanston in an appendix to the third volume of his chancery reports.[3]

The manuscript of Vernon's reports (1681-1720) was found in the study of that eminent lawyer after his death. Although these volumes constitute our first considerable collection of chancery cases, the reports are very brief and are often inaccurate; they are a most inadequate memorial of the labors of such distinguished chancellors as Nottingham, Somers and Cowper.

The first clear and accurate chancery reports are those prepared by Peere Williams (1695-1736). These excellent reports cover a period during which eminent lawyers presided in chancery, and they have always been regarded as one of the classical repositories of equity. Their value has been enhanced by Cox's scholarly

annotations.[1] Precedents in Chancery (sometimes called Finch's, 1689-1722), generally supposed to be the notes of Pooley, the reputed author of Equity Cases Abridged, is of fair repute. Gilbert (1705-27) is of little value. King's chancellorship is covered by the reports bearing his name (1724-34) and by Moseley (1726-30), neither of which is particularly good. Cases temp. Talbot (1731-37) is somewhat better. W. Kelynge (1731-36) contains notes of cases by both King and Talbot.

Of all the great lawyers who have administered equity Lord Hardwicke admittedly stands at the head. The desirability of an authentic collection of his perspicuous and invaluable opinions prompted an undertaking some years ago to reprint his cases, revised and corrected from original manuscript.[2] Unfortunately the work was abandoned after completing the first three years. Meanwhile our main reliance for Hardwicke's work is Atkyns (1736-54), Vesey, senior (1746-56), and Ambler (1737). These reports, although much improved in subsequent editions, are extremely unsatisfactory; their statement of facts is often defective, their reports of the arguments of counsel are far from lucid, and sometimes they give an incorrect report of the decree. Dickens's brief reports (1559-1798), which deal for the most part with the last half of the eighteenth century, are the work of a registrar of the court. Other decisions by Lord Hardwicke are scattered through 9th Modern, Ridgeway, Lee, Kenyon and Cox.

The services of Lord Keeper Henley are recorded by Eden (1757-66), and much more satisfactorily than by the brief and inaccurate reports of Ambler, which also extend through this period. Unfortunately, the second part of Ambler is our main reliance for Lord Camden's work. Most of Lord Thurlow's service is covered by Cox's perspicuous and accurate reports (1783-96). These volumes, which may be termed the first complete reports in chancery, also record part of Lord Loughborough's service as chancellor, as well as Kenyon's decisions as master of the rolls. Brown's reports (1778-94), extending over part of the same period, are not so trustworthy; but they have been improved by the annotations of Eden and Belt. The first five volumes of Vesey, junior, cover the last years of Thurlow's service, all of Loughborough's, and include Sir Pepper Arden's decisions as master of the rolls.

Lord Eldon's herculean labors are preserved in some thirty volumes, of which the reports of Vesey, junior (1789-1816), record nearly one half. These very important reports were much improved by Belt's subsequent annotations and corrections. They contain also most of Sir William Grant's decisions as master of the rolls. Lord Eldon's other reporters are Vesey and Beames (1812-14), Cooper (1815), Merivale (1815-17), Swanston (1818-19), Jacob and Walker (1819-21), Jacob (1821-22), and Turner and Russell (1822-24).

The strong personalities of Lyndhurst and Brougham did not suffice to conceal their deficiencies in special learning, and their administration of equity, as recorded in Russell's reports, failed to add to their reputation. Lord Cottenham, on the other hand, was deeply learned in the principles and practice of the chancery jurisdiction, and the ten volumes of reports of his decisions by Messrs. Mylne, Craig, Phillips, Macnaghten and Gordon are among the most authoritative expositions of technical equity. But the twenty volumes of reports by De Gex and his several associates (1851-65) have

probably been cited oftener in later times, and have carried more weight than any of the contemporary chancery reports. Their standing is not due entirely to the ability of the chancellors during this period—although the list includes, in addition to Cranworth, Campbell and Chelmsworth, such eminent equity lawyers as St. Leonards and Westbury,—but also to the fact that they record the labors of Lords Justices Knight-Bruce and Turner in the Court of Appeal in Chancery.

The decisions of the masters of the rolls, which have been regularly reported in a separate series since 1836, are, as a whole, inferior to those of the vice-chancellors. Lord Langdale's work, as reported by Keen (1836-38) and Bevan (1838-66), is eminently respectable; but the last twenty-three volumes of Bevan's reports, containing Lord Romilly's decisions, have not been highly esteemed, although the labors of a very able bar supplied many deficiencies.

The seventy volumes of reports of the proceedings of the vice-chancellors vary considerably in authority. Beginning in mediocrity, they advance steadily in value. The work of the first vice-chancellors, Plumer and Leach, as reported by Maddock (1815-22) and Simons and Stuart (1822-26), carries little weight. The same may be said of Smale and Giffard's reports of Vice-Chancellor Stuart's decisions. The services rendered by their successors, Shadwell and Kindersley, reported by Simons (1826-52) and Drewry (1852-65), show much improvement. The labors of Knight-Bruce, as recorded in Younge (1841-43), Collyer (1844-45), and De Gex (1846-52), and of Wigram and Turner, in Hare (1841-53), were of a very high order, often outranking in the estimation of the profession the determinations of the chancellor himself. Probably the most substantial contribution to equity was made by Vice-Chancellor Page-Wood, whose very able discharge of the duties of this position led to his subsequent elevation to the woolsack as Lord Hatherley. The reports of Hare, Kay, Johnson and Hemming, from 1853 to 1865, covering most of his service as vice-chancellor, have probably been cited oftener than any other reports from this court.[1]

The ecclesiastical and admiralty courts and the appellate jurisdiction of the House of Lords and the Privy Council present no great difficulties. As a system of judicial precedents the ecclesiastical and maritime jurisdictions practically date from Lord Stowell's time; since then the proceedings of these courts have been quite fully reported. The judgments of the House of Lords during the eighteenth century are recorded by Brown and Tomlins; the reasons upon which some of these judgments are based may occasionally be found in the common law and chancery reports of the time. Complete reports of appeal cases date from 1812; since then, with a single break between 1825 and 1827, the judicial proceedings of the House have been admirably reported. Regular reports of the judicial proceedings of the Privy Council practically begin with the organization of the Judicial Committee.

The present method of systematic reporting dates from 1865. The "authorized" reports, conducted in each court separately as commercial undertakings, were costly and dilatory. Aside from frequent duplication in particular courts, several legal newspapers issued reports of their own which were cheaper, more prompt, and often superior to their rivals. This competition involved an immense waste of time, labor and money. At length, in 1863, a committee of the Bar devised the present system of

coöperative reporting, which soon superseded the old reports. The regular reports are now issued under the general supervision of the Incorporated Council of Law Reporting, assisted by the General Council of the Bar.

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APPENDIX A

LIST OF PRINCIPAL SOURCES OF MEDIAEVAL EUROPEAN LAW[1]

By Edward Jenks[2]

I.

Leges Barbarorum (Folk Laws)

Lex Salica, ed. Hessels and Kern. London, 1880.

Lex Burgundionum. Monumenta Germaniæ Historica, Fo. Leges, tom. iii. pp. 497-578; and *ibid.,* 4° Leges, sect. i. tom. ii. pp. 1-122.

Lex Ribuaria. Ibid., Fo. Leges, tom. v. pp. 185-268.

Lex Wisigothorum, ed. Bluhme. Paris. 1847.

Leges Langobardorum. Mon. Germ. Fo. Leges, tom. iv. pp. 1-225.

Lex Alamannorum. Ibid., tom. iii. pp. 1-182; and *ibid.,* 4° Leges, sect. i. tom. v. pp. 1-176.

Leges Baiuwariorum. Ibid., Fo. Leges, tom. iii. pp. 183-496.

Lex Frisionum. Ibid., Fo. Leges, tom. iii. pp. 631-711.

Lex Thuringorum. Ibid., Fo. Leges, tom. v. pp. 103-144.

Lex Saxonum. Ibid., Fo. Leges, tom. v. pp. 1-102.

Lex Francorum Chamavorum. Ibid., Fo. Leges, tom. v. pp. 269-276.

Leges Anglo-Saxonum, ed. Schmid (*Die Gesetze der Angelsachsen*), Leipzig, 1858.

[Also ed. Liebermann, *Die Gesetze der Angelsachsen.* Halle, 1897-1907.]

Leges Sveonum, ed. Collin and Schlyter (*Samling af Sveriges gamla lagar*). Stockholm and Lund. 1827-1877.

The *Westgötalag* has also been edited, with a French translation, by Beauchet. Paris. 1894.

Leges Norvegorum, ed. Keyser, Munch, and Storm (*Norges gamle Love.*) Christiania. 1846-1895.

Leges Danorum, ed. Kolderup-Rosenvinge (*Samling af gamle danske Love.*) 1821-1846.

There does not appear to be any separate collection of *Icelandic* Folk Laws; but most of them will be found in the Norwegian and Danish collections.

2.

Capitula

Capitularia Regum Francorum. Mon. Germ. Fo. Leges, tom. i. and ii. pp. 1-16, and 4° Leges, Sect. ii. tom. i. and ii.

Capitularia Regum Langobardorum. See *Leges Langobardorum.*

3.

Canon Law

Corpus Juris Canonici, ed. Friedberg. Leipzig. 1879. Containing—

1. *Decretum Magistri Gratiani.*
2. *Decretales Gregorii Noni.*
3. *Constitutiones Bonifacii Octavi.* (The “Sext.”)
4. *Constitutiones Clementis Quinti.* (“The Clementines.”)
5. *Extravagantes.*

4.

Roman Law

Codex Theodosianus, ed. Hänel. Bonn. 1839-1842.

Lex Romana Wisigothorum (“Breviarium Alaricianum”), ed. Hänel. 1849.

Edictum Theoderici. Mon. Germ. Fo. Leges, tom. v. pp. 145-179.

Lex Romana Burgundionum. Mon. Germ. Fo. Leges, tom. iii. pp. 579-624, and 4° Leges, Sect. i. tom. ii. pp. 123-188.

Corpus Juris Romani Justinianei. Berlin. 1895. Containing—

1. *Institutiones,* ed. P. Krueger.

2.*Digesta,* ed. Mommsen.
3.*Codex Justinianus,* ed. P. Krueger.
4.*Novellae,* ed. Schoell and Kroll.

5.

Statutes

English:*Statutes of the Realm from Magna Carta to the end of the Reign of Queen Anne.* 11 vols. 1810-1828.

Scottish:*The Acts of the Parliaments of Scotland.* 11 vols. 1814-1824.

German:*Constitutiones et Acta Regum Germanicorum.* Mon. Germ. Fo. Leges, tom. ii. pp. 16-582, and 4° Leges, Sect. iv. tom. i. and ii.

Collectio Constitutionum Imperialium, ed. Goldast. 4 vols. 1609-1615.

Neue . . . Sammlung der Reichsabschiede, ed. Koch. 4 vols. 1747.

French:*Ordonnances des rois de France de la troisième race,* ed. Laurière, etc. 21 vols. 1723-1849.

Spanish:*Teatro de la Legislacion Universal de España et Indias.*

This edition also contains extracts from the other Sources of Spanish Law, analytically arranged.

Scandinavian.

Swedish: *Diplomatarium Suecanum,* Liljegren and Hildebrand. 1829-1878.

Volume II. of Hadorph's *Rym-Krönikor.* Stockholm. 1674, also contains statutes of later date than those given in the *Diplomatarium.*

Norwegian: *Diplomatarium Norvegicum,* Lange and Unger. 12 vols. 1848-1888.

A good many of the older statutes will also be found in Keyser and Munch, *Norges gamle Love.* Christiania. 1846-1895.

Danish: *Aarsberetninger fra det kongelige Geheimearchiv,* vol. v.

Corpus Constitutionum Daniae, Secher, 1887.

6.

Text-books

A.

England.[1]

B.

Scotland.

Regiam Majestatem, in *Acts of the Parliament of Scotland,* vol. i. pp. 597-641.

Quoniam Attachiamenta. Ibid., pp. 645-659.

Iter Camerarii. Ibid., pp. 693-702.

C.

Italy.

Concordia, in Mon. Germ. Fo. Leges, tom. iv. pp. 235-288.

Liber Papiensis. Ibid., pp. 290-585.

Expositio. Ibid. (as a commentary on the *Liber Papiensis.*)

Lombarda. Ibid., pp. 607-638.

Libri Feudorum. See *De Feudis Libri Quinque* of Cujacius. Lyons. 1566.

(The *Libri Feudorum* are sometimes printed as an Appendix to the *Corpus Juris Civilis,* as *Decima Collatio Novellarum.*)

D.

Germany.

Codex Babenbergensis, in Eccard, *Corpus Historicum Medii Aevi.* 1723. Vol. ii.

Auctor Vetus de Beneficiis. in

Sachsenspiegel, ed. Homeyer. 1842-1861.

Summa Prosarum Dictaminis, ed. Rockinger. *Quellen und Erorterungen zu bayrische Geschichte,* ix. 203.

Deutschenspiegel, ed. Ficker, *Der Spiegel deutsche Leute.* 1859.

Schwabenspiegel, ed. Lassberg. 1840.

Summa Curiae Regis, ed. Stobbe, in *Archiv. fur Oesterreichische Geschichte,* xiv. 307.

Kleine Kaiserrecht, ed. Endemann. 1846.

Bambergensis (Johann v. Schwartzenberg), ed. Mentz. 1510.

E.

France.

Très Ancien Coutumier de Normandie, ed. E. J. Tardif, *Coutumiers de Normandie,* Part I. 1881.

Establissemens le Roy (St. Louis), in Laurière, *Ordonnances,* vol. i., and ed. Viollet. 3 vols. 1881-1883.

Coutumes de Toulouse, ed. A. Tardif. 1884.

Grand Coutumier Normand. ed. Gruchy, *L'ancienne Coutume de Normandie,* 1881; and E. J. Tardif, *op. cit.,* vol. ii. 1896.

Charte aux Normands, in *Coutume reformée de Normandie,* ed. Basnage. 1694.

Très Ancienne Coutume de Bretagne, in Bourdot de Richebourg.

Grant Coustumier de France, ed. Dareste and Laboulaye. 1868.

Style de du Breuil, ed. Lot. 1877.

Grant Coutumier de France. ed. Dareste and Laboulaye. 1868.

Coutume de Poitou, ed. Beautemps-Beaupré. 1865.

Coutume de Berry, ed. Thaumassière. 1701.

The following text-books, though influential, can hardly be regarded as *Sources:*—

Assises de Jérusalem. Beugnot. 1841-1843. 2 vols.

Le Conseil de Pierre de Fontaines. ed. Marnier. 1846.

Le Livre de Justice et de Plet. ed. Rapetti. 1850. (*Collection des documents inédits.*)

Coutumes de Beauvoisis par Philippe Beaumanoir, ed. Beugnot. 2 vols. 1842.

La Somme Rurale de Jean Boutillier, ed. Charondas, 1603.

F.

Scandinavia.

Sjallandske Love (the so-called "Waldemar's" and "Erik's") in Kolderup-Rosenvinge, *Samling af Gamle danske Love,* 1821-1846, vol. ii.

Thord Degn's Artikler. Ibid., vol. iii.

7.

Official Custumals

A.

England.

Most of the early charters affecting English Law will be found collected in Stubb's *Select Charters . . . of English Constitutional History.* 1870.

A.

Scotland.

Leges inter Scottos et Brettos, in *Acts of the Parliament of Scotland,* vol. i. pp. 663-665.

Use of Merchis. Ibid., pp. 713-716.

B.

Germany.

Oesterreichisches Landrecht, ed. Hasenöhrl. 1867.

Leges Upstalsbomicae, in Richthofen, *Friesische Rechtsquellen.* 1840.

Bairisches Landrecht of 1516, ed. Munich. 1520.

Schlesisches Landrecht, ed. Gaupp. 1828.

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C.

France.

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D.

Spain.

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Las Siete Partidas, ed. Lopez. 1555. 3 vols., and ed. Nys. 1883.

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E.

Scandinavia.

Sweden: *Magnus Eriksson's Landslag,* in Collin and Schlyter, *Samling af Sveriges gamla lagar,* vol. X.

Christopher's Landslag. Ibid., vol. xii.

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Norway: *Magnus Haakonson's* ("Lagabotir's") *Landslög,* in Keyser and Munch. *Norges gamle Love,* vol. ii.

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8.

Municipal Codes

A.

Scotland.

Leges Quatuor Burgorum, in *Acts of the Parliament of Scotland,* vol. i. pp. 703, 704.

Articuli in itinere Camerarii. Ibid., pp. 680-682.

B.

Germany.

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C.

France.

Etablissemens de Rouen, ed. Giry. 1883.

Statuts de Montpellier.

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D.

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9.

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England.[1]

B.

Germany.

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C.

France.

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D.

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E.

Scandinavia.

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26.

AN HISTORICAL SURVEY OF ANCIENT ENGLISH STATUTES[1]

By the Record Commissioners[2]

Chap. I.

NO *Complete and Authentic Edition of the Statutes* has hitherto been undertaken by authority; nor has the design itself ever been suggested, simply, and without connection with other schemes of reformation or improvement.

A general revision of the statute law has been often reccommended from the throne; and has been petitioned for by both houses of Parliament; It has engaged the labours of successive committees, and has been undertaken by individuals sometimes with, and sometimes without, the sanction of royal or parliamentary authority; but has never yet been carried forward to any degree of maturity.

In Queen Elizabeth's Reign ad 1557, Sir N. Bacon, Lord Keeper, drew up a short plan for reducing, ordering, and printing the Statutes of the Realm. The following are the heads of this plan:[3] "First where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated.—Item, where there is but one lawe for one thing, that these lawes are to remain in case as statutes.—Item, where part of one acte standeth in force and another part abrogated, there should be no more printed but that that standeth in force.—The doing of these things maie be committed to the persons hereunder written, if it shall so please her Majesty and her Counsell, and daye wolde be given to the committees until the first daie of Michaelmas terme next coming for the doing of this, and then they are to declare their doings to be considered of by such persons as it shall please her Majesty to appoint." Then follow lists of twenty committees of four each, in which the judges, sergeants, attorney and solicitor general, &c. are named; One judge, &c. and three counsel forming a committee, to each of which it was proposed that a title or division of the statute law shall be referred.

The subject was afterwards taken into consideration, so far as related to the penal laws, at subsequent periods in the reign of the same Queen, viz. Anno 27, ad 1585.[1] —Anno 35, ad 1593.[2] —Anno 39 & 40, ad 1597.[3] —Anno 43, ad 1601.[4] —In the proceedings in 1593 and 1597 Sir Francis Bacon took part, and upon them he appears to have founded his sketch, or plan of a general revisal of the statute law.[5] —King James I., upon his accession to the throne of England, 1603-4, and in subsequent periods of his reign, recommended also to Parliament a reform of all the statute law and of the penal laws in particular.[6]

In the year 1610 a digest and repeal of the penal law was expressly stipulated for by the House of Commons, and acceded to by the House of Lords, in their joint transaction of the great contract with the Crown;7 and in the same reign Sir Francis Bacon, Lord C. J. Hobart, Serjeant Finch, Mr. Noy, and others, by the King's command, made considerable progress in the general work of reforming and recompiling the statute law, which Lord Bacon describes8 as "an excellent undertaking, of honour to his Majesty's times, and of good to all time;" and recommends, in imitation of the statutes of 27 Hen. VIII. c. 15, and 3 & 4 Edw. VI. c. 11, for appointing commissioners to examine and establish ecclesiastical laws, that commissioners be named by both houses for this purpose also, with power not to conclude, but only to prepare and propound the matter to Parliament.

In the British Museum is preserved a manuscript volume1 containing the plan of an elaborate report, particularizing the several statutes, from the statute of Westminster First, 3 Edw. I. to 7 Jac. I. 1609, then actually repealed or expired, and also the statutes thought fit either to be absolutely repealed, or to be repealed and new laws to be made in their place. Possibly this may be the very work spoken of by Sir Francis Bacon.2 It is drawn up as by authority, with detailed reasons for every proposed measure; but it is not signed by, or addressed to, any one. A table is subjoined to it, exhibiting the result of the report.

Among the papers of Mr. Petyt, in the inner Temple Library3 is a letter of Lord Bacon's dated 27th, February 1608, which shews that he had the advantage of using for his proposed plan a manuscript collection of the statutes made with great labour by Mr. Michael Heneage, keeper of the Tower records, in five large volumes, which it is feared has been lost. Lord Bacon's disgrace at the latter period of the reign of King James I. and the distractions of the Government in what related to Parliament, were probably the causes of the failure of these measures, and of the silence that ensues respecting them in parliamentary history.

During the usurpation, the same undertaking was resumed with ardor. In 1650, a Committee was named, one of the members whereof was Bulstrode Whitelock, then first Lord Commissioner for the Custody of the Great Seal: the purpose was "to revise all former statutes and ordinances, now in force and consider as well which are fit to be continued, altered, or repealed, as how the same may be reduced into a compendious way and exact method, for the more ease and clear understanding of the people." And the committee were empowered "to advise with the judges and to send for and to employ and call to their assistance therein, any other persons whom they should think fit, for the better effecting thereof, and to prepare the same for the further consideration of the house, and to make report thereof."1 But no such report has been preserved.

In 1651-2, Mathew Hale, Esq., afterwards Lord Chief Justice Hale, Sir Anthony Ashley Cooper, afterwards Lord Shaftesbury and Rushworth, the author of the historical collections, with other persons out of the House, were appointed to report to the committee their opinions upon the inconveniences of the law; and a revised system of the law was reported to the House in the course of the same year.2 The same labour was afterwards transferred to other hands, but the work was not

abandoned; and in 1653, a committee was appointed to consider of a new model or body of the law.3 But of this committee no proceedings are now discoverable.

After the restoration, Finch, Solicitor General, afterwards Earl of Nottingham and Lord Chancellor, Serjeant Maynard, Sir Robert Atkins, Mr. Prynne and others, were appointed in 1666, to be a committee "to confer with such of the Lords, the Judges, and other persons of the long robe, who have already taken pains and made progress in perusing the statute laws; and to consider of repealing such former statute laws as they shall find necessary to be repealed; and of expedience for reducing all statute laws of one nature under such a method and head as may conduce to the more ready understanding and better execution of such laws."4 This, however, was as ineffectual as any of the former measures; and it is the last recorded instance of the interference of Parliament on the subject, previous to those proceedings which gave rise to the commissions under the authority whereof the present work has been executed.

The earliest instance of the exertions of any individuals without the sanction of parliamentary authority, towards making a collection of statutes from authentic sources, appears to have been afforded by Pulton.—He was a learned barrister, of great age and experience, and was employed for several years in the consideration of the statute law. He published two useful books upon that subject; first, an abridgement of the penal statutes; and afterwards a calendar or abstract of all the statutes in use, chronologically arranged; together with an alphabetical abridgement of them, in the manner of Rastall's collection. He appears to have been encouraged and assisted in his first work by Sir William Cordell, then Master of the Rolls, to whom it is dedicated; various editions of this were published from 1560 to 1577. His calendar, first published about 1606, is distinguished by the following expression in the title page, viz: "Editum per mandatum Domini Regis." But nothing else, either in the book or elsewhere, has been found to confirm any marks of royal authority upon the contents of the book. After the publication of these works, without any public patronage or recommendation beyond the permission to use the records, he conceived the plan of copying from their original records, and printing for general use, all the statutes supposed to be in force.

This plan it will be useful to state at length: And this we are enabled to do by the preservation of the papers, containing his original scheme, among Sir Robert Cotton's manuscripts in the British Museum.1 In one of these papers the design is set forth: it is indorsed, in a hand frequent among the Cottonian manuscripts, "concerning Mr. Pulton's suite;" and has no other title, mark or description at the beginning or end; though by another article referring to it, there is proof of its date being in or previous to 1611. "Mr. Pulton seeketh to print the statutes at large. He promiseth to set down which statutes or parts of statutes are repealed, and which, being at the first but temporary, are since expired and void, because not revived. This he hath already done in his late abridgement, for which he had a recompense of the printer. Now, to make this new book at large saleable, he promiseth to print the statutes first in the language the same were first written; and such as were originally in French or Latin, he will translate and print likewise in English. Where the statute has no title, he will devise a title out of the body, and print it with the statute. He will set down which statutes are warranted by the record, and which not. He will correct the printed book by the

record. For which purpose he requireth free access at all times to the records in the Tower. Being very aged, viz. almost four score, he desireth that for his ease and better enabling in his work, the keeper of the records within the Tower of London, may every day deliver unto him, when he shall so require, one Parliament Roll, to be by him and his clerk perused and viewed, in a lodging which he hath taken near unto the said office; the same afterwards to be redelivered by them to the said keeper thereof. That the clerk do help further, and assist him in this service by all the means he can."

Several objections to the prosecution of this plan were made by Bowyer and Elsyng, keepers of the Tower records; among others, that they and their predecessors had actually prepared materials for the work in question, and that they then had ready written five volumes of statutes copied from the records. These were perhaps the volumes alluded to in Lord Bacon's letter before mentioned.1 The dispute between the parties was continued for some time; but there remains among the Cottonian manuscripts2 a draft of an award for its determination by Sir Robert Cotton himself, to whom they referred their differences; and from a paper in the British Museum, among the manuscript of Mr. Madox,3 it appears that an order of Council passed on the 24th October, 1611, granting license to Pulton to have the use of the records in the manner asked. It recites that he undertook the work by persuasion of the judges and others learned in the laws, and requires the keepers of the records, on account of the importance of the work, and for the benefit of the learned, to assist and further him all they can.

Pulton lived to publish the proposed edition in 1618; which is the work already spoken of as Pulton's English Statutes. In his preface, after noticing the redundancies of former editions, containing subsidy Acts and other Acts "expired, repealed, altered, and worn out of use," and his intention to publish such only "which be now in life, force, and general use," he gives the following statement of the means he had employed in compiling his collection.

"First, with as great means, care, and industry, as possibly I could use, so many of the old statutes heretofore printed in the English tongue, made and published in the reigns of the first ten kings (accounting from 9 of Hen. III. unto 1 Ric. III. inclusive) as be chiefly in use and practice, and which are the foundation of proceedings both legal and judicial, have been by me truly and sincerely examined by the original records thereof remaining in the Tower of London, and the residue with the Register of Writs, being the most antient book of the law, the old and new Natura Brevium, the Books of Entries, the Books of Years, and Terms of the Law; the best approved, printed, and written books; and by all such other circumstances, as might best give probability of truth unto the learned. By reason whereof, the aforesaid defects, imperfections, and emblemishments being reformed in this edition, as it is a collection of the most usual laws, gathered from out the Grand Codex of all the statutes, so it may serve as a correction to the former impressions."

The defects of Pulton's publication, as a general collection of statutes, are chiefly these: 1st. As to the statutes preceding Henry VII., it is a translation in English, and does not exhibit the text in the original language of the records, as might have been expected from his proposal: 2dly. Though it had the permission, it had not the

authority of the king, by whom all acts of legislation are to be communicated to the subject; and was only the private work of an individual for his own benefit: 3dly. It is a partial selection of such statutes as in the judgment of the author, were fittest to appear in his book; their authority and use, whether in force or repealed, depending on his opinion: 4thly. It is not, nor does it purport to be, a correct and examined copy from the original records, of all those acts which are given at large; but of such only as the author thought necessary so to examine and correct: and it is left uncertain, which, and how many of them were taken from printed or written books. It has, therefore, though in a less degree, the same faults as all the collections and editions of statutes printed before; and it was particularly unfortunate that the author did not execute that part of his proposals which made their greatest merit, namely, the giving an accurate copy of the original text of the antient statutes from the record.

These objections are no less applicable to the editions by Hawkins and Cay, as falling short of the character of a complete and authentic collection of the statutes. They professed indeed to have copied their text from original records, or other manuscripts, in Latin and French; but by printing some statutes and parts of statutes, with a translation, and some without it, and giving only a translation of others, they have rendered their editions liable to still further objections, for which no subsequent editor has hitherto attempted to offer a remedy.

From the preceding statement, the necessity and use of an authentic publication of the statutes of the realm will appear: For, although the defects of all former collections have been long complained of by learned and eminent men, and although various propositions have been offered at different times, for an authentic publication of the statutes, none such has yet been executed. At length, however, a select committee, appointed by the House of Commons of Great Britain, in the year 1800, to enquire into the state of the public records of the kingdom, having reported upon this branch of the matters referred to their consideration, that in their opinion, it was "highly expedient for the honour of the nation, and the benefit of all his Majesty's subjects, that a complete and authoritative edition of all the statutes should be published;" in pursuance of their recommendation the present work has been undertaken and executed; under the authority and direction of commissioners specially appointed by his Majesty to carry into effect the several measures which were by that committee recommended to the attention of Parliament.

CHAP. III.

Sect. I.—Of the Matters inserted in this Collection of the Statutes; and their Arrangement. Sect. II.—Of the Sources from whence the several Matters have been taken. Sect. III.—Of the Mode used in searching for, transcribing, collating, noting, and printing the Text of the Statutes.

Sect. I.

Of The Matters Inserted In This Collection Of The Statutes; And Their Arrangement.

1. All instruments whatever, comprehended in any of the several collections of the statutes printed previous to the edition of Hawkins, are inserted in this work; these having for a long series of years been referred to, and accepted as statutes in courts of law: together with these are inserted all matters of a public nature, purporting to be statutes, first printed by Hawkins or any subsequent editor; and also new matters of the like nature, contained in any Statute Rolls, inrollments of Acts, exemplifications, transcripts by writ and original Acts, although not heretofore printed in any general collection of statutes. All these are placed in the body of the work as text. But it is to be particularly observed, that any decision upon the degree of authority to which any new instrument may be entitled, as being a statute or not, is entirely disclaimed.

2. Other matters of a parliamentary form and character have been recognized at different periods of our history, as appearing to have legislative authority. It has been observed by Lord Coke, that "Acts of Parliament are many times in the form of charters or letters patent;"1 and many such have been inserted in all editions of the statutes: and that there are "many acts of Parliament that be in the rolls of Parliament and never yet printed:"2 In the report also of the select committee of the House of Commons, in the year 1800, upon the subject of the public records, it is stated, that many statutes and ordinances in the rolls of Parliament are not inserted in the printed statute book; and it is certain that many Acts and matters not found on any statute roll, nor contained in any printed edition of the statutes, are found on the Parliament Rolls, which appeared to have received the threefold assent of King, Lords, and Commons, or to have such qualities, as have been allowed by courts of law to imply that assent.3

With a view therefore to a consideration of the question, whether matters of this nature should be comprehended in the present work, lists of a great number of them were prepared, not only from the Parliament Rolls, but also from other records, particularly the Close Rolls and Patent Rolls, which were examined for the purpose with great care and diligence, and transcripts and collations of many of them were made for the examination of the Commissioners. In the progress of this labour, however, it appeared that the matters which came within the description above mentioned, were so numerous, that the indiscriminate insertion of all of them would constitute a mass, the very bulk of which would prove inconvenient. But, what was of still greater importance, upon examination, it became with respect to many of them, a subject of discussion, from which no certain conclusion could be derived, to what extent they had in fact received sanction, and whether therefore they were, in any degree, entitled to be considered as of legislative authority.1 It was obvious, at the same time, that to have made a selection only of such matters as in the opinion of the commissioners were the least doubtful, was in effect encountering the same difficulty only in a smaller degree; and the sources, from which they were to be taken, not being in themselves conclusive evidence,2 that the matters contained in them were statutes, the selection in each instance necessarily could be nothing more than the result of

private judgment; without the authority of that "general received tradition," which, as Lord Hale observes,[3] attests and approves those statutes which are not properly extant of record.

Acts also which received the royal assent, and which were entered only on the Parliament Roll, and not on the Statute Roll, have been frequently termed *Ordinances;* and various distinctions have ineffectually been attempted to be made between an ordinance and a statute, with regard to the nature and validity of each respectively:[4] but whatever has at any time been written on this subject, is contradictory and indistinct; and in the reign of Charles I., the information on this point, then of some importance, appears to have been very unsatisfactory.[5]

From these considerations therefore, upon mature deliberation, it has been deemed advisable that this collection should include all such instruments as have been inserted in any general collection of statutes printed previously to the edition by Hawkins; with the addition, only, of such matters of a public nature, purporting to be statutes, as were first introduced by him or subsequent editors, and of such other new matters of the like nature, as could be taken from sources of authority not to be controverted; namely, Statute Rolls, inrollments of Acts, exemplification, transcripts by writ, and original Acts.

In the 31st year of Henry VIII. the distinction between *Public Acts and Private Acts* is for the first time specifically stated on the enrollment in Chancery. No private Acts passed after that date have been admitted into this collection: It has been thought sufficient to notice them, by the insertion of their titles only.

Sect. II.

Of The Sources From Whence The Several Matters Have Been Taken.

1. The sources from which the materials have been taken for this collection, are necessarily of a different character and description in different periods of our history.

The earliest statutes contained in the several collections are those of Henry III.; but no parliamentary record of statutes is now known to be extant, prior to the Statute Roll 6, Edw. I. To this interval nevertheless belong the statutes of Merton, Marlborough, Westminster the First, and several others, always included in the printed editions. For this early period, therefore, recourse must be had to inferior sources for the text of our statute law: and even in subsequent times, there is not only an interruption in the series of Statute Rolls, namely, after 8 Hen. VI., until 23 Hen. VI., inclusive, during which the like recourse must be had to sources of an inferior degree of authority; but the Statute Rolls themselves do not, within their own period, contain all the instruments which have been acknowledged as statutes. After 8 Edw. IV. the Statute Roll is not preserved; after 4 Hen. VII. it ceased to be made up; and ultimately it was succeeded, for practical purposes by the enrollment in chancery; though during a short period the Statute Roll and the enrollment appear to have been contemporary.

The materials for the several periods during which no Statute Rolls or parliamentary records exist, can only be collected from records on which copies or extracts of statutes have been entered; or from other manuscripts not on record; or, in default of other authority, from the oldest printed editions in which such matters were first inserted. With respect to entries of record, in these periods, that has been judged to be the most authentic evidence of a statute, which has been preserved as a record or authentic copy from antient times, in the custody of the highest courts authorized for that purpose. Such are copies or extracts of particular statutes found in the Close, Patent, Fine, and Charter Rolls, being records of chancery. Such also are the Red Books of the Exchequer of Westminster, and Dublin. On failure of these records, recourse has, of necessity, been had to manuscripts not of record preserved in the custody of courts of justice, public libraries, or other public repositories. Such are some antient books of statutes in the exchequer at Westminster, in the town clerk's office, London, in the several cathedrals, in the public and other libraries of the several universities of Oxford, Cambridge, and Dublin, and in the British Museum: When all these sources have proved deficient, and in such case only, a copy has been admitted, from the oldest printed edition, with various readings from subsequent printed editions.

During the periods in which Statute Rolls or other parliamentary records do actually exist, the authentic evidence of statutes (and of other proceedings in Parliament, before the commencement of the journals,) must be searched for upon the Statute Rolls; Inrollments of Acts; exemplifications of such Statute Rolls or enrollments; transcripts by writ into chancery for the purpose of such exemplifications; original Acts; and Rolls of Parliament.—These are the only authentic sources from whence, during those periods, a knowledge can be obtained of the different occurrences in Parliament, whether important or minute. With the exception of some rolls containing proceedings in Parliament from 18 to 35 Edw. I., which are in the Chapter House at Westminster, such of the original Statute Rolls, inrollments of Acts, and Parliament Rolls, as are still preserved, are deposited in the Tower of London, or at the Chapel of the Rolls, places appropriated to the custody of the records of the King's chancery, which has ever been deemed the proper repository of the statutes of the Kingdom.

II. *The Nature* and qualities of the several records and manuscripts from whence all the statutes, as well those of an earlier as of a later period, have been taken for insertion or collation in this work, and the place where such original record and manuscript is kept, will more fully appear from the following detail.

1. Statute Rolls.—These are records of chancery, of the highest authority, on which were entered the several statutes, when drawn up in form, for the purpose of being proclaimed and published; these statutes being framed upon such original petitions and answers, or entries thereof on the Parliament Rolls, as related to public concerns. The earliest Statute Roll now known to exist, is that which commences with the statute of Gloucester, 6 Edw. I. ad 1278. From that period to 8 Edw. IV. inclusive, ad 1468, with an interruption after 8 Hen. VI. until 23 Hen. VI. inclusive, the statutes are preserved in the Tower of London in a regular series, on 6 separate rolls, each roll consisting of several membranes tacked together. The contents of each roll are as follows, viz:

Of the Great Roll; statutes from 6 Edw. I. to 50 Edw. III. But this roll does not contain all the statutes which have been printed as of that period.1

Second Roll; statutes temp. Ric. II. there is also a separate roll, of one membrane, containing a duplicate of the statutes 21 Ric. II.

Third Roll; statutes temp. Hen. IV. and V.

Fourth Roll; statutes 1 Hen. VI. to 8 Hen. VI.

Fifth Roll; Statutes 25 Hen. VI. to 39 Hen. VI.

Sixth Roll; Statutes 1 Edw. IV. to 8 Edw. IV. This is the last Statute Roll now known to exist, none of a later date having been found.

These have ever had the reputation annexed to them of being Statute Rolls. Some of them are cited by that name upon the Close and Patent Rolls; and referred to by great law writers, Lord Coke, Lord Hale, and the editors of statutes, Pulton, Hawkins, Cay, &c. There is evidence also that Statute Rolls have existed of a subsequent time; for the statutes after 8 Edward IV., until 4 Henry VII. inclusive, are inserted in the early printed editions in a form manifestly copied from complete Statute Rolls; and they are found in the like form in Lib. XI. in the exchequer at Westminster, MS. Cott. Nero C. I., in the British Museum, and in several other manuscript collections. But there is reason to conclude, that the making up of the Statute Roll entirely ceased with the session 4 Hen. VII., as no such roll of a later date, nor any evidence thereof, has been discovered; and it is observable that in the next session, 7 Hen. VII., public Acts were, for the first time, printed from the several bills passed in Parliament, and not as part of one general statute drawn up in the antient form.

2. Inrollments of Acts of Parliament.—These are records containing the acts of Parliament certified and delivered into chancery. They are preserved in the Chapel of the Rolls, in an uninterrupted series from 1 Ric. III. to the present time; except only during the Usurpation. By the officers of chancery they are commonly termed “Parliament Rolls;” and they are variously endorsed, some with the Phrase “Inrollments of Acts.” From 1 Ric. III. to 3 Car. 1. inclusive, they comprehend several other proceedings of Parliament besides the Acts enrolled; (sometimes for instance, the commissions for giving the royal assent to bills are found entered on them;1) thus partaking of the qualities of rolls of Parliament, and including nearly the same contents: until, the miscellaneous matters disappearing by degrees, the Acts inrolled only occur: After 5 Hen. VII. they may be considered in effect, as coming in the place of the Statute Roll. To 25 Hen. VIII. they contain all Acts, public and private, which were passed in every session, each with an introductory and concluding form of their being presented and assented to: From 25 Hen. VIII., to 35 Eliz. several of the private Acts, and afterwards to 3 Car. 1. all the private Acts, are omitted, their titles only being noticed. From 16 Car. 1. to 31 George II., the inrollments contain nothing but public Acts, and the title of the private Acts, with the several forms of assent, without any other parliamentary matter. And from 32 George II. their contents are the same, with the omission of the titles of the private Acts.

At present, after all the public-general Acts of the session have received the royal assent, a transcript of the whole is certified by the clerk of the Parliaments, and deposited in the Rolls Chapel: On that occasion the clerk of the Parliaments sends the roll, or rolls, containing such transcript, apparently in a complete state, engrossed on parchment, signed, and certified by him as clerk of the Parliaments; and it is thereupon arranged with the other records; and thus becomes the inrollment of the statutes of that session of Parliament. For this transcript the clerk of the Parliaments is paid every session out of the Hanaper, on a receipt by the clerk of the records in the Rolls Chapel, stating that the roll is delivered there.

It may be further observed upon this subject, that the proceedings which took place in the House of Lords in Ireland in 1758, for the better preservation of the records of Parliament in that kingdom, where the constitution and law of Parliament were in all essential points conformable to those of England, afford a strong illustration of the practice of certifying statutes and recording them in chancery.[1]

3. Exemplifications; and transcripts by writ.—Exemplifications are copies sent out of chancery under the King's seal; either to sheriffs of counties and cities in England, or to the Chancellor or Chief-Justice of Ireland, or to other courts or places, for the safe custody and for the proclaiming and confirming of the statute; or in other cases for affording authentic evidence of the statute. In the Tower of London, copies of the statutes 9, 10, 11, 14, 15, 18 and 20 Hen. VI. (for some years to the number of two, three, six, or seven copies) are preserved on separate skins of parchment, which appear to have been prepared as exemplifications, for the purpose of proclaiming the several statutes; and these serve to supply the deficiency of the Statute Roll during that period. One similar copy of the statutes 13 Ric. II. is also preserved in the Tower.

It is not irrelevant to remark, that an exemplification differs from an original grant under the great seal, or an original act of Parliament, in this; that an exemplification is a copy, and can be made only from the record. At the present day every exemplification, being first made out in form by the proper officer, is examined with the record by two masters in chancery, who not only subscribe a certificate on the exemplification, of their having examined it with the record, but also sign a certificate to that effect, addressed to the Lord Chancellor, on a paper called "The Docket," which is left with him before the exemplification is allowed to pass the Great Seal.

Transcripts by writ were copies sent into chancery in answer to the King's writ or mandate, calling for a copy of the statute from the officer in whose custody it was preserved. A transcript of the statutes of Wales, 12 Edw. I. is preserved in the Tower of London, with the writ annexed, by which that transcript was required from the exchequer at Westminster, where it was entered of record, according to the usage which formerly prevailed of sometimes inrolling statutes in courts of justice. Transcripts and exemplifications of statutes have also been occasionally found in various other depositories.

4. Original acts.—These, from the 12th year of Henry VII. to the present time, with some interruption, particularly in 14 & 15 Hen. VIII. are preserved in the Parliament office. Some petitions and bills previous to 12 Hen. VII. are in the Tower of London,

but in no regular series. The original Acts in the Parliament office consist of the bills as ingrossed after being brought into Parliament, and in the state in which, after such ingrossment they passed both Houses, and received the royal assent. Each Act is on a separate roll numbered; and reference is made to them from a calendar kept of the Acts of each session in the Parliament office. These are the materials from which the clerk of the Parliaments makes up the inrollments of public Acts sent by him into chancery and preserved there; or certifies Acts into chancery, when required so to do.

As to the comparative authority of the original Acts and the inrollments in chancery, it is to be observed, that all the original Acts are separate from each other; and that they are frequently interlined, defaced, erased, and in many instances, with great difficulty intelligible: the inrollment in chancery is always fair and distinct; and the Acts are entered in a regular series, on one roll or subsequent rolls, as part of the proceedings of a Parliament, the time of the holding of which is stated at the beginning of the roll. In modern practice, if any doubt arises as to the correctness of the inrollment in chancery, application is made to the clerk of the Parliaments; and the original Act is thereupon produced, and compared with the inrollment, and an amendment, if requisite, is made in the inrollment accordingly.

5. Rolls of Parliament.—These contain entries of the several transactions in Parliament; when complete they include the adjournments, and all of the common and daily occurrences and proceedings from the opening to the close of each Parliament, with the several petitions or bills, and the answers given thereto, not only on public matters, on which the statute was afterwards framed, but also on private concerns. In some few instances the statute as drawn up in form is entered on the Parliament Roll; but in general the petition and answer only, are found entered; and in such case the entry of itself furnishes no certain evidence, that the petition and answer were at any time put into the form of a statute.[1]

Copies of petitions in Parliament and answers thereto, as early as 6 Edw. I. and in various years of Edw. II. and Edw. III. are among Lord Hale's manuscripts in the library of Lincoln's Inn. Rolls containing pleas, petitions and answers, and other proceedings in Parliament, from 18 to 35 Edw. I. and one of the petitions in Parliament 7 Hen. V., are in the Chapter House at Westminster. A book of inrollment, called Vetus Codex, in which are entered proceedings in Parliament, from 18 Edw. I. to 35 Edw. I. and in 14 Edw. II. is in the Tower of London.[2] In that repository also are preserved rolls containing pleas and other proceedings in Parliament, between 5 Edw. II. and 13 Edw. III.; rolls of Parliament of 9 Edw. II.; 4, 5, and 6 Edw. III.; and 13 Edw. III.; and from thence, to the end of the reign of Edw. IV., in a regular and nearly uninterrupted series. After that time the rolls of Parliament are for a certain period supplied by the inrollments of Acts preserved in the Chapel of the Rolls, and finally by the journals of the two Houses of Parliament.[3]

6. The Close, Patent, Fine, and Charter rolls, among a variety of grants, recognisances, and other miscellaneous matters, concerning the state of the realm, and the rights of the Crown, recorded in them, include entries of statutes, and some instruments having direct reference to statutes wherein such statutes are recited at length. These rolls are kept at the Tower, from the beginning of the reign of King

John to 22 Edw. IV., and from the reign of Edw. V., to the present time at the Chapel of the Rolls.

7. Books of record, containing entries of statutes and parliamentary proceedings.—Of this sort is, the Red Book of the Exchequer of Westminster, some of the early part of which was compiled by Alexander de Swereford, first a clerk and afterwards a baron of the exchequer, in the reign of Henry III. It seems afterwards to have been considered and used as an authorized repository by the court itself; and contains entries and inrollments of many charters and antient acts of Parliament, as well as other instruments relating to the King and the rights of the Crown, from the time of William the Conqueror to the end of Edw. III.: the originals of several of these Acts and instruments are preserved in the Tower of London, and in the Chapter House at Westminster, with references to inrollments in this book, or to the circumstance of the Act being sent into the exchequer. The Red Book of the Exchequer at Dublin is considered as of the same authority: it contains entries of Magna Carta, 1 Hen. III. especially granted to the people of Ireland; of the Statute of Westminster the first, 3 Edw. I. (which is not to be found on the Great Roll of statutes in the Tower of London, being prior in date to the present commencement of that roll,) and also of the Statutes of Gloucester, 6 Edw. I. de Viris Religiosis, 7 Edw. I., and Westminster the second, 13 Edw. I., agreeing in general to the text of those statutes on the Statute Roll in the Tower. There is reason to conclude that these statutes were entered in the Red Book at Dublin, from an exemplification sent over from England in the 13th year of Edw. I., as is noticed in a memorandum on the Close Roll of that year. A register book marked “A” preserved at the Chapel House at Westminster, as in the custody of the treasurer and chamberlains of the exchequer, contains entries or inrollments made in the time of Edw. I. Among these are the Statute of Gloucester, 6 Edw. I., and the Statute of Westminster the second, 13 Edw. I. The originals of the several statutes and instruments, it is stated in the register, were deposited in certain chests in the Chapter House; but these originals had not been discovered.

8. Books and manuscripts not of record, containing entries or copies of statutes, are very numerous. In the court of exchequer at Westminster, are three books, marked IX., X., XI. Book X. contains many of the earlier statutes previous to Edw. III.: Books IX., XI. contain the statutes from 1 Edw. III. to 7 Hen. VIII.

In the town clerk’s office, at the Guild Hall of the city of London, are several manuscript volumes; in which, among other matters chiefly relating to the laws and customs of the city of London, are entries of many of the antient statutes previous to Edw. III. The greatest number, and the earliest copies are in two volumes, distinguished by the appellations Liber Horn, and Liber Custumarum. It appears from internal evidence that Liber Horn was compiled about the year 1311, and Liber Custumarum not long after the year 1320: Liber Horn is rendered valuable by having been in many instances corrected, in a later hand writing, from exemplifications of statutes sent under seal to the sheriffs of London. In two other manuscripts one called Liber de Antiquis Legibus and the other Transcriptum Libri Albi, copied from a volume originally compiled in the mayoralty of Richard Whityngton ad 1419, 7 Hen. V., are occasional entries of a few antient statutes. In other volumes marked G. H. and I. are entries of some of the statutes of Edw. III., Richard II., Henry IV., and Henry

V.; many of them appearing to have been made from exemplifications sent to the sheriffs of London for proclamation.

Of manuscript collections of statutes, preserved in public repositories, the greatest number collected together in any one place, is to be found in the British Museum. They are distinguished as being of the Cottonian or Harleian Collection; from the royal library; Donation manuscripts; and Lansdowne manuscripts. The Cottonian manuscripts Claudius D. II. and Vespasian B. VII. were resorted to by Hawkins and Cay, for copies of statutes previous to Edw. III.; and Nero C. I. for statutes of Henry VI. and Edw. IV. not found at the Tower.

In the Bodleian library at Oxford, are Rawlinson's, Hatton's, and Laud's manuscripts. Among the latter is a roll of statutes, No. 1036, consisting of eleven small membranes of parchment united together; not much more than four inches wide; but each being two feet or more in length. This roll appears to have been written in the time of Edw. I.: it contains no statute later than the Articuli Super Cartas, 28 Edw. I.

At Cambridge several manuscript collections of statutes are preserved in the library of the University and in Trinity College Library. In Corpus Christi or Bene't College Library are the manuscripts bequeathed to the College by Archbishop Parker.

Chartularies or registers, preserved in several cathedrals, contain copies of some of the old statutes. Such are the Black Book of the cathedral of Christ Church, Dublin, written between the years 1280 and 1299, and register A in Gloucester cathedral, compiled in 1397.

In Lincoln's Inn Library, are Lord Hale's manuscript copies of rolls and petitions in Parliament: in the Inner Temple Library, Mr. Petyt's collection of manuscripts among which are several volumes of the statutes. In many other public libraries also manuscript collections of statutes are preserved.

Of the several manuscripts not of record, an extensive and careful examination has been made in preparing for the present edition: and it has been ascertained that, although they differ from each other considerably in their degrees of antiquity and correctness, yet the credit of no single one is entirely to be relied on; for scarcely any manuscript has yet been discovered, in any repository, in which there are not some material errors perverting or altogether destroying the sense of the text. In some instances, however, such as Cott. Claud. D II. in the British Museum, and M m. v. 19, in the library of the University of Cambridge, several of the instruments contained in the manuscripts purport to be examined by the roll. In Liber Horn, in the town clerk's office, London, several are marked as examined 'per Ceram;' 'per Ceram Gildaule;' 'per Statutum Gildaule London in Cera;' 'cum brevi cum eisdem in Gildaula adjunct'; all which signify that the entry in the book has been examined with an exemplification of the statute or instrument under the Great Seal, sent to the mayor and sheriffs of London with or without a writ for publication thereof. The Rawlinson Manuscript No. 337 in the Bodleian Library at Oxford, and the Harleian Manuscript No. 5022 in the British Museum, refer to the inrollment on the Statute Roll, of several articles inserted

in those volumes, but do not profess that the articles themselves were examined by that roll.

III. On a mature consideration of all the circumstances before stated, the following *Rules of Preference* have been adhered to, in the use of the several sources for the text, and for various readings of the statutes, in the present collection.

During the periods in which Statute Rolls exist, such Statute Rolls have been considered and used as the highest authority for the statutes contained in them: namely, the statutes 6 Edw. I. to 8 Edw. IV.; with the omission of the statutes 9 to 23 Hen. VI. both inclusive.

But for such statutes as, during the period of the existence of the Statute Rolls, do not appear on those rolls; and for statutes made in any period of which the Statute Roll is not now in existence namely, previous to 6 Edw. I.; after 8 and before 25 Hen. VI.; and after 8 Edw. IV.; and also for the correction of manifest errors or omissions in the text, whether taken from Statute Rolls or elsewhere the following sources have been recurred to in regular gradation; preference being given to them according to the following order, but all being used and collated, where necessary: viz. 1. Inrollments of Acts.—2. Exemplifications and transcripts.—3. Original Acts.—4. Rolls of Parliament.—5. Close Patent, Fine and Charter rolls.—6. Entries and books of record.—7. Books and manuscripts not of record.—And finally, 8. The printed copies; the earliest of which was not published until more than 200 years subsequent to the present commencement of the Statute Rolls.

The following reasons for preference among manuscripts not of record have been adopted: 1. Their professing to be authentic copies from any records, exemplifications, or transcripts: 2. Their age; the oldest being on the whole the most worthy of credit: 3. The uniformity and regularity of the series of statutes, and instruments in each collection: 4. Their having been already printed and received in use, as evidence of the text of statutes; or, if not so printed, their according with the printed copies, and with each other, so that when the manuscripts differ, the majority should prevail: 5. Certain manuscripts have been holden to be of superior authority upon some particular subjects, having special connection with the places in which they are preserved: Such as the books preserved in the exchequer, for statutes relating to that court, or to accounts, or to money; books at the town clerk's office, London, relating to the assises of bread and ale, weights, and measures, &c: 6. In all manuscripts some articles are found much more correct than others; a judgment has therefore frequently been formed from internal evidence in favour of a particular statute or reading, although the manuscript in which such statute or reading were found, might not, in other instances, be entitled to preference: 7. Where it has happened that several manuscripts agreed in the text or reading of any instrument, and were so equal in their claims for preference, that it was entirely matter of indifference which should be chosen for a source of extract or quotation, that manuscript has been used which has been quoted or extracted from for other purposes, in preference to one not before quoted; and one which has already been printed from, in preference to one which has not.

CHAPTER IV.

Sec. I.

Of The Original Language Of The Charters And Statutes.

The language of the charters and statutes, from the period of the earliest charter now given, 1 Henry I. to the beginning of the reign of Henry VII. is Latin or French. From that time it has been uniformly English. The petitions or bills on which the statutes were founded, began to be generally in English early in the reign of Hen. VI.

All the Charters of Liberties, and of the Forest, from 1 Hen. I. to 29 Edw. I. (with the exception after mentioned), are in Latin; but translations of some of them into French, are found in various collections. In D'Achery's Spicilegium[1] there is a French translation, as it is called by Blackstone, of the Charter of King John; for it is doubtful whether that charter was ever promulgated in French in this kingdom. Some early manuscripts[2] contain French translations of the two charters of 9 Hen. III., and of the Charters of Inspeximus and Confirmation in 25 and 28 Edward I., though these latter appear on the Statute and Charter Rolls in Latin. The charter dated 5 Nov. 25 Edw. I.[3] is in French: as is also the duplicate of that charter dated 10 Oct. and entered on the Statute Roll 25 Edw. I.[4]

The statutes of Henry VIII. are almost entirely in Latin. Some legislative matters, not in the printed collections, are entered on the Patent Rolls in French.[5]

The statutes of Edward I. are indiscriminately in Latin or French; though the former language is most prevalent. But the Statute of Gloucester 6 Edward I. which on the Statute Roll is in French, appears in many contemporary manuscripts in Latin. In several manuscripts, particularly Register A. in the Chapter House at Westminster, this statute is given at length both in Latin and French. On the other hand the statute of Westminster the second, 13 Edw. I., which is in Latin on the roll, appears in many manuscripts in French; and Chapter 34 of this latter statute, as to violence against women, which on the roll appears in French, is given, like the rest of the statute, in Latin, in several manuscripts.[1] The French Chapter, 49, as to champerty by Justices, is omitted in the Tower Roll, and in many other copies, which give the statutes in Latin, but is found in the copies which give the statute in French.[2]

The statutes of Edward II. are, like those of Edward I., indiscriminately in Latin or French: but the latter language prevails more than in the statutes of Edward I.

The statutes of Edward III. are more generally in French than those of any preceding king: yet some few are in Latin. The statutes of Richard II. are almost universally in French; those of the sixth and eighth years are in Latin. The statutes of Henry IV., with the exception of chapter 15 of the statute 2 Hen. IV. which is in Latin, are entirely in French; as are those of Henry V., with the exception of the short statutes 5 and 7 Henry V. which appear in Latin.

The earliest instance recorded of the use of the English language in any parliamentary proceeding, is in 36 Edw. III. The style of the roll of that year is in French as usual, but it is expressly stated that the causes of summoning the Parliament were declared “en Englois,”3 and the like circumstance is noted in 37 and 38 Edw. III.4 In the fifth year of Richard II.,5 the Chancellor is stated to have made ‘un bone collacion en Engley’s (introductory, as was then sometimes the usage, to the commencement of business) though he made use of the common French form for opening the Parliament. A petition from the “Folk of the Mercerye of London,” in the 10th year of the same reign,6 is in English; and it appears also, that in the 17th year1 the Earl of Arundel asked pardon of the Duke of Lancaster by the award of the King and Lords, in their presence in Parliament, in a form of English words. The cession and renunciation of the Crown by Richard II. is stated to have been read before the estates of the realm and the people in Westminster Hall, first in Latin and afterwards in English, but it is entered on the Parliament Roll only in Latin.2 And the challenge of the Crown by Henry IV. with his thanks after the allowance of his title, in the same assembly, are recorded in English; which is termed his maternal tongue.3 So also is the speech of Sir William Thirnyng, the Chief Justice of the Common Pleas, to the late King Richard, announcing to him the sentence of his deposition, and the yielding up, on the part of the people, of their fealty and allegiance. In the sixth year of the reign of Henry IV.4 an English answer is given to a petition of the commons, touching a proposed resumption of certain grants of the Crown, to the intent the King might the better live of his own. The English language afterwards appears occasionally, through the reigns of Henry IV. and V.5

In the first and second, and subsequent years of Hen. VI. the petitions or bills, and in many cases the answers also, on which the statutes were afterwards framed, are found frequently in English; but the statutes are entered on the roll in French or Latin. From the 23rd year of Hen. VI. these petition or bills are almost universally in English, as is also sometimes the form of the royal assent: but the statute continued to be inrolled in French or Latin.6 Sometimes Latin and French are used in the same statute, as in 8 Hen. VI.; 27 Henry VI.; and 39 Henry VI. The last statute wholly in Latin on record is 33 Henry VI.; the last portion of any statute in Latin is 39 Henry VI.; chapter 2.

The statutes of Edward IV. are entirely in French. The statutes of Richard III. are in many manuscripts in French, in a complete statute form; and they are so printed in his reign and that of his successor. In the earlier English editions a translation was inserted, in the same form: but in several editions, since 1618, they have been printed in English, in a different form, agreeing, so far as relates to the Acts printed, with the inrollment in chancery at the Chapel of the Rolls. The petitions and bills in Parliament, during these two reigns, are all in English.

The statutes of Henry VII. have always, it is believed, been published in English; but there are manuscripts containing the statutes of the first two Parliaments, in his first and third year, in French.1 From the fourth year to the end of his reign, and from thence to the present time, they are universally in English.

Attempts have been made by many learned persons to explain this variety of languages in the earlier periods of our legislation; and some have referred the

preference of the one language or of the other, to the operation of particular causes.[2] Nothing, however, is known with certainty on this subject; and at the present day it is utterly impossible to account, in each instance, for the appearance of the statute in French or in Latin. It seems on the whole to be highly probable that for a long period of time, charters, statutes, and other public instruments were drawn up indiscriminately in French or Latin, and generally translated from one of those languages into the other,[1] before the promulgation of them, which in many instances appears to have been made at the same time in both languages.[2]

It is matter of curiosity to observe, that the use of the French language in statutes was preserved rather longer in Ireland than in England. The Statute Roll of the Irish Parliament, 8 Hen. VII., preserved at the rolls office in Dublin, is in French; on the Statute Roll of the two next Parliaments of Ireland, 16 and 23 Hen. VII., the introductory paragraphs stating the holding of the Parliament, &c. are in Latin; after which follows an Act or chapter in French, confirming the liberties of the church and the land: and all the other Acts of the session are in English.

CHAPTER V.

Section II.

Of The Methods Successively Adopted For Promulgating The Statutes, Before And Since The Union Of Great Britain And Ireland.

The Promulgation of the Statutes, which formerly took place within the realm of England, as well as in Scotland and Ireland, has been wholly superseded by the practice of modern times. Before the introduction of printing, the publication of the statutes of England was made by means of exemplifications thereof, sent to the sheriffs, under the Great Seal, out of chancery, with writs annexed, requiring the proclamation and publication of the same by them,[3] and sometimes also directing copies to be made and distributed, and the sheriffs to return what was done by them thereupon. The earliest statutes were published in this manner; as appears not only by copies of the writs subjoined to the records and manuscripts of the respective statutes, of the thirteenth century, but also by original writs still preserved in the Tower of London.

In England printed promulgations of the statutes, in the form of sessional publications, began in the first year of Ric. III. ad 1484, very recently after the introduction of printing; and in consequence thereof, such exemplifications and writs as are above mentioned, were soon altogether discontinued;[1] yet the statutes themselves, continued nevertheless to be inrolled in chancery; and some of the earliest sessional publications appear by their form to have been printed from a Statute Roll. All the original bills and Acts now extant in the Parliament office, are some years subsequent in date to the commencement of the printed sessional publications of the statutes; and it is evident, from some of those printed sessional publications in the time of Hen. VII. whereof the

contemporary bills and Acts are still preserved, that such bills and Acts, though concurrent in time were not then uniformly used as the original text for such publications. The sessional publications are at present, and have for a long series of years been printed entirely from original Acts in the Parliament office.[2]

In Scotland it was the exclusive privilege and official duty of the Lord Clerk Register to enter the acts of Parliament in the proper record, and to give authentic copies of them to the sheriffs, magistrates of boroughs, and such as might demand them. A precept is extant for proclaiming and publishing the statutes of Robert I. in the year 1318; and there exists also a parliamentary ordinance made in the reign of David II., 1366, by which the Acts of that Parliament are directed to be sent under royal seal to each sheriff to be by him publicly proclaimed. The earliest printed publication of statutes in Scotland took place in the year 1540-1.

In Ireland the promulgation of such statutes as were passed in England and transmitted to Ireland, was regularly made by means of a transcript sent under seal from England, with a writ directed to the Chancellor of Ireland, requiring the same to be kept in the chancery of that Kingdom, to be enrolled in the rolls of the said chancery, then to be exemplified under the Great Seal of Ireland, and sent unto and proclaimed in the several courts and counties throughout the kingdom. Sometimes the writ was to the justices, in Ireland, simply requiring proclamation.

With respect to the statutes made in Ireland, provisions are contained in several Acts for the special proclamation of such Acts, so that the penalties inflicted by them should not be incurred until after such proclamation.[1] It appears also that it was usual to proclaim the statutes in general by the king's writ, made out by the clerk of the Parliament. Sessional publications of the acts did not take place in Ireland before the reign of Charles I.; and such publications were not continued regularly and uniformly until after the Revolution.

In Great Britain the public inconvenience experienced from the defective promulgation of the statutes, led to the adoption of new measures in the year 1796; by which, the Acts printed by the King's printer, whose authority had been long deemed sufficient to entitle his printed copies to be received in evidence, in all courts of law,[2] were distributed throughout the kingdom as speedily as possible after they had received the royal assent: and the experience of the good effects of those measures led soon afterwards to their execution in a much greater extent.

After *The Union* of Great Britain and Ireland, a select committee of the House of Commons was appointed in the first session of the United Parliament, to consider of the most effectual means of promulgating the statutes of the United Kingdom; upon whose report resolutions for that purpose were adopted by the Commons, and having been agreed to by the Lords, they were presented to his Majesty by a joint address of both Houses; and his Majesty was thereupon pleased to give directions accordingly.

By the tenor of these resolutions, his Majesty's printer was authorized and directed to print not less than five thousand five hundred copies of every public general Act, and three hundred copies of such local and personal Act as were printed; the public

general Acts to be transmitted as soon as possible after each bill should receive the royal assent, to the members of both houses of Parliament, the great officers and departments of state, public libraries, courts of justice, sheriffs, municipal magistrates, and resident acting justices of the peace, throughout Great Britain and Ireland; according to a prescribed mode of distribution; with a direction that every chief magistrate and head officer of every city, borough, or town corporate in England and Ireland, and of every royal burgh in Scotland, and every sheriff, clerk of the peace, and town clerk in the United Kingdom, receiving such copies should preserve them for the public use, and transmit them to his successor in office: and this mode of authenticating and promulgating the statutes is now carried into execution, throughout every part of the United Kingdom.

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PART II.

THE COURTS, THEIR ORGANIZATION AND JURISDICTION

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28. The History of the Court of Chancery.George Spence.
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27.

THE COMMON LAW COURTS AS ESTABLISHED UNDER EDWARD I[1]

By Frederic Andrew Inderwick[2]

IN 1196, under Richard I., there were numerous appointments of judges to the Curia Regis, including those of Hubert Walter, Archbishop of Canterbury, the Bishops of London and Rochester, and several laymen; and similar appointments continued to be made, both to the Curia Regis and to the Justices Itinerant, until the 52nd Henry III. (ad 1268), when the system was again altered.

In the meantime, however, dissatisfaction had arisen with the proceedings of the Curia Regis itself. This Court followed the King not only theoretically but actually. Where the King went to hold a Court there also went the Curia in both departments; the Curia Regis with the Justiciar, the Chancellor and the Justices, and the Exchequer with the Treasurer, the Chamberlain, the officers and the treasure. And thus the King in his progresses was accompanied not only by his great and smaller officers of State, but by carts and wagons loaded with bullion,[3] with gold and silver plate, with jewels, and all the personal treasures of the King not deposited in the Abbey or in the treasury at Winchester. Numerous *hanapers,* or hampers of plaited rushes or straw, formed part of the baggage, and held the writs, the records, and the tallies necessary for carrying on the business of the courts. And thither in the wake of the King followed the suitors whose plaints waited determination in the King's Court. These perambulations of the monarch reached their culminating point in the reign of King John. When he was out of the kingdom, Archbishop Hubert Walter acted as Chancellor and sat in the King's place at Westminster. When he was at home, he was in constant progress through the country, and in the year 1211 it is said that he sat at no less than twenty-four separate towns.[1] To all these resting-places the unhappy suitors followed, or lost the chance of their causes being tried. And accordingly it was provided, by the 17th clause of Magna Carta, that for the future, common pleas, or causes between party and party, as distinguished from Crown and Revenue cases, should not follow the King in his wanderings, but should be heard and determined in some ascertained and well-known place. "*Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo.*" This ascertained place was Westminster Hall, and the Court of Common Pleas retained the name, down to its abolition as a separate jurisdiction in 1875, of *The Court of Common Pleas at Westminster.*

Here then we have the origin of the Court of Common Pleas, for although that Court was not actually constituted at the time of King John, nor was there any prohibition against common pleas being heard by the Curia and by the Exchequer, as had hitherto been the practice, yet the provision of the Charter involved the continued retention in London, or in the ascertained place to be afterwards fixed, of a sufficient number of justices and barons to compose a court for the hearing of the subjects' causes. And

thus it frequently happened that one division of the Curia was sitting at Westminster while another division was travelling about the country, either with or without the King, as the case might be; the Justiciar being sometimes with the judges in the county and sometimes with the judges in London.[1] Numerous instances also occurred where, the Justiciar being absent, questions of law were left for him to decide on his arrival, or were sent to be discussed before him at Westminster. One of the questions so reserved was whether on proof of his ancestor's absence for twenty years, an heir at law could enter upon the land of the missing owner, and take possession of the freehold, on the presumption that his ancestor was dead.[2]

Henry III. confirmed the Charter of his father in this as in other respects, and instituted a Court of Common Bench with duly qualified justices to sit perpetually at Westminster to hear causes between parties and to have exclusive jurisdiction in regard to certain claims. It had no criminal jurisdiction, did not follow the Sovereign in his peregrinations, and gradually absorbed all the private business of the country. In 1235, Thomas de Muleton[3] was appointed Chief Justice of the Common Bench, being the first Chief Justice of either of the Courts of Common Law, and from this period personal actions gradually ceased to be heard either in the Curia Regis or in the Exchequer. To enforce this procedure Edward I.,[4] after the abolition of the Curia, expressly declared that the hearing of common pleas in the Exchequer or elsewhere out of the Common Bench, was contrary to the provisions of the Great Charter.

The natural dissatisfaction which was felt with the Curia Regis rapidly extended to the appointment of Chief Justiciar. The position of this great officer of State was that of a politician and a soldier as well as, or perhaps more than, that of a creator and administrator of the law. Many statesmen of great eminence had held the post. Odo of Bayeux was the first, Hubert de Burgh was among the last. Henry, Duke of Normandy, afterwards Henry the Second, during the later years of King Stephen, was Chief Justiciar and sat regularly in the court. Henry III. also sat in person and delivered a judgment, which is reported.[1] Ranulph de Glanvil, and possibly Henry de Bracton, also occupied the post of Chief Justiciar. Latterly, however, the office had fallen into less competent hands, and when the latter years of King Henry III. showed the scandal of two Chief Justiciars, one appointed by the king and one appointed by the barons, professing to exercise judicial functions at one and the same time as they were leading armies against each other in the field, it was felt that the moment had arrived when the office, with its inconsistent combination of statesman, soldier, lawgiver, and judge, should be brought to an end. Philip Bassett and Hugh le Despencer were the two so contending, and after the death of le Despencer on the field of Evesham, in 1265, and the subsequent resignation of Bassett, the King's nominee, the Curia Regis and the Chief Justiciar ceased to exist.

The Curia Regis had thus been the Royal Court of England for a period of about 200 years. It sprang into being when the object of the Conqueror was to establish an autocratic power and to stifle the existing system of self-government, and it came to an end when the combination of the Barons had curbed the power of the Crown, and the growth of a National Parliament had re-asserted in a modified form the antient rights of self-government. From that time to the present the judicial has been

definitely severed from the military and executive power, and succeeding Chief Justices have been lawyers and lawyers alone.

The accession of Edward I. (ad 1272-1307) found the Courts of King's Bench, Common Bench and Exchequer sitting in Westminster Hall. No Act of Parliament or royal edict had abolished the Curia Regis, but it had come to an end, like many another English institution, because it had done its work and was no longer suitable to the times. The Constitutions of Clarendon (ad 1165) had recognised the Curia Regis as a tribunal of common resort,2 where the Bishops sat with the Justiciars and the Barons until cases of blood required them to depart. But since then its jurisdiction as a Supreme Court had been much impaired. The distribution of its business over the country, through the appointment of itinerant justices, who sat in their several counties as justices of the Curia Regis,1 had tended to this result, and at the same time the prerogative of the Chief Justiciar had been gradually encroached upon by the growing power of the Chancellor as a lawyer and a statesman. Its end was gradual, and the exact moment of its termination cannot be ascertained, for it actually overlapped the new system. The Justiciar and his colleagues held office for some years after the description of the King's justices had been changed from the general appellation of justiciars to the limited title they still hold of justices assigned to hold pleas, *coram rege,* before the King.

The courts thus established, which from that time forward for six hundred years, under the familiar title of the Courts of Common Law, transacted the business of the country, reflected the condition of the English people at the period of their institution. The Normans, who had invaded but not overrun the country, impressed upon its surface their thoughts and traditions; but the Norman Inquisition had only emphasized the Anglo-Saxon practice of open trial by freemen and neighbours. Inter-marriages and territorial settlements had, also, by this time amalgamated the two races into one, so that there was no longer any recognised distinction between Norman and Anglo-Saxon, but all were equally English. And though the Norman blood was thought the more noble, and those families whose ancestors came over with the Conqueror regarded themselves as of a more patrician class, yet the great mass of the people were still of the Anglo-Saxon strain, whose manners and customs still survived. The language of the country was also in a state of transition—Latin was specially that of the learned, English was that of the common people, while French was gradually coming into use by all classes. The polyglot jargon of the courts and the law books belongs to a later date. Thus though the Norman system of Chief Justices and trained lawyers as Presidents of courts was accepted as safe and satisfactory in principle, yet the Anglo-Saxon method of local trials and the judgment of neighbours remained undisturbed, and was recognised as an essential feature of the new procedure. As the county in the Anglo-Saxon times was the unit for judicial administration, so also it remained under the Normans. And as the shire-gemote, formerly presided over by the Sheriff, who convened the suitors and arranged the details of business, was held twice in the year as the Supreme Court of the district for the trial of causes and of criminals, so also under the new system the county remained the unit, the Sheriff summoned the jurors and witnesses and arranged the business, and twice in the year the King's justices, superseding the Sheriff in his office of President, visited each county and tried all causes and offences arising within its limits. Hither also came the witnesses

and the suitors, collected from the county, who judged the law and the facts, and found their verdicts from their knowledge of the party's reputation, and of the circumstances into which they had to inquire.

In the 52nd Henry III. (ad 1268) Robert de Brus (grandfather of Robert the Bruce, King of Scotland) was appointed the first Chief Justice of the King's Bench. He was a man of noble lineage and of good fortune, who was a lawyer by education and by profession. He had acted for some years as a Justiciar, and had gone several circuits. His position, however, as Chief Justice was limited to the administration of justice: he was no longer a statesman or a viceroy, and the salary, which was 1,000 marks when the Chief of the Court was also Chief Justiciar, was reduced to 100 marks when the office was solely that of Chief Justice of the King's Bench.[1] In other words, £15,000 a year to the Chief Justiciar was reduced to £1,500 a year to the Chief Justice.

The Courts accordingly sat as the King's Bench, the King's Exchequer, and the Common Bench, otherwise the Common Pleas. The King's Bench was presided over by the Lord Chief Justice with certain *puisne* or assistant judges, the Exchequer by the Lord Treasurer with the Chancellor of the Exchequer and other barons, and the Common Bench by the Chief Justice and other justices from time to time appointed by the King. It appears that for some time after the division of the Curia into these three separate courts, the Exchequer continued to try pleas between party and party, but in ad 1300 that court was ordered by Statute[1] to refrain from hearing such causes as contrary to the Great Charter, and to confine itself to matters touching the King's revenue. Shortly afterwards, in 1303, William de Carleton, a justice of the Common Pleas, was appointed Chief Baron of the Exchequer.[2] This office he held concurrently with that of a *puisne* judge of the Common Bench, and was the first person so appointed. From this date, as vacancies in the office of Chief Baron from time to time occurred, they were usually but not invariably filled from the justices of the Common Bench. The justices so appointed continued to hold the two offices of Justice and Chief Baron, their duties at that period being in no way inconsistent, as the barons could not try causes or hear appeals, and the Common Bench had no jurisdiction over affairs of the revenue.

The business was divided in the following manner. The King's Bench had exclusive jurisdiction in all pleas of the Crown, and in all appeals from inferior courts. The Common Bench had exclusive jurisdiction in all real actions or suits relating to land and in actions between private persons to try private rights, while the jurisdiction of the Exchequer was limited to causes touching the King's revenue with which it had exclusive power to deal. All these judges went Circuit twice a year, the barons of the Exchequer only trying cases on the revenue side, and no baron being permitted to try a prisoner or a civil cause unless he happened also to be a justice of the Common Bench, when he tried prisoners and causes in the latter capacity. The Assizes were held in the County Courts, and those tribunals were for many years after the end of the Curia Regis constituted as before with bishops, abbots, earls, barons, knights and freeholders of the county, the reeve and the burgesses of each township in the county and all those who of old were accustomed to be summoned to attend the business of the court. Itinerant Justices were appointed from time to time for some generations after the accession of King Edward I., and they went circuits equally with the justices

of the Courts of Common Law. But the practice was found to be inconvenient. All courts, including those of the Itinerant Justices, were closed so long as the King's Judges of either Bench held their Justice Seat within the County. The Justices in Eyre had accordingly an inferior position and less authority, in public estimation, than the justices in the King's Courts; there were great complaints of the expense and burthen cast upon the counties for the escort and entertainment of these numerous justices, and in 1335 they ceased to be appointed.

This division of the business of the courts, which was however much interfered with by various devices of the lawyers at a later period, had the inevitable result of throwing the greater portion of the work upon the Common Bench, which became, as it was called by Sir Edward Coke,1 "the lock and key of the Common Law," or, more familiarly by Sir Orlando Bridgman, "the Common Shop for Justice."2 Crown cases were limited in number, and the justices of the King's Bench, after a time, were not only put into an easy position as regarded the work they were called upon to perform, but as in those days their principal source of income was from the suitors' fees, they correspondingly suffered in pocket. The Common Bench, on the other hand, was always full of work, which rapidly increased, with the result that whereas the justices of the King's Bench seldom numbered more than three or four, those of the Common Bench were frequently seven or eight and sometimes amounted to as many as nine. Thus under Edward I. there were at times four, five and six justices of the Common Bench in addition to the Chief.3 Under Edward II. the Court was ordered to sit in two divisions by reason of the multitude of pleas.4 Under Richard II. and under Henry IV. there were three justices of the King's Bench and five of the Common Bench.1 Under Henry V. there were four justices of the King's Bench and six of the Common Bench, in addition to the Chiefs.2 Under Henry VI. and Edward IV. there were four justices of the King's Bench and seven3 and at one time eight4 of the Common Bench. The latter court had also this great advantage, that it sat always at Westminster, while the King's Bench, the Exchequer, and the Chancery were liable to follow the progresses of the King. And although it soon became the practice to dispense with the attendance of the judges and the barons, unless the King had some special need for their assistance, yet when he was located for an indefinite period at some provincial town, and had there established his Royal Court, the King's Bench and the Exchequer with their clerks, their secretaries, their treasure and their baggage moved from London in the wake of the Sovereign. Thus from 1277 to 1282 the Law Courts were at Shrewsbury,5 while the King was fighting in Wales, and from 1298 to 1305 they were at York,6 while the King was on his expeditions into Scotland. On the latter of these occasions a square chequer board with the necessary seats and fittings was erected in the yard of York Castle for the use of the barons and the accountants of the Exchequer.

The decadence of the smaller courts in the various counties and the scandals arising therefrom led to a new departure in the administration of justice, and in the reign of Edward III. (about 1327) Justices of the Peace for each county were first appointed. In or about 1350 they were ordered to hold Sessions quarterly to try breaches of the Statute of Labourers.7 About 1359-608 they were empowered to try crimes and misdemeanours committed in their county, and by a Statute of Edward IV.9 they were empowered to sit regularly in Quarter Sessions for general business.

The immediate reason for the permanent establishment of Quarter Sessions, as recited in the preamble to the Statute, appears to have been the misconduct of the sheriffs, who packed the juries, compelled the payment of excessive fees, and by various extortionate devices held unhappy suitors to ransom. And here again, the Anglo-Saxon system of self-government seems to have been recognised, by the removal of these trials from the Sheriff or officer of the Crown to the resident gentry and landowners of the county.

The story of the Courts of Common Law from the closure of the Curia Regis to the end of the civil wars is a history rather of individual judges than of any substantial changes in legal procedure.

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28.

THE HISTORY OF THE COURT OF CHANCERY[1]

By George Spence[2]

IT has always been held by the great oracles of the law, that the principles of the Common Law are founded on reason and equity;[3] and so long as the Common Law was in the course of formation, and therefore continued to be a *lex non scripta,* it was capable—as indeed it has ever continued to be, to some extent—of not only being extended to cases not expressly provided for but which were within the spirit of the existing law,[4] but also of having the principles of equity[5] applied to it by the judges in their decisions,[1] as circumstances arose which called for the application of such principles. This was more especially open to the judges as regards defences to actions which were not founded on writs, and were therefore under their own control. But in course of time, a series of precedents was established by the decisions, or *responsa,* as Bracton calls them, of the judges, which were considered as of almost equally binding authority on succeeding judges as were the acts of the legislature; and it became difficult to make new precedents without interfering with those which had already been established. Hence (though new precedents have ever continued to be made), the Common Law became, to a great extent, a *lex scripta,* positive and inflexible; so that the rule of justice could not accommodate itself to every case according to the exigency of right and justice.[2]

The Romans, as has already been mentioned, had found themselves in a similar condition as regards the law which was contained in the Twelve Tables, and the subsequent additions which had been made to it. To supply this deficiency in their original system of jurisprudence, first the Consuls, then the Prætors, were permitted as occasion required to correct "the scrupulosity and mischievous subtlety of the Law,"[3] and supply its defects; not, indeed, as regards the Prætors, by altering the law itself, but by means of a distinct equitable code, framed by themselves and propounded on entering on their office; and which was for the most part administered by the same tribunals which dispensed the ordinary law, and by the same mode of procedure.[4]

Hadrian, as we have seen, compiled from the previous Edicts a code of Equitable Jurisprudence,[1] and that code was expounded by the commentaries and *responsa* of the Jurisconsults, so that it became, like the Common Law of England, though by a different process, a *lex scripta.* But even the *jus honorarium,* when thus reduced to system, was found to be insufficient to answer every exigency. It appears that the judges and persons intrusted with the administration of the law, assumed authority to apply principles of equity, or natural justice, to the particular cases which seemed to require such an interposition. However, probably from a fear of the uncertainty and inconvenience which might have resulted from such a course being pursued, Constantine, ad 316, and after him Valentinian, as has already been adverted to,[2] prohibited the judges from exercising any such discretion, reserving to themselves

alone, in their consistory or council, the application of principles of equity, as distinct from the received rules and maxims of the law.3 From that time cases were continually referred to the Emperors, either originally, or by way of appeal; and their decisions, thus pronounced, as well as their less formal rescripts, became part of the written law.4 If such a deficiency was found to exist after Hadrian's Edict, we cannot be surprised at its having been experienced in England at the time when the Court of Chancery first came into existence as a distinct Court of equity.5 A very large infusion of equitable principles had been incorporated in the Roman law by means of the Perpetual Edict. In those important branches of the law, particularly, which related to contracts, a system of equitable jurisprudence had been introduced, which left little, if anything, to be supplied. Equitable principles were applied to every contract of sale and purchase, pledge, letting, hiring, and the like;1 whether the contract were executory, or perfected. In the former case, if there were a want of complete *bona fides,* the *jus honorarium* furnished a good defence to any attempt to enforce it at law;2 in the latter, by the same law the party complaining might, by a rescissory action, avoid the transaction,3 and a purchaser, who had been in any way defrauded, might bring an action for compensation, if that would afford a more appropriate remedy than a rescission of the transaction:4 express stipulation on the part of a contracting party for exemption from any such liability was of no avail.5 Provision was also made for the correction of *mistakes,* without rescinding the transaction.6 In every case, particularly in respect of transactions which were classed as *bonæ fidei,*7*Fraud* might be taken advantage of by way of defence;8 and where a person sustained an injury or loss by means of a fraud, for which he could not obtain redress by any recognized form of action, the Perpetual Edict gave him a remedy according to the circumstances of the case.9 These were the remedies which might be obtained before the ordinary tribunals; but, large as they were, it was found that proceedings by action in cases of fraud and circumvention, would not afford in all cases an adequate remedy;1 and that there were many cases calling for relief, which could not properly be provided for by any form of proceeding in the ordinary tribunals. Hence by a Prætorian Edict, which was incorporated in the Perpetual Edict, liberty was given to every person who had been led into doing any act by which his rights were affected, through fear, surprise, circumvention or trickery, or by mistake, "*justum errorem,*" to resort to the extraordinary jurisdiction2 of the Prætor for a *Restitutio in integrum,* that he might be restored to his rights, and placed in the same position as if no such transaction had taken place.3

The provisions of the Common Law of England, both as regards its principles and mode of procedure, but more especially the latter, at the period above alluded to, namely, the reign of Edward III., as will have been in part observed from the preceding sketch, fell far short of the *lex scripta* of the Roman jurisprudence. In many of the cases above enumerated, for which provision was made by the Roman law, no remedy, or at least no adequate remedy, could be obtained. Even as regards such of the principles of equity belonging to the Roman jurisprudence as were admitted into the Common mon Law, no adequate means for carrying them out were provided.

A system which was so materially deficient to answer the purposes of justice, could not be satisfactory.1 The Roman scheme of judicial organization, as handed down by the *corpus juris,* as we have seen, presented for imitation two modes for supplying the

deficiencies of the English system: the one was for the *Chancellor* to supply the deficiencies of the law by introducing a *jus honorarium* to be administered by the Courts of Law; the other was to resort to the royal prerogative in each particular case, where no remedy, or an inadequate remedy, was provided by the law.2 The first method, namely, the introduction of a *jus honorarium,* could not be acted upon by the Chancellor of his own authority, as will have been collected from what has already been stated: for though the Chancellor issued all writs, the Judges of the Common Law Courts assumed exclusive jurisdiction to decide upon their validity, disregarding the sanction of the Chancellor, and his College of Clerks.3 Nor could the Chancellor declare what should be a sufficient *defence* to an action; indeed, with this part of the judicial machinery he had no opportunity to interfere.

However, it was possible to attempt a remedy of a corresponding nature to the *Jus honorarium* by means of the legislature, and that attempt was made, as has already been noticed, by the statute of Westminster the Second (13 Edward I.).4 This statute opened the measn of obtaining remedies in numerous cases, which were before excluded by the rules of the common law; and other statutes were passed to supply many of the deficiencies in the common law, as new circumstances, unprovided for by the law, arose.

But in fact a *lex scripta* grew up in the interpretation of the apparently large and flexible provisions of the statute of Westminister the Second itself. To supply the yet existing deficiencies in the law, the remaining expedient presented by the Roman judicial system, namely, the exercise of the royal prerogative in particular cases, and on their own circumstances as they occurred, was resorted to in the manner to be hereafter described.

But over and above these calls for the interference of the prerogative, the circumstances of the times1 required that some extraordinary powers should be exercised to prevent obstructions to the course of justice, even in cases where the law was sufficient, if duly administered, to afford a complete remedy—a necessity quite as urgent as that which arose from the deficiencies in the law itself. This combination of circumstances ultimately gave rise to the establishment of the extraordinary jurisdiction of the Court of Chancery, on which subject we are now about to enter. But it will be necessary for us, first, to direct our attention to the constitution of the King’s Select Council, from which the Court of Chancery may be said to have sprung.

We must go back a little in order to examine into the constitution of the Select Council after the Norman Conquest, which has hitherto been only casually adverted to, as the functions of the Court of Chancery were in the first instance delegated to that council.

The Norman Sovereigns, like their Anglo-Saxon predecessors,2 were advised in the exercise of their prerogatives in respect of matters political and judicial,3 by a Council always in attendance on the king’s person, which was distinct from the Great Council or Parliament,4 though, as it would appear, forming part of the Great Council when assembled. The king presided in both, and they had the same general appellation, namely, “The Council,” till the reign of Edw. I., from which time the Great Council,

which usually was called together four times in the year, obtained the settled name of “The Parliament.”[1]

[3] It is not easy to distinguish the peculiar functions of each of these councils;[2] probably the functions of the minor or Select Council were in a great part suspended, whilst the Great Council was sitting; certainly from the time of Edward III. the Council and the Lords’ House were frequently blended together as a Council within a Council; but in that reign the Lords as a distinct body were *the Judges* of Parliament,[4] though even then we find matters referred to the select Council, sometimes, that they might make a report to a subsequent Parliament.[5]

This select Council was composed of certain great officers who were members *ex-officio,* as the Chancellor, Treasurer,[6] the Grand Justiciary and other justices in the early reigns,—the justices of either Bench after the institution of separate courts,—the justices in Eyre—the Escheators,[7] and such others, usually but not exclusively, Bishops, Earls, and Barons, as the king thought fit to name.

The serjeants and the masters, who have already been mentioned and whose office will be further described hereafter, were also occasionally called in.[8] Ultimately the masters became *ex-officio* members of the council[9] for the purpose of advice.

The official members on some occasions sat alone, at other times with those who were associated to them.[1]

Whenever the council required the assistance of other persons, they were summoned by writs issued by the Chancellor, by order of the council, according to circumstances; and if any information was required by the council in respect of any matter before them, writs and commissions emanating from the council were dispatched out of the Chancery, and the inquisition taken under such writs having been presented to the council, such orders were thereupon made as justice appeared to require.[2]

This was the king’s permanent council, or what would now be termed the Privy Council in contradistinction to the Great Council or Parliament, before described, which only met in obedience to special writs of summons, whereas this council was always sitting for the dispatch of business.[3]

This council was used to sit in different chambers about the palace, such were the Painted Chamber, the Whitehall, the Chamber Marcolf; sometimes in *la Chambre des Etoiles,* to which place of their meeting the general return of certain writs in the reign of Edward III. *coram nobis in camera,* are referred. The council very often sat in the Chancery.[4]

It appears that in early times, probably down to the reign of Edward III., as will be more particularly noticed hereafter, it was in this council, presided over by the king himself, or some person delegated by him when absent, that all applications for the special exercise of the prerogative in regard to matters of judicial cognizance, criminal and civil, were discussed and decided upon.

The general nature of the applications which were addressed to the council may be ascertained from the answers to the petitions which have been preserved; they are as follows:—sue at Common Law, (that is by ordinary writ,) or in the County or Hundred Court;—sue in the Exchequer;—sue in Chancery, that is before the ordinary common law court held before the Chancellor, which will be noticed hereafter;—a writ on the subject shall be dispatched out of Chancery;—the king will consider;—a remedy shall be provided, and the like.1

As regards the particular description of judicial business which was disposed of by the council itself in early times, we are left somewhat to conjecture. It seems to have exercised a Criminal as well as Civil jurisdiction. Sir Francis Palgrave considers that the council exercised a general superintending authority over the courts of common law, though in a manner rather resembling the authority which a tribunal exercises over its members, than as resulting from the subjection of one court to another.2

Mr. Hardy, in his Introduction to the Close Rolls, has set out a passage from Benedict Abbas, from which it would appear that, so early as the time of Henry I., the council took cognizance generally of those cases which the ordinary judges were incapable of determining.3 From the records of the proceedings of this council in after times, we learn, that the council by delegation from the king, advised as to the exercise of the prerogative on all applications to obtain a remedy for injuries and acts of oppression, where from the heinousness of the offence, or the rank or power of the party, or any other cause, there was likely to be an impediment to a fair trial, or to the attainment of appropriate redress, in the ordinary tribunals; so also when by force and violence, justice was prevented taking its ordinary course.1 The council on such applications either took the case into their own hands, or gave specific directions in regard to it according to the circumstances of the case.2 Where a party was suffering imprisonment by the process of an inferior court, the double remedy of a *subpœna* against the pursuing party, and a writ of *Habeas Corpus cum causa* was sometimes given.3 The council had the power of issuing writs into all special Jurisdictions or Franchises, as Wales and Ireland,4 which, with their other extraordinary powers, gave them surpassing capabilities beyond those of any other court, except the Court of Chancery. The poor appear to have been the objects of their particular care.5 "For God and in work of charity" generally concluded all the petitions to the council.6

The council also appears to have exercised a prerogative jurisdiction in cases of fraud, deceit, and dishonesty, not so tangible as to be within the reach of the common law; and *int. alia* to have issued writs of *ne exeat regno* in civil cases against foreign debtors who desired to escape from payment of their debts.7

The clergy, as before observed, having been excluded in the time of Henry III. from entertaining any question as to *fidei læsio* and *juramenti transgressio,* may account for the council having been applied to in cases of fraud and deceit, after the reign of that monarch.

The interference of the Prerogative with the ordinary course of justice to the extent and in manner above described, appears to have been recognized in early times as constitutionally unobjectionable; but to provide against abuse, the Barons at various

times claimed to have a voice in the appointment of the Chancellor, Judges, and great officers of state, who were *ex-officio* members of the select council, and which at times they exercised in Parliament.1 By the articles agreed on in the eighth year of Henry VI. it was provided, that all Bills forwarded to the council that embraced matters terminable at the *common law* should be sent there to be determined, unless there were *too much might* on one side, or there were other cause reasonable moving the council to retain them.2 By the statute 5 Rich. II. stat. 1, c. 8, those who had lost their deeds in the late troubles were authorized to present petitions to the king and his council, when such remedy was to be provided as was just; in this we may recognize an old Anglo-Saxon custom.

The Great Council, or Parliament, was also a court for judicial purposes, ordinary and extraordinary. Indeed, in the time of Edward I., and for some time afterwards, the Parliaments, excepting as regards the granting of taxes, were not so much legislative assemblies, as the King's Great Council in which subjects applied for judicial relief against their fellow subjects.3 In early times petitions of all kinds and descriptions were presented to the king, or to the Great Council on the occasion of their meeting.4 The Parliament, or Great Council, itself disposed of many of the cases brought before it; amongst the rest those which had been referred to it, from their difficulty, by the ordinary tribunals.5

If the case required a *new law,* an award was made by the king and barons, who alone at this time, as already observed, interfered in regard to matters connected with the administration of justice.1 This award in early times had the force of a statute; afterwards the Commons, as has already been mentioned, established the right of concurring in all legislative Acts, and, by consequence, in these awards, which then became what are now called Private Acts of Parliament.2

In cases not requiring special interference, the same course seems to have been there adopted as on the applications which were made to the council. If the matter were remediable at law, and there were no obstacle to the remedy being obtained, the petitioner was sent to the Common Law Courts; if it were a matter of revenue, he was sent to the Exchequer; if the matter related to the king's grants, or other matters cognizable under the Chancellor's ordinary jurisdiction, he was sent to the Chancery; if it were matter proper for the consideration of the council it was sent there.3 The judges, and other official members of the select or privy council, originally attended as a constituent part of the Great Council; but in the time of Edward III. or Richard II. the Lords, by their ascendency, threw the judges and other official members of the council into the shade, and took the decisive jurisdiction into their own hands;4 thus, their ancient colleagues of the council, not being Lords, have been reduced to the condition of silent assistants, unless when called upon to give their opinions.5

During the time to which the references in the preceding pages relate, a growing Jurisdiction, exercised by the Chancellor apart from the council, is observable, the nature and progress of which are now to be the subject of inquiry. The Chancellor, whose office has been traced down to the reign of Henry II., continued to exercise very important functions; he was still almost always a high dignitary of the Church, and besides his independent legal jurisdiction, which will be particularly noticed

hereafter,[1] it would appear that this great officer was the principal actor as regards the judicial business which the Select Council, as well as the Great Council, had to advise upon or transact.[2]

Thus Matthew Paris, incidentally mentioning Radulphus de Neville, Bishop of Chichester, who was Chancellor to Henry III., says, “qui erat Regis fidelissimus Cancellarius, et inconcussa columna veritatis, *singulis* sua Jura, precipue *pauperibus,* juste reddens et indilate.”[1] There are earlier notices of a similar kind. The panegyrics composed in honor of the famous Thomas à Becket, Chancellor of Henry II., by Fitzstephens, and of the Bishop of Ely, Chancellor of Richard I., ad 1189, by Nigel de Wetekre, refer to each, in the following terms,—

> Hic est qui regni leges cancellat iniquas,
> Et mandata pii principis æqua facit.

As to the latter it is added—

> Si quid obest populo, vel moribus est inimicum
> Quicquid id est, per eum desinit esse nocens.[2]

In the reign of Edward I., the English Justinian in more than one sense, we begin to observe unequivocal marks of an extraordinary jurisdiction exercised in the Chancery in civil cases. It was a custom with this monarch to send certain of the petitions addressed to him praying extraordinary remedies, to the Chancellor and Master of the Rolls, or the Chancellor or the Master of the Rolls alone, by writ under the privy seal, (which was the usual mode by which the king delegated the exercise of his prerogative to the council,) directing them to give such remedy as should appear to be consonant to honesty (*honestati*).[3] There is reason to believe that this was not a novelty.[4] Considering what was the constitution of the council, great inconvenience and uncertainty must have resulted from leaving the correction and extension of the law in civil cases to such a tribunal; though it would appear from an ordinance issued in the 8 Edward I., that the Chancellor was not necessarily the person to whom the exercise of the prerogative of grace even in matters purely civil was committed. When the Chancellor administered relief independently of the council, it was by express delegation from the king, and given, as it would seem, by the advice of the council.[1] It will be remembered, that it was in the 13th year of the same king that the stat. of Westminster the Second, which authorized the granting of writs *in consimili casu,* was enacted, by which the necessity for many of these applications must have been superseded.

Several records relating to the Court of Chancery during the reign of Edward II. have been brought to light by Lord Campbell, from which it appears that the court was then in full operation.[2]

In the reign of Edward III. the Court of Chancery, as a *court of ordinary jurisdiction,* became of great importance. The Chancellor, under his ordinary jurisdiction, held Pleas of *scire facias* for repeal of letters patent,—of petitions of right, and *monstrans de droit* for obtaining possession or restitution of property from the Crown[3]

—Traverses of offices,[4] —*scire facias* upon recognizances,—executions upon recognizances,—executions upon statutes,[5] and pleas of all personal actions by or against any officer or minister of the Court of Chancery.[6]

The Chancellor also held jurisdiction on appeals of false judgement, when any lord would not do right to those under his jurisdiction.[7] He was visitor of colleges, etc., of royal foundation, and had jurisdiction[1] as to the king's wards;[2] he also took security for keeping the peace.[3]

The jurisdiction of the court as to recognizances, appears to have arisen in this way. It was a practice to secure the fulfilment of grants and leases, and other contracts, by recognizances acknowledged in Chancery; the power of issuing the writs of execution belonged to the court, and it naturally, therefore, assumed the power to judge of the default by which the recognizance was alleged to have been forfeited.[4] Recognizances were afterwards, as we shall see, imported into the extraordinary jurisdiction of the court, and made use of to bind the parties to do right.[5]

The Chancellor had jurisdiction in all cases in which the crown was concerned.[6] The petition of the Commons, 45 Edward III., seems to admit, that when the king was a party, he had a right to sue in the Court of Chancery, or in the ordinary courts of law at his pleasure, and so it seems had his grantees.[7]

The proceedings in all or most of these cases, were by common law process, not by petition or bill; but the Chancellor never had authority to summon a jury: on issue being joined on a matter of fact, in a cause before the Chancellor in his ordinary court, it was tried in the Court of King's Bench.[8] The Chancellor in the exercise of his ordinary or common law jurisdiction could not advert to matters of conscience.[9]

A summary jurisdiction was committed to the Chancellor in many cases, by various Acts passed in this reign, but whether to be exercised according to the formalities of common law procedure, or according to the course of the council, is matter of doubt.[1]

In this reign (Edward III.) the Court of Chancery appears as a distinct court for giving relief in cases which required Extraordinary remedies. The king being, as may well be conceived, looking to the history of his busy reign, unable from his other avocations to attend to the numerous petitions which were presented to him, he, in the twenty-second year of his reign, by a writ or ordinance referred all such matters as were *of Grace,* to be dispatched by the Chancellor or by the Keeper of the privy seal.[2]

The establishment of the Court of Chancery as a regular court for administering extraordinary relief, is generally considered to have been mainly attributable to this or some similar ordinance.[3] It will be observed, that it conferred a general authority to give relief in all matters of what nature soever requiring the exercise of the Prerogative of Grace—differing from the authority on which the jurisdiction of the courts of common law was founded; for there the court held jurisdiction, in each particular case, by virtue of the delegation conferred by the particular writ, and which could only be issued in cases provided for by positive law. This is one of the great and

fundamental distinctions between the jurisdiction of the courts of common law and that of the Court of Chancery.

However, as will have been observed by the references in the preceding pages, matters of Grace were not yet sent exclusively to the Chancellor or the Lord Privy Seal. The Great Council and the Privy Council still entertained questions of this nature by delegation from the sovereign. Some cases also were still *specially* sent to the Chancellor, or Chancellor and Treasurer, sometimes with a requisition that they should assemble the justices and serjeants and others of the council, to assist in their determination.[1]

From this time suits by petition or bill, without any preliminary writ, became a common course of procedure before the Chancellor[2] as it had been in the council. On the petition or bill being presented, if the case called for extraordinary interference, a writ was issued by the command of the Chancellor, but in the name of the King,[3] by which the party complained against was summoned to appear before the Court of Chancery to answer the complaint, and abide by the order of the Court.[4]

One great engine for the discovery of truth, which, as before observed, was unknown to the common law, namely, the examination of the parties on oath, was employed by this tribunal, as it was by the council from which this court was now branching off.

The principles on which the decisions of the Chancellor in the exercise of the extraordinary jurisdiction thus committed to him, were founded, were, it would seem, those of Honesty,[1] Equity, and Conscience.[2] The latter, as a principle of decision, was then unknown to the common law,—it was of clerical introduction; Equity was known to the Roman law,[3] and was, as we have seen, long before this acknowledged, to some extent at least, as a rule for decision in the common law courts;[4] but Equity is reserved for a more full discussion in a subsequent page.

The increased importance of the ordinary and extraordinary jurisdiction of the Chancellor[5] appears to have attracted the attention of the people at large; all would naturally be anxious that the office should be filled by competent persons. It seems to have been considered by some that the extraordinary jurisdiction might, if left in the hands of persons not versed in the common law,[6] be converted to the destruction of the law. Urged, probably, by some such suggestions, Edw. III. in the 15th year of his reign appointed Robert Parning, King's Serjeant, his Chancellor. "This man," says Lord Coke, "knowing that he who knew not the common law could never well judge in equity, which is a just correction of law in some cases, did usually sit in the Common Pleas, which court is the lock and key of the common law, and heard matters in law there debated, and many times would argue himself."[1] He died two years afterwards.

In the 45th and 46th years of Edward III.,[2] between which time and the death of Serjeant Parning there had been several clerical Chancellors, and the important ordinance of the 22d Edward III. had been issued, Sir R. Thorpe, Chief Justice of the Common Pleas, and Sir J. Knivet, Chief Justice of the King's Bench, were respectively appointed to the office of Chancellor. This was, probably, in consequence

of the petition of the Lords and the Commons, of the 45th Edward III., which prayed, that as ecclesiastics were not in all cases amenable to the laws, lay persons should for the future be selected for this high office.3 Sir J. Knivet continued Chancellor till the 50th year of the king; but from that time, and probably for the reasons amongst others, which will be presently mentioned, the office returned to its accustomed channel.4

By the statute 37 Edward III. c. 18, it was enacted, that all those who made suggestions to the king, putting in danger the liberty or franc tenement of any person, should be sent with such suggestions before the Chancellor, the Treasurer, and the king's Great Council, and should there find surety to pursue their suggestions, and should incur the same penalties on failure as would have been inflicted had the matter been proved.5

In this reign the Court of Chancery, as well as the Court of King's Bench, ceased to follow the king.1

The terms "Honesty," "Equity," and "Conscience," which, as we have seen, were the recognized principles of the decisions of the Chancellor, under his extraordinary or prerogative jurisdiction in the reigns we have just passed over, would rather lead to the supposition that the jurisdiction as originally exercised was confined to cases of a nature purely civil. But in the reign we are now entering upon, the disorderly state of the country, and the insufficiency of the ordinary means of preserving internal peace and order, appear to have called forth the exercise of the authority of the Chancellor, as well as of the Council, in a manner partaking of a criminal character.

The ancient system of police by mutual *borh,* or pledge, and the other police regulations, which Bracton describes in his 3d Book (*de Corona*), would appear in theory to have been amply sufficient for the preservation of the peace; but it is evident that they were found to be ineffectual in practice, or incapable of being enforced.

Edward III. and his Council found it necessary, in the very first year of his reign, to adopt some more effectual measures of police than those which already existed. For this purpose Justices of the Peace were instituted throughout the country.2 It was the duty of these magistrates to repress violence and disorder of every kind, and for that purpose they were, amongst other things, empowered to take security for the peace, to inquire into misbehavior of officers, and to inflict punishment for trespasses, extortions, and similar offences.

Early in the reign of Richard II. it was found necessary to provide some further measures for repressing forcible entries on lands. By the 5th Richard II. stat. 1, c. 8, persons so offending were subjected to imprisonment; by the 15th Richard II. c. 5, in case of forcible entry, any Justice of the Peace might take the power of the country, *posse comitatus,* and put the offender in jail.1

2 But the course of justice itself was interrupted, and all these provisions were rendered in a great degree ineffectual by the lawless spirit of the times. The Commons in the 5th year of Richard II. complain of "grievous oppressions in the King's Courts, the Chancery, King's Bench, Common Bench, and Exchequer, by the multitude of

braceours of quarrels, and maintainors, who are like things in the country, so that justice can be done to none."3

In this state of things the middle and lower orders of society were almost out of the protection of the law.

The defence of the poor and helpless, as has already been observed, was one of the most ancient, as it was in the early period of our history one of the most essential, of the prerogatives which descended from the Anglo-Saxon to the Norman sovereigns.4 Henry III. had found it necessary to direct special commissions throughout the country, to inquire into the oppressions of the poor, with a view to their redress.5

In the reign of Richard, the unsettled state of the country tended to encourage every sort of violence; the necessity for more than the ordinary means of protection from oppressions and spoliation was obvious; the Justices were overawed, and in some instances the very powers which were confided to them, were employed as instruments of oppression, so that in a subsequent reign it was found necessary to place the Justices themselves under the especial supervision of the Chancellor.1

The Chancellor, therefore, at the very outset of Richard's reign, the king being himself of tender years, with the sanction no doubt of the Council, exercised an authority, especially in favor of the weak, for repressing disorderly obstructions to the course of the law, and punishing the defaults of the officers who were entrusted with its administration, and affording a civil remedy in cases of violence and outrage, which, for whatever might be the reason, could not be effectually redressed through the ordinary tribunals; this jurisdiction will be more particularly considered hereafter.

The Commons seem to have taken great umbrage at this exercise of authority on the part of the Chancellor, particularly as the Chancellor did not scruple to entertain jurisdiction in cases of violent dispossession of land, which was an interference with *franc tenement,* of which they were very jealous. The Commons required that all such cases should be left to the Common Law;2 but the Chancellors,3 supported by the Council, and under the shield of the clerical character, persevered against all opposition in exercising this branch of the prerogative, in the Council, and in the Court of Chancery;4 and a resort to the Chancellor under his extraordinary jurisdiction was thus secured for the poor, the weak, and the friendless,5 to protect them from the injuries to which they were exposed.

But many powerful reasons operated to induce persons of all classes to apply for the powerful aid of the Chancellor in cases which were not strictly within the range of the principles above adverted to. Before the Chancellor, disputed facts might be established by the personal examination, on oath, of the party against whom any complaint was made,—an advantage which could be obtained in no other court, with the exception of the Council. Besides this the Court of Chancery, and the Council, alone exercised a general Preventive jurisdiction. Again, it was in the Court of Chancery or the Council only that, in some cases of outrage, compensation could be obtained, the only remedy the Common Law afforded being punishment through the

medium of criminal process.[1] These concurrent causes operated, about the time we are now contemplating, to bring numerous suitors to this court.

In this reign petitions, or Bills as they were afterwards called here as in Parliament, were addressed directly to the Chancellor himself, whether because he was the person to whom the prerogative of grace had been committed,[2] or, as some have conjectured, because it was known to the suitors that to that high dignitary their petitions would ultimately be referred.[3] Many of these Bills are extant, some have been published by the Record Commissioners; most of these are founded on some outrage or violence for which redress is sought: they will be referred to more particularly in a future page.[4]

The Commons reiterated their petitions against this growing jurisdiction.[1] The particular grounds of their remonstrances were, that persons were called to this court, not upon any specific complaint, but *quibusdam certis causis;* that persons were required to answer as to their franc tenement, (which was something almost sacred in the minds of land-owners,) and to disclose their titles, which the Commons denounced as being contrary to law; that the course of proceeding was not according to the Common Law, but the practice of the Holy Church; and that the process of these extraordinary tribunals was abused by being employed as the means of extortion.[2] The answer to these remonstrances generally was, that the king would preserve his prerogative.

It is a little remarkable that amidst these complaints, although no Act of the legislature had conferred on the Chancellor any of the coercive powers which the Commons so forcibly denounced, no direct complaint is made, as to the jurisdiction which he had assumed being an invasion of any constitutional principle, or that this permanent delegation was an excess in the exercise of prerogative. Acts of Parliament indeed[3] had been passed, which possibly may have been intended by one branch of the legislature at least, to control the extraordinary jurisdiction exercised by the Council, and subsequently by the Chancellor; but if so, they failed of their intended effect, as regards both: and the same fate attended the stat. 4 Hen. IV. c. 23, which will be presently mentioned.

The Commons not succeeding in their attempts to extinguish this extraordinary jurisdiction, they addressed their petitions to its due regulation, and in consequence, by the statute 17 Rich. II. c. 6, it was enacted, that where persons were compelled to appear before the Council or the Chancery on suggestions found to be untrue, the Chancellor should have the power to award damages according to his discretion; and though it was not until the statute or ordinance of the 15th Henry VI. c. 4, that it was directed that no writ of subpœna should issue until surety should be found to answer the party his damages if the matter contained in the bill could not be made good, sureties had been in fact required in the reign of Rich. II.[1]

From the time of passing the stat. 17 Richard II. we may consider that the Court of Chancery was established as a distinct and permanent court, having separate jurisdiction, with its own peculiar mode of procedure similar to that which had

prevailed in the Council, though perhaps it was not yet wholly separated from the Council.2

The writ of subpœna, in its modern form, prior to the late alterations, now came into general use in the Court of Chancery, though, as appears from the preceding authorities, it was not then invented, as stated by the Commons, 3 Hen. V.3 In many of the petitions or bills, no other relief was prayed, than that a subpœna might issue.4

References to the Council were still made in extraordinary cases of a nature purely civil, but it seems to have been considered there, that the Chancery was the proper Court for making decrees in such matters.5

In this reign we find some matters delegated to the Chancellor by authority of Parliament. In the 15 Rich. II. two petitions were addressed to the King and the Lords of Parliament; the answer to each was the same, that the petition be sent to the Chancery, and by authority of Parliament the Chancellor was to cause the parties to come before him in the said Chancery, and there, the matter contained in the petition, to diligently view and examine, and hear the reasons of the one party and the other; "and further, let there be done by authority of Parliament that which right and *reason* and *good faith* and *good conscience* demand in the case."1

Petitions for extraordinary remedies were still presented to the king, but they were usually referred by him to the Chancellor.2

The Chancellor at this time was assisted in the exercise of his judicial duties, legal and equitable, by the Master of the Rolls;3 but this high officer and his duties will be the subject of particular notice hereafter.

An event which I am about to notice took place in this reign, which appears to me to have had great influence in the establishment of the extraordinary jurisdiction of the Court of Chancery, and in throwing it into the hands of the clergy.

In the reign of Edward III. the exactions of the court of Rome had become odious to the king and the people. Edward, supported by his Parliament, resisted the payment of the tribute which his predecessors from the Conquest downwards, but more particularly from the time of John, had been accustomed to pay to the court of Rome; and measures were taken to prevent any further encroachments of the papal power.4 A general distaste on the part of the laity of all ranks to everything connected with the Holy See had begun to spring up. The name of the Roman Law, which in the reigns of Henry II. and III., and of Edward I., had been in considerable favor at court, and even as we have seen with the judges, became the object of aversion.

In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common law tribunals.1 Perhaps one object on the part of the judges might have been to exclude the doctrine as to *fidei commissa,* or trusts, which, as we shall see, first came distinctly into notice in this reign. The effect, however, of the exclusion of the Roman law from the common law tribunals, was, as will be more

particularly noticed when I come to treat of Trusts, that a distinct code of laws was formed and administered in the Court of Chancery, by which the enjoyment and alienation of property were regulated on principles varying in many essential particulars from the system which those who originated and carried into effect the exclusion of the Roman law, were so anxious to preserve.

Nor were these united endeavors for the exclusion of the Roman law, as it appears to me, less important in fixing the appointment of the office of Chancellor in the members of the clerical body. Notwithstanding all the efforts that were made to repress them, Trusts soon became general. Some rules for their regulation were absolutely necessary—it was from the Roman law they had sprung up;—who so proper to introduce and systematize the necessary rules for their regulation, as those who were now exclusively conversant with this law, and who alone, as it was excluded from the Common Law Courts, could resort to it for their guidance? Accordingly, from this time (with some exceptions, which only tend to affirm the general proposition) none but clerical Chancellors were appointed, down to the 21st year of Henry VIII.

It may well be doubted, whether, but for this last circumstance, the system of equitable jurisprudence which we find established in the reign of Henry VIII., on which the doctrine of Uses, and much of the modern jurisdiction of the court is founded, would then have existed. The antipathy to the Roman law, which in the reign of Elizabeth was extended as regards a considerable portion of the community, to everything Roman, and the intensity of which has scarcely yet subsided, broke forth in the latter end of the reign of Elizabeth, and in that of James I., in a way that leaves little doubt as to what would have become of the equitable principles of the Court of Chancery, if that court in its infancy had been permanently committed to Common Law Judges as Chancellors. Although a little in anticipation, I cannot but here notice, as some confirmation of the conjecture which is hazarded above, that a writer of the reign of James I., who, if not as he styles himself, a Serjeant, was evidently speaking the sentiments of that order,[1] says, "*The Common Law commandeth all that is good to be done.*"[2] —"The suit by subpœna is against the common weal of the realm."[3] The whole of the system which formerly prevailed in the Court of Chancery as to Uses, and which was then applied to Trusts, is also denounced by him in terms,[4] which show that, under Chancellors taken from the professors of the Common Law merely, the modern system of Equitable Jurisprudence (whether for good or for ill others will judge) would never have been reared, at least in the Court of Chancery.

But to resume. In the reign of Henry IV. the Commons renewed their petitions against the Court of Chancery, particularly complaining that the court interfered with matters that were remediable at law;[1] and in the fourth year of this king, as before noticed, a statute was passed declaring that judgments given in the King's Court should not be reversed, "*adnihilentur,*" excepting by attaint, or for error;[2] not, however, expressly referring to the Court of Chancery, nor, in terms, touching the jurisdiction exercised by that court, which did not annul, but deprived the party of the fruits of his judgment.

No bills addressed to the Chancellor in this reign have been found; few in the reign of Henry V., though uses and trusts had then become very general: now, however, the bills began to be in English.3

In the reign of Henry V. the Commons repeated their remonstrances against the obnoxious subpœna, but without effect.4 However, it was admitted by the Commons in the most angry of their petitions, that there were some cases in respect of which no remedy, or at least no effectual remedy could be obtained, by the ordinary course of law, and over which the Court of Chancery might justifiably exercise jurisdiction.5 Nor was this altogether denied by the judges of the courts of Common Law.1 The Council still exercised an extraordinary jurisdiction concurrently with, but distinct from, the Court of Chancery.2 Applications were also still made to Parliament, in cases where justice was obstructed in the courts of Common Law, or where those courts had not the means of affording relief. There are some instances of such applications on the subject of Trusts.3

In the reign of Henry VI., this court was in full operation, and large additional powers of coercion were conferred on the Chancellor in particular cases.4 The writs in the reign of Henry VI. refer to the proceedings as being in Cancellaria, without reference to the Council.5 From this time the bills appear to have been filed.6

In the reign of Edward IV. proceedings by bill and subpœna became the daily practice of the Court of Chancery;7 and from that time, though the judges continued to dispute the Chancellor's authority to interfere with the proceedings of the Common Law Courts,8 we do not trace any further opposition on the part of the Commons to the authority of the Court of Chancery;9 and down to the reign of Charles II. the court continued to be substantially the same as it was in the reign of Edward IV.

In the reigns of Henry V. and VI. various statutes were passed, which expressly delegated to the Chancellor, in particular cases, some branches of the jurisdiction which had been claimed or exercised both by the Council and by Parliament in aid of the Common Law, to be exercised with the *advice of the Chief Justice* of either bench, or of the *Chief Baron* of the Court of Exchequer.1

The Star Chamber—The Court Of Requests—Special Commissions Of Oyer And Terminer—The Equity Court Of The Exchequer.

Having traced the extraordinary jurisdiction of the Court of Chancery as connected with or as forming part of the Council, until the time of its establishment as a separate and independent jurisdiction, it may be well cursorily to notice two other branches or offsets from the Council, which also formed themselves into distinct tribunals, namely, the Star Chamber and Court of Requests.

It has already been noticed that in the reign of Edward III. the Council were in the habit of sitting in what was called the Starred Chamber. After it became the habit to depute to the Chancellor a portion of the business of the Council, namely, that which

related to civil rights, the Council usually sitting in the Star Chamber entertained jurisdiction over those cases which were not sent to the Court of Chancery. At length the Court of Star Chamber was established. This Court, like the Court of Chancery, derived its origin from the Royal prerogative.[2] The Court of Star Chamber by continued usage, and as ultimately regulated by the stat. 3 (Clarendon says 10th) Henry VII. c. 1, and 21 Henry VIII. c. 30, had jurisdiction in cases of oppression and other exorbitant offences of great men, (where, as Lord Coke observes, inferior judges and jurors, though they should not, would in respect of the greatness of the offenders be afraid to offend,) bribery, extortion, maintenance, champerty, embracery, forgery, perjury, dispensers of false and dangerous rumors, news, and scandalous libeling; false and partial misdemeanors of sheriffs and bailiffs of liberties; frauds, deceits,[1] great and horrible riots, routs, and unlawful assemblies, single combats, challenges, duels, and other heinous and extraordinary offences and misdemeanors;[2] leaving ordinary offences to the courts of common law.[3] Thus a jurisdiction founded on the inefficiency of the ordinary tribunals to do complete justice in criminal matters, and other offences of an extraordinary and dangerous character, arose almost concurrently with the establishment of the Court of Chancery and entirely analogous in principle and procedure to that Court, but confining its jurisdiction to cases partaking of a criminal character;[4] "and whilst it was gravely and moderately governed," says Clarendon, "it was an excellent expedient to preserve the dignity of the king and the peace and security of the kingdom."

The Court of Chancery sometimes, besides itself granting civil relief, made use of the Court of Star Chamber to subject the parties to punishment where gross frauds had been perpetrated. Thus, we find an order of Lord Keeper Bacon to this effect, "Because the Court disliketh the said evil practices and fraud, and thinketh them not meet to be passed over without further examination," it is ordered that the plaintiff and one Frankland, shall at their equal charges, exhibit a bill in the Court of Star Chamber, against Fulwood the defendant, "touching his indirect, lewd, and fraudulent practices."[5]

This Court, however, having become odious by the tyrannical exercise of its powers, it met with a different fate to that of the Court of Chancery, having been abolished by the statute 16 Car. I. c. 10.[6]

The Court Of Requests

It has generally been supposed that the Court of Requests, which was a minor Court of Equity, had its origin from the writ or proclamation of the 22d of Edward III., before referred to;[1] but the more probable origin is an order of the 13th Rich. II., for regulating the Council, by which the Lords were to meet between eight and nine o'clock, and the bills of the people of *lesser charge* were to be examined and dispatched before the Keeper of the Privy Seal, and such of the Council as should be present for the time being. From this time, at least, the Lord Privy Seal held a Court of Equity called the Court of Requests. The course of procedure was the same as in the Court of Chancery. The bills of complaint filed there, ordinarily contained the one or the other of these two suggestions, namely, that the plaintiff was a very poor man not able to sue at common law, or that he was one of the King's servants or ordinarily

attendant on his person;—it was the poor man's Court of Equity.[2] The Lord Privy Seal, and the Masters of the Requests, who exercised similar functions to those of the Masters in Chancery, presided. This court continued to be resorted to down to the 41st of Eliz. when it ceased to exist, having been virtually abolished by a decision of the Court of Queen's Bench.[3] Greater facilities were from that time given to the poor for enabling them to proceed in the superior courts *in formâ pauperis,* which will be noticed hereafter in treating of the course of procedure in the Court of Chancery.

Special Commissioners Of Oyer And Terminer

The King was frequently applied to, as has been before observed, to grant a more certain and speedy remedy in criminal cases than could be obtained by the ordinary proceedings of the Common Law Courts. In answer to these applications, Special Commissioners of Oyer and Terminer were frequently awarded by the Council, to whom such applications were usually referred, directed to persons specially named, who usually, as it would appear, were not justices of the one bench or the other.[1]

Poverty or the number of the applicant's enemies, and the inefficiency of the Common Law, were also the ordinary grounds of the applications for this extraordinary exercise of the Prerogative. The great abuses attending these commissions, caused them to be confined to "great and horrible trespasses;"[2] and even these became less frequent as the remedial jurisdiction exercised by the Council in its various branches, especially in the Star Chamber, became more fully developed.[3]

Courts Of Equity Of The Exchequer, Counties Palatine And Of Lords And Ladies

Not only the Court of Exchequer,[4] whose functions were in a peculiar manner connected with the Royal authority, but the Counties Palatine of Chester, Lancaster and Durham, the Court of Great Session in Wales, the Universities, the City of London, the Cinque Ports, and other places, silently assumed extraordinary jurisdiction similar to that which was exercised in the Court of Chancery; some of them yet subsist.[5]

The equitable jurisdiction of the Exchequer has lately been transferred to the Court of Chancery.

In the reign of Rich. I. the Earl of Moreton, a nobleman of vast possessions, had his Chancellor;[6] and after this time many Lords and Ladies affected to establish in their several Honors a Court of Chancery, with similar powers to those exercised by the High Court, but they were extinguished by the Legislature.[7]

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29.

THE ECCLESIASTICAL COURTS AND THEIR JURISDICTION[1]

By William Searle Holdsworth[2]

THE Ecclesiastical Courts have a longer history than the Courts of Common Law and Equity. At all periods in their long history prevailing theories as to the relations between Church and State have influenced both the law which they administer, and their position with regard to the English judicial system. If therefore we are to understand the arrangement of the Ecclesiastical Courts at different periods, and the sphere of jurisdiction assigned to them, it will be necessary to say something by way of introduction upon these matters. We can then proceed to treat of the courts themselves and their jurisdiction.

(i) The law administered by the Ecclesiastical Courts, and their relation to the English judicial system.

This subject falls naturally and chronologically into two divisions (*a*) the Pre-reformation, and (*b*) the Post-reformation period.

(*a*) *The Pre-reformation period.*

Throughout this period political and religious ideas were dominated by the theory of the survival of the Holy Roman Empire. It may be that in the common affairs of life, in the smaller associations in which men were grouped in a feudal state, this theory played little direct part. But in the law of the church, as administered in the Ecclesiastical Courts throughout Latin Christendom, it was all important. The Roman Empire had not perished. The Roman Emperor, represented by the emperor of Germany, still ruled the world in matters temporal; the Pope in matters spiritual. "The Pope, as God's vicar in matters spiritual, is to lead men to eternal life; the Emperor, as vicar in matters temporal, must so control them in their dealings with one another that they may be able to pursue undisturbed the spiritual life, and thereby attain the same supreme and common end of everlasting happiness. In the view of this object his chief duty is to maintain peace in the world, while towards the Church his position is that of Advocate, a title borrowed from the practice adopted by churches and monasteries of choosing some powerful baron to protect their lands and lead their tenants in war. The functions of Advocacy are twofold: at home to make the Christian people obedient to the priesthood, and to execute their decrees upon heretics and sinners; abroad to propagate the faith among the heathen, not sparing to use carnal weapons. Thus the Emperor answers in every point to his anti-type the pope, his power being yet of a lower rank, created on the analogy of the papal, as the papal itself had been modelled after the elder Empire."[1] To Pope and Emperor the other rulers of the earth were subordinate.

On its temporal side this theory tended to become more and more untrue with the growth, during the Middle Ages, of the territorial state. But the influence of the old theory can be seen in the preamble of Henry VIII.'s statute which asserts that "by dyvers sundrie olde autentike histories and cronicles it is manifestly declared and expressed that this realme of England is an impire, and so hath ben accepted in the worlde, governed by oon supreme heede and King, having the dignitie and roiall estate of the imperiall crowne of the same."2

The changing condition of Europe did not so obviously affect the dominion claimed by the Pope in matters spiritual. The claim of the Pope to be the head of a universal church was, in the Middle Ages, far less a mere theory than the parallel claim of the Emperor to be the head of a universal state. The Pope wielded a real authority over the faithful; and, of the fate of those who sought to cut themselves off from the communion of the faithful, the Albigenses and Southern France could tell. At the beginning of the 14th century Boniface VIII. could claim that the Pope held the chief place, that the Emperor was but his feudatory.1

The dominion of the papacy had been consolidated during the 11th and 12th centuries by a series of able popes—preeminent among whom were Gregory VII. (1073-1080) and Innocent III. (1198-1216). It was maintained by the rules of the Canon Law which was accepted as the "jus commune" of the church throughout Europe. It was from the 11th to the 13th centuries—during the most splendid period of the papacy—that the greater part of the Corpus Juris Canonici was compiled.

Roman civil law had never wholly perished. But the revival of interest in its study begins in the early years of the 12th century, when Inerius began to lecture upon the Digest at Bologna. "Roman law was living law. Its claim to live and to rule was intimately connected with the continuity of the empire."2 A famous school of law was founded. The systematic study of the civil law produced a desire to reduce to a similar system the scattered rules of the canon law. Gratian, a monk of Bologna (1139-1142), gathered them up into a systematic treatise.3 The nature of his work is well illustrated by the name applied to it when it first appeared. It was called the "Concordia Discordantium Canonum." Later it was known as the Decretum Gratiani. Henceforth the Canon Law stood side by side with the Civil Law. The University of Bologna possessed two faculties of law—the civil and the canon. The students were decretistæ or legistæ.4 There were doctores decretorum, doctores legum, or doctores utriusque juris.

The Corpus Juris Canonici is made up of the following parts:—(1) The Decretum Gratiani. This comprehended all the papal legislation down to the year 1139. The activity of papal legislation1 soon rendered a fresh compilation necessary. Several private collections were made. The collection made by Bishop Bernard of Pavia in five books is noteworthy as having supplied the method of arrangement of later portions of the Corpus Juris.2 (2) The Decretals of Gregory IX. (1234). This was composed of the decisions of the pope upon matters referred to him from all parts of Europe. (3) The Liber Sextus of Boniface VIII. (1298). As its name would imply it is intended as a supplement to Gregory's five books. It contains not decisions, but abstract rules of law, which are no doubt extracted from the decisions. (4) The

Clementinæ (1313). (5) The Extravagantes, i. e. the more important of later decretals. These were never formally promulgated as a code like the preceding four branches of the law.3 Professors of the canon law added many explanatory notes (glosses) to the text. Generally one gloss was accepted as the most important and was called the Glossa Ordinaria.4

The canon law was received in England, as in other parts of Europe, as the jus commune of the church. The English provincial constitutions formed but a small part of the law of the church. "They contain little that is new, and are only a brief appendix to the common law of the universal church."5 William Lyndwood—the official principal of the Archbishop of Canterbury—wrote a commentary upon them in 1430, which has always been reckoned a leading authority in ecclesiastical law.1 He clearly regards them as a supplement merely to the jus commune of the church. The decretals of the pope are the edicts of a sovereign legislator whose authority it is heresy to question. Provincial constitutions are valid only in so far as they interpret or enforce these papal decrees.2 The test exacted of persons suspected of Lollardry was subscription to the Decretum, the Decretals, the Sext, and the Clementines.3

The canon law recognised the pope not only as the supreme legislator, but also as supreme judge of the Church, possessed not merely of appellate, but also of original jurisdiction. He could be called in by a litigant at any stage in the suit; and not merely the judgments he pronounced, but also any dicta he might be inclined to express, had the force of law.4 He could delegate his powers to legates *a latere,* who, by virtue of their commission, superseded all the ordinary courts. "The metropolitan must plead as plaintiff before the suffragan, the superior before the inferior, if the *princeps* will have it so."5 In fact the Pope could, and did to a large extent, make himself the "Universal Ordinary." He has, says Bracton,6 ordinary jurisdiction over all in things spiritual, as the king has ordinary jurisdiction over all in his realm in things temporal. It is clear from books of practice on the canon law that whenever any considerable sum was at stake in an action the usual course was to "impetrate" an original writ from Rome nominating papal delegates to hear the case.7 In the 13th century the number of English cases which came before the pope was larger than that from any other country in Europe.8 The methods by which, as we shall see, the Archbishop of Canterbury has attracted much of the business of the ordinary courts to his provincial courts, have been suggested by the practice of the Roman Curia.1

Such, then, was the system of the canon law, in force in England as in all the other countries of Western Europe. But the church and its law must necessarily exercise its activity within a state; and, whatever extreme churchmen might contend for, it was impossible that all ecclesiastical persons should live exempt from all temporal jurisdiction. Moreover, the canon law attempted to exercise a wide control over the laymen pro salute animæ. As the state grew into conscious life it was inevitable that occasions for disputes between the temporal and spiritual powers should arise. Two systems of courts exercising two systems of law cannot coexist in one state without disputes as to the limits of their respective authority. Within a certain sphere each was supreme. But there was always a debatable land over which neither party was completely sovereign.

The precocious growth of the state in England brought this necessary antagonism between the claims of Church and State into prominence at a comparatively early period. The controversy about investitures was settled in England in 1106. It was not till 1122 that a smilar controversy in Germany was ended by a similar compromise. In the royal writ of prohibition the royal courts had a weapon of precision which in the end secured for them the jurisdiction which they claimed. All questions touching lay fee, all questions concerning advowsons, all criminal cases, save cases of felony where a clerk was the culprit, all cases of contract and tort, were gradually drawn into the royal courts. They were drawn into the royal courts in spite of the protests of churchmen. Though churchmen sitting as royal justices helped to secure the victory of the common law, it is clear that the canon law and the churchmen *qua* churchmen must have regarded them as encroachments.2 Similarly, statutes, like the statutes of Provisors and the two statutes of Præmunire, attempted to check, in the interests of patrons and of the state, the abuses of papal patronage. The aim of the statute of Provisors1 was to protect spiritual patrons against the pope. If the pope attempted to appoint, the right of presentation lapsed to the crown. The bishops took no public part in the enactment of this statute. The first statute of Præmunire2 punished those who drew "any out of the Realm in Plea *whereof the cognisance pertaineth to the king's court,* or of things whereof judgments be given in the king's court, or which do sue in any other court to defeat or impeach the judgment given in the king's court." The statute plainly says nothing of cases over which the king's court never claimed jurisdiction. The second statute of Præmunire3 was aimed at those who "purchased or pursued, in the Court of Rome or elsewhere," any "Translations, processes, and sentences of Excommunications, Bulls, Instruments, or any other things whatsoever which touch the king, against him, his crown, and his regality,"4 whereby the king's court was hindered in its jurisdiction over pleas of presentment. The guarded answer returned by the bishops, in reply to the question addressed to them as to the papal power in this respect, shows an obvious desire to conciliate the Parliament without committing themselves to any statement contrary to canon law.5 It is clear that such legislation is as "antiecclesiastical" as the issue of writs of prohibition. To argue from such legislation, or from the issue of such writs, that the Ecclesiastical Courts imagined that they were independent of the Pope or the canon law, would be about as reasonable, as to argue from the Grand Assize, and the possessory assizes that the feudal courts admitted the royal claim to jurisdiction over all cases of ownership or possession of freehold.

The state successfully asserted its rights to the jurisdiction which it claimed. But we can see from the benefit of clergy,1 and from the statute of Circumspecte Agatis,2 and the Articuli Cleri3 that it was willing to allow a large sphere to the Ecclesiastical Courts and the canon law. In one respect, indeed, it allowed to the rival jurisdiction a larger authority than it possessed in any other country in Europe. It abandoned to it absolute jurisdiction over testamentary and intestate succession to personal property.4 Where the jurisdiction of the Ecclesiastical Courts was admitted, the state automatically enforced their sentences of excommunication by the imprisonment of the excommunicate.5

Thus matters stood before the Reformation. The jus commune of the Western Church was administered in the Ecclesiastical Courts. The common law was administered in

the royal courts. The royal courts claimed exclusive jurisdiction in certain matters. Other matters they were content to leave to the Ecclesiastical Courts. Certain rights allowed to the pope by the canon law had been curtailed by English statutes, which the royal courts would enforce if called upon to do so. Within their respective limits the canon law enforced by the Ecclesiastical Courts, and the common law enforced by the royal courts were separate systems of law, differing in many of their rules, deriving their binding force from different sovereigns.

The claims made by these rival systems produced much friction. But the prevailing theories as to the relations between church and state made it impossible for either of these rival powers to do without the other. Papal dispensations from the rules of the canon law acknowledged the power of the pope; but they enabled the crown to use the revenues of ecclesiastical benefices for the maintenance of his civil service. Diplomatic reasons demanded some kind of arrangement; and at the latter end of the Middle Ages an arrangement was arrived at on a profit-sharing basis. Such an arrangement produced peace; but it was a peace which made reform impossible. Abuses were allowed to spring up unchecked until an entirely new theory as to the relations between Church and State materially altered both the law administered in the Ecclesiastical Courts, and their relation to the English judicial system.

(*b*) *The Post-Reformation period.*

At the beginning of the 16th century many circumstances combined to show that the old theories as to the relations between Church and State were breaking down. All over Europe centralized territorial states were taking the place of the loosely knit feudal monarchies of the Middle Ages. The wealth and corruption of the church, and more particularly the abuses of the Ecclesiastical Courts, were exciting extreme unpopularity. The doctrines of the church, also, were beginning to be assailed with the more effective weapons which the New Learning had provided. The better class of ecclesiastical statesmen saw clearly that some reform was necessary.

England, like the rest of Europe, felt these influences. Cases like that of Hun[1] bore witness to the unpopularity of ecclesiastics, their courts, and officials. We can see from the case of Standish[2] that Henry VIII., backed by popular opinion, was minded to assert a larger control over ecclesiastics. Wolsey, who was perhaps the most far-seeing statesman of the day, was already taking measures to reform the corruption of the church. But neither Henry nor England had any desire to separate from the general system of the Western church. There were but few adherents to Protestant doctrine. If the pope would consent to Henry’s demands for an increased control over the clergy; if the church had been reformed as Wolsey desired, there appeared to be no necessity for a break with Rome. The Anglican church might have had a history very similar to that of the Gallican church.[1]

The divorce question made this solution impossible. The pope coerced by Charles V. could not grant the divorce. A break with Rome was therefore necessary. Although the break was accomplished with as little external change as possible, it necessarily involved an altogether new view as to the relations between Church and State.

The tentative way in which the separation was carried out shows how unwilling Henry was to break with the past. The attitude of the pope, however, rendered separation inevitable. In the preambles to Henry's statutes we may see the gradual elaboration of the main characteristic of the changed relations of Church and State—the theory of the Royal Supremacy. The dual control over things temporal and things spiritual is to end. The Crown is to be supreme over all persons and causes. The Canon Law of the Western Church is to give place to the "King's Ecclesiastical Law of the Church of England."2

The Reformation Parliament met in 1529 after the fall of Wolsey. The first acts of that Parliament, carried in spite of the opposition of the clergy, were directed against certain abuses in the church and its courts.3 The clergy also (1531) recognised the royal Supremacy "so far as the law of Christ allows."4 In 1532 it was so clear, from the unsatisfactory progress of the divorce, that there would be legislation aimed more directly at Rome, that Warham, the archbishop of Canterbury, drew up a formal protest against all statutes to be passed in the ensuing session, which should prejudice the ecclesiastical or papal power.5 An act was passed against the payment of Annates. But the act is still respectful to "our Holy Father the Pope"; who was still allowed to charge certain fees for the consecration of bishops; and the king was given a discretion as to its enforcement.1 In 1533 the Statute of Appeals was the necessary consequence of the king's marriage and of the divorce proceedings taken before Cranmer.2 In the preamble to that statute the new relations between Church and State were sketched by the king himself. We have in it the first clear statement of the new Anglican position. "By divers sundry old authentic histories and chronicles it is manifestly declared . . . that this realm of England is an empire . . . governed by one supreme head and king . . . unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality be bounden and owe to bear next to God a natural and humble obedience; he being also institute . . . with plenary whole and entire power, pre-eminence, authority, prerogative and jurisdiction to render and yield justice and final determination to all manner of folk, residents, or subjects within this his realm in all causes . . . happening to occur . . . within the limits thereof without restraint or provocation to any foreign princes or potentates of the world. The body spiritual whereof having power when any cause of the law divine happened to come in question or of spiritual learning, it was declared . . . by that part of the said body politic called the spirituality (now being usually called the English Church) which . . . is sufficient and meet of itself, without the intermeddling of any exterior person . . . to declare and determine all such doubts and to administer all such offices and duties as to their rooms spiritual doth appertain . . . : and the laws temporal for trial of property of lands and goods for the conservation of the people of this realm in unity and peace . . . was and yet is administered . . . by sundry judges and administers of the other part of the said body politic called the temporality, and both their authorities and jurisdictions do conjoin together in the due administration of justice the one to help the other: and . . . the king his most noble progenitors and the nobility and commons of this said realm at divers and sundry Parliaments as well in the time of king Edward I., Edward III., Richard II., Henry IV., and other noble kings of this realm made sundry . . . laws . . . for the entire and sure conservation of the prerogatives, liberties, and pre-eminences of the said imperial crown of this realm, and of the jurisdictions Spiritual and Temporal of the same, to

keep it from the annoyance as well of the see of Rome as from the authority of other foreign potentates."1 The king is supreme in his realm. His courts, spiritual and temporal, can decide for themselves all cases which occur within the realm. This has always been the law. The anti-ecclesiastical statutes of the Middle Ages are vouched to support the historical theory put forward by the state. When the state's theory has been accepted by the church, it will be an appropriate statutory foundation for the modern ecclesiastical claims of the church, now part of the state, and subject to the royal supremacy.

Later statutes of Henry's reign further amplified and defined the supremacy which he claimed. The Act of Supremacy recognised the king as "the only Supreme Head in earth of the Church of England,"2 having full power to correct all "errors, heresies, abuses, offences, contempts, and enormities" which by any manner of spiritual authority ought to be reformed; and the oath taken in accordance with this act denies to the pope any other authority than that of bishop of Rome.3 It was in accordance with this act that Henry gave an extensive commission to Cromwell to act as his Vicar-General. It is clear that Henry is beginning to regard himself as possessing all that "usurped" authority which once belonged to the pope. This is shown by the act of 15454 which declares that the king has power to exercise all ecclesiastical jurisdiction, "and that the archbishops, bishops, archdeacons, etc., have no manner of jurisdiction ecclesiastical but by, under, and from the king." In accordance with this theory the bishops and archbishops took out commissions to exercise their ordinary powers and authorities.1

Most of the other acts of Henry's reign are the logical consequence of these changed relations between church and state. Annates and all other payments to Rome were definitely cut off.2 In the act for the submission of the clergy3 it was provided that no new canons should be enacted, except in convocations summoned by the king's writ, with license to assemble and make canons. The existing canons were to be revised by a committee of 32, of whom 16 were chosen from layment and 16 from ecclesiastics. Further provision for this revision of the canon law was made by other statutes of this reign; and it was enacted that, in the meantime, those which did not conflict with God's law and the king's should be still in force.4 No such revision was in fact made in Henry VIII.'s reign. But the teaching of the canon law was in every way discouraged at the universities. In place of lectures on canon law lectures on civil law were established. Degrees soon cease to be taken in canon law as a separate faculty.5 The act of 1545 allowed the doctors of the civil law, though laymen and married, to exercise ecclesiastical jurisdiction. This discouragement of the canon law was a necessary consequence of Henry's settlement. It is clear that the canon law as taught in the Middle Ages would have been in entire conflict with the new order.

Thus it may be said that the great work of Henry's reign was to effect an entire change in the relations between church and state. The church ceased to form part of the Western church in communion with Rome. The law of the church ceased to be the canon law of Rome. But beyond that there was little change. The Act of the Six Articles reaffirmed most of the leading doctrines of the Roman Catholic Church.1 The existing organization of the Ecclesiastical Courts was maintained. The king had put himself in place of the pope. The king's ecclesiastical law administered by civilians

was put in place of the canon law of Rome. "The Reformation," says Archdeacon Hale,[2] "if under that general term we may include the whole series of events by which this country was freed from the authority of the Bishop of Rome, was in its commencement nothing more than a legal and political Reformation; a renunciation of the intrusive power of the Pope over the King's subjects, and an assertion of the competency of the Anglican Church to decide by her own tribunals all questions relative to Divine Law and to spiritual learning. A Reformation in religion soon followed; but it was a providential and not a necessary consequence."

Little need be said of the reigns of Edward VI. and Mary.[3] They are episodes which added little of permanent importance to Henry's settlement. Edward VI. applied the doctrine of the royal supremacy in its extreme form. Henry had left the authority of the bishops unimpaired. Edward in many cases excluded their authority. He directly appointed them. Process in the Ecclesiastical Courts ran in his name. Only those who had special authority from him could exercise jurisdiction. Frequent commissions issued by him, in virtue of his supremacy, in many cases superseded the authority of the ordinary courts. As we might expect, their jurisdiction fell into contempt.[4] The reform in doctrine and the reform of the canon law was hastily pressed forward. Mary on the other hand went to the opposite extreme. The old state of things as it existed in 1529 was as far as possible restored.

Elizabeth's reign is marked by a recurrence to Henry VIII.'s principles, both as regards the relation between church and state, and as regards the position and jurisdiction of the Ecclesiastical Courts. "The policy of Elizabeth and her ecclesiastical settlement is historically linked on directly to that of her father."[1] The church was given a more definitely Protestant character, but with as little change of the older order as was possible. In the Acts of Supremacy and Uniformity the relations between church and state are permanently and definitely ascertained.

The Act of Supremacy[2] annexed to the "imperial crown of this realm" all "such jurisdictions, privileges, superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state, and persons, and for reformation, order and correction of the same and of all manner of errors, heresies and schisms abuses offences contempts and enormities." The supremacy was of wide and somewhat indefinite extent. But it did not go the whole length of Henry VIII.'s later statutes or of Edward VI.'s statutes.[3] The crown made no claim to "the ministering either of God's Word or of the Sacraments."[4] The older organization of the Ecclesiastical Courts was maintained. The crown simply claimed to be supreme over all causes and persons to the exclusion of any foreign power.

With a view to the better maintenance of the Supremacy, and the ecclesiastical settlement therein involved, the crown was empowered to entrust its exercise to commissioners appointed under the Great Seal.[5] In thus exercising the royal jurisdiction by commission precedents of Edward VI. and Mary's reign were followed.[6] The power was exercised when the Court of High Commission was created in 1559.

Some attempts were made to pursue the plan of revising the canon law. But though the revision had been completed by Cranmer and Peter Martyr, it never obtained legislative sanction.7 The canon law, so far as it was in harmony with the new settlement, still continued to be administered by the civilians, who combined their practice in the Ecclesiastical Courts with their practice in the court of Admiralty.1 As the exercise of the jurisdiction of the court of Admiralty was controlled by the writ of prohibition, so (in spite of all protests)2 was the exercise of the jurisdiction of the Ecclesiastical Courts.

Administered in this way, the law of the church, like the maritime law, has ceased to possess an international character.3 It has become national like the church itself. "The ecclesiastical law of England," said Lord Blackburn,4 "is not a foreign law. It is a part of the general law of England—of the common law—in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the courts of Queen's Bench, Common Pleas, and Exchequer, to which the term common law is in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, and form . . . the king's ecclesiastical law."

But though Henry's settlement as to the royal supremacy, as to the courts, and as to the ecclesiastical law was followed in its main lines, the doctrines of the church were given a more definitely Protestant character. The matters which the Court of High Commission could declare to be heresy were defined.1 Statutory force was given by the Act of Uniformity, to the second book of common prayer of Edward VI.'s reign, with certain alterations and additions.2 Not only the Ecclesiastical Courts, but also the justices of oyer and terminer and of assize, were empowered to see to the observance of the Act.3

This settlement has been fully accepted both by the judges and the bishops. In *Caudrey's Case*4 "It was resolved that the said Act (the Act of Supremacy) . . . concerning ecclesiastical jurisdiction was not a statute introductory of a new law, but declaratory of the old."5 The relations between church and state were explained almost in the words of the preamble of Henry VIII.'s statute of Appeals; and the historical argument, as to the continuous independence of the church, hinted at in that preamble, was expanded and improved. Though the Canon law had been laid under contribution it never was the law of the Church of England. "As the Romans fetching divers laws from Athens, yet being approved and allowed by the state there, called them notwithstanding jus civile Romanorum: and as the Normans borrowing all or most of their laws from England, yet baptized them by the name of the laws and customs of Normandy: so, albeit the kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here by and with a general consent, are aptly and rightly called the King's Ecclesiastical Laws of England."1 In 1851 the two archbishops and the twenty bishops of England declared the "undoubted identity of the church before and after the Reformation"; and that though severed from Rome the church had in no respect severed her connexion "with the ancient Catholic Church."2

Neither the legal nor the doctrinal theory should blind us to the fact that a very real change had been made at the Reformation. The relations between church and state, and the position of the Ecclesiastical Courts were fundamentally altered. The church was brought within the state. It was subjected to the power of the crown. That has involved in the course of time other consequential changes. Having been brought within the state, its position has been modified with changed ideas as to the balance of powers within the state, and as to the limits of state control. The court of High Commission wielded the royal supremacy, when the royal supremacy over the church conferred powers as large and indefinite as the royal prerogative in the state. That court disappeared, with the court of Star Chamber, when so large a prerogative was found incompatible with liberty.3 Similarly the royal supremacy conferred a wide dispensing power. That too was limited at the Revolution when it was found to put too large a discretionary power in the hands of the crown.1 In later times the proper sphere of ecclesiastical jurisdiction has been curtailed. Membership of the church is not considered a necessary qualification for full rights in the state. The members of other religious communities have been admitted to share them. The jurisdiction of the Ecclesiastical Courts has necessarily been weakened by the disappearance of the idea that it is the duty of the state church to use coercive measures to secure, pro salute animæ, the morality of all the members of the state. On the other hand later statutes have provided new courts or new machinery for the more effective discipline of the clergy in communion with the church.2

In this manner the Tudor settlement, without sacrificing what was valuable in the institutions and the doctrines of the past, has founded a church well fitted to be an English State Church, because, like the constitution of the English State, it is capable of adaptation to altered circumstances without a palpable breach of continuity. In no respect did the Tudors more clearly show their capacity to understand and to represent their people. In the age of Elizabeth, when religious feeling ran high, it often appeared to the more enthusiastic that her establishment was neither Protestant nor Catholic. But however illogical it appeared to the fanatic, it appealed to the more moderate. Being successful it did not long want defenders; and it has secured defenders so skilful that they have made love for the Church an essential factor in English political life.

The lawyer has deduced from the uncertain utterances of Anglo-Saxon history, and from the anti-ecclesiastical legislation of the Middle Ages, the existence, from the earliest times, of an independent national church. The theologian has conferred upon it an unique Catholicity. The benches of judges and bishops have enunciated the same doctrines in language only technically different. In fact the Reformation did in a similar manner for the church, what the Revolution did for the state. Macaulay says of the Revolution, "the change seems small. Not a single flower of the crown was touched. Not a single new right was given to the people. The whole English law, substantive and adjective, was in the judgment of all the greatest lawyers, of Holt and Treby, of Maynard and Somers, almost exactly the same after the Revolution as before it. Some controverted points had been decided according to the sense of the best jurists; and there had been a slight deviation from the ordinary course of succession. This was all; and this was enough." The same sentiments, applied to the church, are both good law and sound doctrine. But if we look a little beyond the

immediate consequences of either the Reformation or the Revolution we can see that the changes involved are very far reaching. The result of the Revolution was the transference of control over the executive from the prerogative to Parliament through the growth of the cabinet system. The result of the Reformation was the abolition of the dual control of church and state, the transference to the state of complete control over the church, and the substitution for the canon law of the King's Ecclesiastical Law. The crown's prerogative still retains traces of its origin in a feudal society; and it could be described by Blackstone in terms which might have commanded the approval of a Stuart king, or the censure of a Stuart Parliament. The Church still retains her courts with some remnants of their ancient jurisdiction, and in her formularies some traces of a Catholicism older than that of Rome.

(ii) The Ecclesiastical Courts.

The courts which have administered the ecclesiastical law at different periods may be divided into the following groups:—

(1) The ordinary courts of the Diocese, the Peculiar and the Province.

(2) The High Court of Delegates.

(3) The Court of High Commission.

(4) The Statutory courts of the 19th century.

(1) The ordinary courts of the Diocese, the Peculiar, and the Province.

(*a*) *The Diocese.*

The Bishop of each diocese held a Consistory Court for the diocese. From about the middle of the 12th century the Chancellor or "Official" of the bishop usually presided over this court. He was the ordinary judge competent, like the judge of the court of Admiralty, to exercise all the jurisdiction inherent in his principal, except in such cases as the bishop might expressly reserve for his own hearing. In time he comes to be the permanent judge of the court, and retains office after the death, removal, or beyond the pleasure of the bishop by whom he was appointed.[1] But the bishop has never lost the right of withdrawing cases from his cognisance, if he wishes to hear them himself.[2] Similarly, the bishop sometimes delegated jurisdiction over certain parts of his diocese to his "commissary."[3] There was an appeal from the Consistory Court to the Provincial Court of the archbishop.

Each archdeacon in the diocese held a court for his archdeaconry.[4] The ordinance of William I., removing ecclesiastical pleas from the hundred court, mentions both the archdeacon and the bishop as persons who held pleas in the hundred court.[5] In its origin the office of archdeacon was ministerial. He held a court as a deputy of the bishop, just as the steward held the manorial court as a deputy of his lord. "But the tendency of all such institutions is to create new jurisdictions, and, early in the 12th century, the English archdeacons possessed themselves of a customary jurisdiction."[6] It was possibly with a view to stop the encroachments of the archdeacon that the

bishops adopted the plan of exercising their jurisdiction through officials. An appeal lay from the archdeacon's court to the Consistory Court.[1]

(*b*) *The Peculiar.*

The tendency in all feudal states was to vest jurisdiction in any considerable landowner. This tendency was felt in the church as well as in the state. Just as in the state the jurisdiction of the ordinary communal courts was displaced by the franchise jurisdiction, so in the church the jurisdiction of the ordinary Diocesan courts was displaced by the jurisdiction of the Peculiar Courts. One cause for the growth of these Peculiar Courts was the conflict between the bishops and their chapters, which resulted in the apportionment of the land, and jurisdiction over the land, between the bishop and the chapter. Thus both the bishops and the deans of the chapters possessed Peculiar Courts. A second cause was the exemption of the greater abbeys from episcopal jurisdiction. A third cause was a similar exemption of the king's chapels royal.[2] The variety of these Peculiar Courts can be seen from the statement of the ecclesiastical commissioners of 1832,[3] that "there are Peculiars of various descriptions in most Dioceses, and in some they are very numerous: Royal, Archiepiscopal, Episcopal, Decanal, Subdecanal, Prebendal, Rectorial, and Vicarial; and there are also some Manorial Courts." Some of these Peculiars were wholly exempt from Episcopal, and even from Archiepiscopal control. But there was an appeal from them in earlier days to the Pope; in later days to the High Court of Delegates. Recent legislation has abolished most of these courts.[1]

(*c*) *The Province.*

The archbishops of Canterbury and York possessed various Provincial Courts.[2] The Provincial Courts of the Archbishop of Canterbury were the following:—

(α) The court of the "Official Principal" of the archbishop (usually known as the Court of the Arches[3]) was at once the court of appeal from all the Diocesan Courts, and also a court of first instance in all ecclesiastical causes. The latter jurisdiction it attained by a series of encroachments (not without protest on the part of the bishops) analogous to the encroachments of the papal jurisdiction.[4] This jurisdiction was restrained by the Statute of Citations,[5] which put an end to the practice of citing persons outside their dioceses, except on appeals, on request of the bishop, or in case of the bishop's negligence to hear the case. "As official principal the judge was held to possess all the judicial power of the archbishop . . . he issued process in his own name, and seems in all respects to represent the archbishop in his judicial character as completely as the chief justice represented the king."[6] Whether or no this deprived the archbishop of the right to sit and act personally in his court is not quite clear.[7]

(β) The Court of Audience. Just as the bishop did not deprive himself of all jurisdiction by delegation to an official or commissary, so the archbishop did not originally deprive himself of all jurisdiction by delegation to the official principal. He possessed a jurisdiction concurrent with that of the Court of the Arches, which was exercised in the Court of Audience. In later times this jurisdiction was exercised by the judge of the Court of Audience.[1] At one time the archbishop may have exercised a

considerable part of his jurisdiction in this court. It is mentioned in a 17th century account of the Ecclesiastical Courts; but it does not appear to have been revived as a separate court after the Restoration.2 It has now fallen into disuse. It must not be confused with the personal jurisdiction which the archbishop has over his suffragan bishops.3

(γ) The Prerogative Court.4 This court was sometimes presided over by the official principal, sometimes by a special commissary. It took cognisance of the testamentary jurisdiction belonging to the archbishop. It originally sat in the archbishop's palace. It was moved, about the time of the Reformation, to Doctors' Commons. The archbishops attracted to this court most of the testamentary business of the country. Whenever a man left *bona notabilia* in more than one diocese they claimed to oust the jurisdiction of the bishop.5 In spite of much opposition they made good their claims, which were recognised by the canons of 1604.6

(δ) The Court of Peculiars.7 This Court was held by the Dean of the Arches at Bow church for the thirteen London parishes, which were exempt from the diocesan jurisdiction of the bishop of London.

(ε) The Court of the Vicar-General in which the bishops of the province are confirmed.8

The provincial courts of the archbishop of York were the Chancery Court, the Prerogative Court, and the Court of Audience. These courts corresponded to the Court of the Arches, the Prerogative Court, and the Court of Audience of the archbishop of Canterbury.1

The Public Worship Regulation Act2 provides for the appointment by the archbishops of Canterbury and York of a single judge for their provincial courts. Such person is to hold the posts of the official principal of the Arches Court and the Chancery Court, and Master of the Faculties3 to the archbishop of Canterbury. The person appointed must be either a practising barrister of ten years' standing, or a judge of one of the Superior Courts. He must also be a member of the Church of England. He holds office during good behaviour.

There is a question whether at any time Convocation ever acted as a court.4 There is some evidence to show that in the 14th and 15th centuries persons accused of heresy were brought before Convocation by the bishop who had cognisance over the case. But the members of Convocation did not vote on such trials. It was probably rather in the nature of a body of assessors to the archbishop than a court possessing jurisdiction. Coke, it is true, treats it as having once possessed jurisdiction in cases of heresy;5 and a majority of the judges in *Whiston's case*6 seemed to think that it might still possess such jurisdiction. The statute 24 Henry VIII. c. 12 made the upper house a final court of appeal in ecclesiastical causes which concerned the king. Possibly the idea was to follow up the analogy between the temporal and spiritual jurisdictions, suggested in the preamble to the statute, by giving to it the position of the House of Lords. But this jurisdiction was, as we shall see, taken away by 25 Henry VIII. c. 19. It is clear that Convocation exercises no jurisdiction at the present day.

(2) The High Court of Delegates.

In the pre-Reformation period there was practically an unlimited right of appeal to the pope in all cases which fell within the jurisdiction of the Ecclesiastical Courts. This right was fettered to a slight degree by the rules made by the pope himself,1 and by the statutes of præmunire, in those cases in which the civil tribunals claimed exclusive jurisdiction. But where it existed the system of appeals and rehearings was, or might be, never ending. “Not only might a matter in dispute be treated over and over again, delegacy superseding delegacy, and appeal being interposed on every detail of proceeding one after another, but even after a definitive decision a question might be reopened and the most solemn decision be reversed on fresh examination. On this system of rehearing there was practically no limit, for, however solemn the sanction by which one pope bound himself and his successors, it was always possible for a new pope to permit the introduction of new evidence or a plea of exceptions. In this way the Roman Court remained a resource for ever open to litigants who were able to pay for its services, and the apostolic see avoided the imputation of claiming finality and infallibility for decisions which were not indisputable.”2

The Statute for the restraint of appeals3 prohibited all appeals to Rome, and provided that certain4 appeals should go from the archdeacon to the bishop, and (within 15 days) from the bishop to the courts of Arches or Audience, and from those courts to the archbishop himself. His decision was final except in cases touching the king. In that case there was an appeal from any of the Ecclesiastical Courts to the upper house of Convocation. This act was superseded by one passed in the following year which provided a new court of appeal for all ecclesiastical causes.5 The court created by this act becomes known as the High Court of Delegates. The act provided as follows:—“For lack of justice at or in any of the courts of the archbishops of this realm, or in any of the king’s dominions, it shall be lawful for the parties grieved to appeal to the King’s Majesty in the King’s court of Chancery; and that upon every such appeal a commission shall be directed under the Great Seal to such persons as shall be named by the King’s Highness his heirs and successors, like as in case of appeal from the Admiral’s court, to hear and definitively determine every such appeal, and the causes concerning the same. And that such judgment as the said commissioners shall make and decree . . . shall be good and effectual, and also definitive.”1 An appeal to the same body was provided from such peculiar jurisdictions as were exempt from episcopal or achiepiscopal control.2

A person desiring to appeal addressed a petition to the crown in Chancery, on which a commission of appeal issued appointing certain commissioners. If any of these commissioners died pending the appeal, if they were equally divided, or if, for any reason, it was desired to increase the strength of the court, a “commission of adjuncts” issued, adding certain persons to the court. It followed that the court was differently constituted for the hearing of each appeal.3

Henry VIII.’s statute declared the judgment of the Delegates to be final. But it was decided by the Elizabethan lawyears that the crown could, like the Pope, issue a commission of Review, to hear the whole case over again.4

The Court was not a court of first instance. It heard appeals from the provincial courts, and from the exempt peculiar jurisdictions. It did not control the court of High Commission, the abolition of which necessarily added to the number of cases heard before it.4

The crown had an absolute discretion as to the persons to be appointed. But, as the lawyers of Doctors' Commons were the only lawyers acquainted with canon or civil law and procedure, certain of them were usually included in the commission. In some of the earlier cases bishops and judges were included. In the 18th century the bishops are rarely included, and are at length entirely excluded.5 It was stated in 1832 that in ordinary cases the delegates were three puisne judges and three civilians, though, in special cases, temporal peers, and other judges might be added.1

The Court was not satisfactory. It was a shifting body. No general rules of procedure could be established. It did not as a rule give reasons for its decisions. Its members were only paid a guinea a day; and consequently it was usually composed of the junior civilians. On them, the judges of the Common Law Courts, appointed as delegates, were obliged to rely for their law.2

In consequence of the dissatisfaction felt at the working of this tribunal the Ecclesiastical Commission of 1832, in a special report, recommended the transfer of its jurisdiction to the Privy Council. This recommendation was carried out by 2, 3 Will. IV. c. 92.3 The jurisdiction is now exercised by the Judicial Committee of the Privy Council created by 3, 4 Will. IV. c. 41.4

(3) The Court of High Commission.

The Court of High Commission was created, as we have seen, under powers given to the crown by the Act of Supremacy.5 The first commission was issued in 1559 to Parker, Grindal, and seventeen others. Their duties were to enforce the Acts of Supremacy and Uniformity, and to deal generally with ecclesiastical offences. They could conduct their enquiries with or without a jury. They could summon persons on suspicion. They could examine any one on oath.6 The later commissions are all formed on the model of the first. But they show a tendency to increase the jurisdiction of the commissioners. They were entrusted with the acts for the protection of the Establishment passed later in the reign. The qualifying clause, "according to the authority and power limited, given, and appointed by any laws or statutes of the realm," which is inserted in the earlier commissions, was omitted in 1596. The authority given to the commissioners was not diminished under James I. and Charles I. In 1613 they were empowered to execute the Star Chamber rules as to the censorship of the press, and to hear complaints of wives against husbands. In the commission of 1625 it was provided that, during the session of Convocation, their powers should be exercised only by the bishops in Convocation. But this clause was dropped in the following reign.1

The Court entertained all important causes of doctrine and ritual. During its existence not many of these causes came before the Court of Delegates. But the causes which it most frequently entertained were proceedings in respect of immorality and

misconduct of the clergy and laity, and proceedings in respect of recusancy and non-conformity. It did not supersede the ordinary Ecclesiastical Courts. It exercised a concurrent jurisdiction.2

The Commissioners could exercise their powers throughout England. But, as a rule, separate commissions were issued for the provinces of York and Canterbury, and sometimes for separate dioceses.3 Their powers were, as we have seen, wide and indefinite; and, except in the commissions of 1611, 1613, 1620, and 1625, their exercise was subject to no appeal.4

A strong court of this nature was necessary to support the Established Church against its Puritan and Catholic enemies.5 It was not at first unpopular. But, as Mr. Prothero points out, "The efficiency of the system . . . and the general results produced, depended mainly on the views and characters of the archbishops and their episcopal colleagues, on whom fell almost all the burden of carrying the commission into effect."1 In the Stuart period, as we have seen, the state was divided into two camps.2 Just as the supporters of the Council, the Admiralty, and the court of Chancery, relying on the prerogative, opposed the common lawyers, who led the parliamentary opposition; so the supporters of the State Church relied upon the court, which exercised the Royal Supremacy, in their efforts against sectaries of all kinds. The Puritans necessarily found themselves in alliance with the common lawyers; and in this manner a religious element was imported into the political and legal controversy, which was destined to prove, for an interval, fatal to the constitution. Though Coke had, in *Caudrey's case,*3 unduly magnified the Royal Supremacy, he found, in his Fourth Institute, many reasons for showing that the Court of High Commission had exceeded its powers. He denied it the right to fine and imprison.4 He commented upon the lengthy provisions of the more recent commissions and the denial of all right to appeal.5 He contended that it should deal only with important cases.6 The common lawyers followed his lead. The action of the court was fettered by writs of prohibition. Persons imprisoned by it were released by writs of habeas corpus.7 It was attacked by Parliament in 1610,8 and necessarily fell with the victory of the Parliamentary party in 1640.9 The same act abolished all the other Ecclesiastical Courts. The court of High Commission was not restored at the Restoration with the other Ecclesiastical Courts.10

(4) The Statutory Courts of the 19th century.

Certain statutes of the last century have provided new and more convenient procedure, and, in some cases, new courts, for the exercise both of criminal and civil jurisdiction.

The procedure of the Ecclesiastical Courts had become so dilatory and expensive that much difficulty had been found in bringing to justice clergy guilty of immoral conduct. The ecclesiastical commissioners reported in 1832 that, "some cases of a flagrant nature, which have occurred of late years, have attracted the attention of the Public to the corrective Discipline of the Church, as administered by the Ecclesiastical Courts, and have at the same time exhibited in a strong light the inconveniences which have attended the application of the ordinary process of the Courts to such

suits; namely, an injurious delay in effecting the desired object of removing Ministers of immoral and scandalous lives from the administration of the sacred offices of the Church; and the large expense incurred in such suits."1

The Church Discipline Act of 18402 was passed to deal with the cases of clerks "who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws."3 It enacted that no criminal suits be instituted otherwise than according to procedure provided by the Act.4

In cases where a clerk is charged with an offence the bishop, may, on the application of a complainant, or of his own motion, issue a commission to five persons to inquire. They must report to the bishop whether there are prima facie grounds for instituting proceedings.5 With the consent of the party accused, the bishop may pronounce sentence without further proceedings.6 If he does not consent, articles are drawn up against the party accused.7 If he admits the truth of the articles the bishop (or his commissary specially appointed for that purpose) may pronounce sentence.8 If not, either the bishop assisted by three assessors may hear the case, or the bishop may send the case to be tried by the court of the Province.9 But the letters of request for this purpose must have been sent before the filing of the articles.10 An appeal is provided to the court of the Province and to the Privy Council.11 In order to avoid the double appeal, most cases were sent by the bishop to the court of the Province in the first instance.1

The provisions of the Act did not apply to persons instituting suits to establish a civil right.2 They did apply to all exempt and peculiar places, except those belonging to bishoprics or archbishoprics.3 Pending the enquiry or trial, the bishop was empowered to inhibit the party accused from continuing to perform the services of the church.4 This act has for most purposes been repealed, in respect of offences committed by clergymen, which come within the provisions of the Clergy Discipline Act of 1892.5

The Act provides that a clergyman convicted of treason, certain felonies and misdemeanours, or adultery, or against whom a bastardy order, or a decree for judicial separation has been made, shall ipso facto forfeit his preferment within twenty-one days.6 It provides that a clergyman may be prosecuted, in the Consistory Court of his diocese, by any of his parishioners, if he is convicted by a temporal court of an act (other than those named above) constituting an ecclesiastical offence, or, if he "is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality, and not being a question of doctrine or ritual."7 The bishop may in all cases disallow the prosecution if he sees fit. The trial is before the bishop's chancellor; but, if either party so requires, questions of fact must be decided by five assessors.8 There is an appeal on any question of law, and, with the leave of the appellate court, on any question of fact, either to the court of the Province or to the Privy Council.9

In 1874 the Public Worship Regulation Act10 gave to the existing Ecclesiastical Courts a new machinery for the trial of offences against the ceremonial law of the

church. An archdeacon, a churchwarden, or any three parishioners of the archdeaconry or parish within which a church or burial ground is situate, may represent to the bishop that unlawful additions have been made in the fabric or ornaments of the church, or that there has been use of unlawful ornaments, or neglect to use prescribed ornaments, or that there has been failure to comply with the rules of the book of Common Prayer, as to the conduct of services.[1] The bishop may, if he pleases, refuse to institute proceedings.[2] If he thinks that proceedings should be taken, he may himself, with the consent of both parties, deal finally with the case.[3] If they do not consent, the case is heard by the judge of the court of the Province.[4] From his decision an appeal lies to the Privy Council.[5]

The working of this act has not been found to be altogether satisfactory. The ecclesiastical commissioners of 1883 reported that it added little to the powers conferred on the Court of the Arches by the Church Discipline Act; and that, in practice, proceedings taken under it were no more convenient than proceedings taken under the earlier act.[6]

The Benefices Act of 1898[7] gave to the bishop in certain cases[8] the power to refuse to institute a person presented to a benefice. An appeal from such refusal lies to the archbishop of the Province, and to a judge of the supreme court, nominated pro hac vice by the Lord Chancellor.[9] The judge decides any question of law, and finds the facts. The archbishop gives judgment as to whether the facts so found renders the presentee unfit for the duties of the benefice.[10] From this decision there is no appeal.[10] The same tribunal is given a jurisdiction in cases where a bishop has superseded and inhibited an incumbent, by reason of negligent performance of his duties. The incumbent can in such cases appeal to this tribunal. The judge decides whether there has been negligence. The archbishop, if negligence is found, decides whether it is good ground for the inhibition.[11]

(iii) The jurisdiction of the Ecclesiastical Courts.

In the 12th century the Ecclesiastical Courts claimed to exercise wide jurisdiction. (1) They claimed criminal jurisdiction in all cases in which a clerk was the accused, a jurisdiction over offences against religion, and a wide corrective jurisdiction over clergy and laity alike "pro salute animæ." A branch of the latter jurisdiction was the claim to enforce all promises made with oath or pledge of faith. (2) They claimed a wide jurisdiction over matrimonial and testamentary causes. Under the former head came all questions of marriage, divorce, and legitimacy; under the latter came grants of probate and administration, and the supervision of the executor and administrator. (3) They claimed exclusive cognisance of all matters which were in their nature ecclesiastical, such as ordination, consecration, celebration of service, the status of ecclesiastical persons, ecclesiastical property such as advowsons, land held in frankalmoigne, and spiritual dues.

These claims were at no time admitted by the state in their entirety. In course of time most of these branches of jurisdiction have been appropriated by the state. All that is practically left at the present day is a certain criminal or corrective jurisdiction over

the clergy, and a certain jurisdiction in respect of some of the matters contained under the third head. The history of this jurisdiction we must now sketch.

(1) Criminal and corrective jurisdiction.

(*a*) *Criminal jurisdiction.*

In the 12th century the Church claimed that all clerks should be exempt from any kind of secular jurisdiction, and, in particular, that "criminous clerks" should be subject to the jurisdiction of the Ecclesiastical Courts alone.[1] In answer to this claim Henry II., in 1164, propounded the scheme contained in the third clause of the Constitutions of Clarendon.[2] He contended that that scheme represented the laws in force in the time of Henry I. According to the clause the clerk is accused before the temporal court. He must there plead his clergy. He will then be sent to the Ecclesiastical Court for trial, and a royal officer will attend the trial. If he is found guilty and degraded the royal officer will bring him back, as a layman, to the temporal court to suffer the layman's punishment. Becket objected to this scheme on three grounds:—(1) A clerk ought not to have been accused before the temporal court; (2) a royal officer ought not to have been present in the Ecclesiastical Court; (3) further punishment by the lay court involved an infringement of the rule that no man ought to be punished twice for the same offence. The first two of these objections were good according to the canon law. As to the third the canon law was not at that date clear; but the principle for which Becket contended was shortly afterwards condemned by Innocent III.[1] The results of Becket's murder were curious. The temporal courts maintained their claim to bring the criminous clerk before them. They abandoned their claim to punish the degraded clerk. This abandonment gave rise to the Privilege or Benefit of Clergy.

Originally the Benefit of Clergy meant that an ordained clerk charged with felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III.'s reign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence.[2] The Ecclesiastical Court then tried the accused by the obsolete process of compurgation.[3] The court could sentence to degradation, imprisonment or whipping. The Benefit of Clergy did not apply to high treason, to breaches of the forest laws, to trespasses or misdemeanours.[4]

In course of time the Benefit of Clergy entirely changed its nature. It became a complicated series of rules exempting certain persons from punishment for certain criminal offences.[1]

(1) The class of persons who could claim it was enlarged, and distinctions were drawn between them. In 1350[2] it was enacted that secular as well as religious clerks should have the privilege. After this statute the privilege became extended to all who could read. In 1705[3] even this requirement was abolished. But traces of the time when the privilege was really a privilege of the clergy were long maintained in the rules that the "bigamus" (*i. e.* the men twice married or married to a widow) and a woman, could not claim it. The first exception lasted till 1547,[4] the second till 1692.[5]

In 1487[6] it was enacted that all persons, except those actually in orders, should, if convicted of a clergyable felony, be branded and disabled from claiming the privilege a second time. In 1547[7] a peer, even if he could not read, was given the same privilege as a person actually in orders.

(2) Changes were made in the method and consequences of successfully pleading clergy.

It had been found better for the prisoner not to plead his clergy at once, but to plead to the indictment, and take his trial, as he could then challenge the jury, and there was always a chance that he might be acquitted. If he was convicted he could then plead his clergy.[8]

In 1576[9] the necessity for proving innocence in the Ecclesiastical Court by compurgation was abolished. But the judges could imprison persons (not being peers or clerks in orders), who had taken the Benefit of Clergy, for any term not exceeding a year. In 1717[1] it was enacted that persons convicted of clergyable larcenies (not being peers or clerks in orders) should be transported for seven years.

(3) The number of offences not clergyable were gradually increased and, when new offences were created, they were generally stated to be without Benefit of Clergy.

We have seen that at common law, high treason, breaches of the forest laws, and misdemeanours were not clergyable. On the other hand all felonies except insidiatio viarum, and depopulatio agrorum were clergyable.[2] By successive statutes the following offences were deprived of the benefit of clergy:—Petty treason, murder in churches or highways, and later all murders, certain kinds of robbery and arson (except in the case of clerks in orders), piracy, burglary and housebreaking if any one was in the house and put in fear, horsestealing, rape, abduction with intent to marry, stealing clothes off the racks, or stealing the king's stores.[3]

In 1827[4] the Benefit of Clergy was abolished.

(*b*) *Corrective jurisdiction.*

The Ecclesiastical Courts exercised a wide and vague control over the religious beliefs and the morals of clergy and laity alike. The state regarded itself as under a duty to enforce obedience to the laws of God. The Ecclesiastical Courts were the instruments through which the state acted. The result was "a system of moral government emanating from the episcopal order, and forming that part of the pastoral care, which is fully expressed in the Consecration Service, when the bishop promises that such as be unquiet, disobedient, and criminous within his diocese, he will correct and punish, according to such authority as he has by God's word, and as to him shall be committed by the ordinance of this realm."[5]

We may divide the extensive jurisdiction thus exercised by the Ecclesiastical Courts into two heads:—(α) offences against religion, (β) offences against morals.

(α) Offences against religion.

Of such offences the most important is heresy. It was regarded as a species of high treason against the church. "A man who did not begin by admitting the king's right to obedience and loyalty, put himself out of the pale of the law. A man who did not believe in Christ or God put himself out of the pale of human society; and a man who on important subjects thought differently from the church, was on the high road to disbelief in Christ and in God, for belief in each depended ultimately upon belief in the testimony of the church."[1] The infrequency of heresy, down to the time of Wicklif and the Lollards, makes it somewhat uncertain in what manner the Ecclesiastical Courts could deal with it. The case of the deacon, who was burnt at Oxford because he apostatized for the love of a Jewess, is the only undoubted case mentioned in the older books.[2] But heresy was known on the continent, and there is no doubt that the canon law distinctly laid it down that the penalty was death by burning.[3] It is to this rule of the canon law that Lyndwood refers as authority for the proposition the heretics must be burnt.[4] The accounts we have of the story of the deacon and the Jewess are too obscure to make it an authority for any distinct legal proposition. But the case of Sawtre (1400) is a clear case in which the rule of the canon law was applied. He was convicted of heresy before the bishop of Norwich and recanted his heresy. He fell again into heresy, and was condemned by the archbishop and his provincial council, as a relapsed heretic. On this conviction the king issued a writ de hæretico comburendo.[1]

This case clearly shows that the common law recognised the rule of the canon law, and that therefore such a writ lay at common law. It was not till a fortnight after this writ was issued that the act 2 Henry IV. c. 15 was passed with a view to strengthen the hands of the law in dealing with heresy. That act provides that persons "defamed or evidently suspected" of heresy shall be detained in the bishop's prison till they abjure. If they decline to abjure, or relapse, they are to be burnt. By a later act of 1414[2] all officials "having governance of people" were directed to take an oath to use their best endeavours to repress heresy. They were to assist the Ecclesiastical Courts whenever required. The justices of assize and the justices in quarter sessions were to receive indictments of heresy, and to deliver over the persons indicted to be tried by the Ecclesiastical Courts.

The act thus gave the clergy power to arrest and imprison by their own authority, and to requisition the aid of the civil power in so doing.[3]

Henry VIII.'s legislation necessitated some changes in the law relating to heresy. By an act of 1533[4] it was declared that speaking against the authority of the pope, or against spiritual laws repugnant to the laws of the realm, should not be heresy. The act of 2 Henry IV. c. 15 was repealed, and the bishops were thereby deprived of the power to arrest and imprison on suspicion. The tourn and the leet, as well as the justices of assize and the quarter sessions, were given power to receive indictments of heresy. Thus an accusation for heresy must, as a rule, begin by an indictment before some recognised temporal court. The result was a great cessation in prosecutions for heresy.[5] The act of the Six Articles[6] (1539) made the holding of certain opinions felony; and it was provided that commissions should issue to the bishop and other persons to inquire into these offences four times a year.

In Edward VI.'s reign all the previous legislation touching heresy was repealed. The common law was restored.1 But the common law was the law settled by Sawtre's case.2 The result was curious. Persons might be burnt for heresy in a Protestant country under the authority of the papal canon law.

Elizabeth's Act of Supremacy authorised the establishment of the court of High Commission for the trial of ecclesiastical offences.3 But it considerably limited their powers to declare opinions heretical.4 If, however, a man was convicted of heresy by the court he might be burnt according to the rule of the common law. Heretics were burnt in 1575 and 1612. In the latter case Coke's opinion was against the legality of the issue of the writ de hæretico comburendo, but four judges were against him.5 In 16776 "all punishment of death in pursuance of any ecclesiastical censures" was abolished. But the act contained a proviso that nothing in it shall "take away or abridge the jurisdiction of Protestant archbishops or bishops, or any other judges of any Ecclesiastical Courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions, but that they may proceed to punish the same according to his Majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death." Many of these offences can now be punished in the temporal courts: but by virtue of this saving it is probably theoretically possible that persons guilty of such offences may be excommunicated, and imprisoned for six months by an Ecclesiastical Court.

(β) Offences against morals.

The Ecclesiastical Courts exercised a wide disciplinary control over the moral life of the members of the church. The criminal precedents published by Archdeacon Hale in 1847 illustrate the nature of the jurisdiction. They consist of a collection of extracts from the Act Books of six Ecclesiastical Courts between the years 1475 and 1640. The offences dealt with are varied and numerous. They comprise, adultery, procuration, incontinency, incest, defamation, sorcery, witchcraft, behaviour in church, neglect to attend church, swearing, profaning the Sabbath, blasphemy, drunkenness, haunting taverns, heretical opinions, profaning the church, usury, ploughing up the church path.1 The methods by which the Ecclesiastical Courts proceeded were well calculated to produce evidence of the commission of such offences. They might proceed:—(1) By inquisition. In this case the judge was the accuser. He might proceed upon his own personal knowledge or on common fame. As a rule the apparitors or other officers supplied the information. They used their powers in many cases in the most corrupt manner. Chaucer probably represented the popular view when he makes the Friar say of the "sompnour"—

> "A sompnour is a renner up and doun
> With maundementz for fornicacioun,
> And is y-bete at every tounes ende."

Or (2) they might proceed on the accusation of some individual who was said to "promote the office of judge." Or (3) they might proceed by Denunciation. In that case the person who gave the information was not the accuser, nor subject to the conditions attaching to this position.1 This system was, as Stephen says, "in name as

well as in fact an inquisition, differing from the Spanish Inquisition in the circumstances that it did not . . . employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind."2 We can see, from the number of cases tried, that up to 1640 the system was in full vigour. In the archdeacon of London's court, between Nov. 27, 1638, and Nov. 28, 1640, there were 30 sittings and 2500 causes entered. If each person attended on two or three court days the number of persons prosecuted would be less than this. But the records show that 1800 people were before the court in that time, "three-fourths of whom, it may be calculated, were prosecuted for tippling during Divine Service, breaking the Sabbath, and non-observance of Saints days."3

It is not difficult to see why the Parliament in 1640 abolished the Ecclesiastical Courts. A system which enabled the officers of inferior courts to enquire into the most private affairs of life upon any information was already out of date.

The ordinary Ecclesiastical Courts and their jurisdiction were restored in 1661;4 and there is no legal reason why at the present day they should not try cases of adultery or fornication. But between the Restoration and the present day their jurisdiction has been much curtailed, and has finally altered its shape, not only because men's ideas upon methods of moral government have changed, but also because the state has interfered to punish offences which were once left to the Ecclesiastical Courts. In 1533 unnatural offences, and in 1541 witchcraft were made felonies.1 In 1603 bigamy was made felony.2 In 1823 jurisdiction in cases of perjury was taken away from the Ecclesiastical Courts.3 In 18554 suits for defamation, and in 18605 suits against laymen for brawling in church were similarly removed. It was a principle laid down by Coke, as an established maxim in law, "that where the common or statute law giveth remedy in foro seculari (whether the matter be temporal or spiritual), the conusance of that cause belongeth to the king's temporal courts only; unless the jurisdiction of the spiritual courts be saved, or allowed by the same statute, to proceed according to the ecclesiastical laws."6 The result is that while the jurisdiction of the Ecclesiastical Courts over certain kinds of immorality still in theory remains, in practice these courts are only called upon to act in the case of the clergy. In this respect, as we have seen, their jurisdiction has been improved.7 They are no longer "courts of law having authority over the sins of all the subjects of the realm." They are "courts for enforcing propriety of conduct upon the members of a particular profession."8

The Ecclesiastical Courts at one time claimed a species of corrective jurisdiction in all cases in which there had been fidei læsio. This, if conceded, would have given them an extensive jurisdiction over contract. We have seen that in the 14th century the temporal courts stopped the exercise of this species of jurisdiction.9

(2) Matrimonial and Testamentary causes.

(*a*) Matrimonial.

The Ecclesiastical Courts had, certainly from the 12th century, undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity

of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage were decided by the Ecclesiastical Courts administering the canon law.1 The common form of the writ of prohibition always alleged that the matter over which jurisdiction had been assumed was neither matrimonial nor testamentary.2

The temporal courts had no doctrine of marriage. But questions as to the validity of marriage might come incidentally before them. Was a woman entitled to dower? Is the child of a marriage entitled to inherit English land? What if the parties, ignorant of any impediment, marry in good faith and have issue? What if the jurors in an assize find facts from which a marriage can be presumed? In answering some of these questions the temporal courts often laid down rules about marriage which were at variance with the rules of the canon law. The canon law laid it down clearly that mere consent—without any further ceremony, and without cohabitation—sufficed. The temporal courts laid more stress upon some ceremony, or some notorious act. The death-bed marriage was not regarded as sufficient to establish a claim to dower. A child legitimated per subsequens matrimonium could not inherit English land. If the parties were ignorant of the impediment, and later whether or not they were ignorant, the children were legitimate, if born before divorce, or, later, if their parents were not divorced. For the purposes of an assize a de facto marriage would be recognised.3 It was probably a consideration of these rules of the temporal courts, adjudicating on marriage, or rather on the reputation of marriage, for very special purposes, which led the House of Lords in 18434 to assert, in defiance of the canon law of the Middle Ages, that the presence of an ordained clergyman was necessary to constitute a valid marriage.

Over the law of divorce the Ecclesiastical Courts had complete control till 1857. This jurisdiction comprised suits for the restitution of conjugal rights, suits for nullity, either when the marriage is ab initio void, or when it is voidable, suits for a divorce a mensa et thoro by reason of adultery or cruelty. The Ecclesiastical Courts could pronounce a marriage void ab initio; and in that case the parties were said to be divorced a vinculo matrimonii. But they had no power to pronounce a divorce a vinculo if there had been a valid marriage.1

For a short time after the Reformation the Ecclesiastical Courts seemed to have considered that they had this power.2 But this opinion was overruled in 1602.3 A valid marriage was therefore indissoluble, except with the aid of the legislature. At the end of the 17th century a practice sprang up of procuring divorces by private act of Parliament.4 The bills were introduced into the House of Lords, who strictly examined the circumstances of the case. As conditions precedent it was necessary to have obtained a decree a mensa et thoro from the Ecclesiastical Court, and to have recovered damages against the adulterer in an action at common law for criminal conversation.

The anomaly of this state of the law was striking. It practically made divorce the privilege of the very rich. This was forcibly expressed by Maule, J., in his address to a prisoner who had been convicted of bigamy, after his wife had committed adultery, and deserted him. “Prisoner at the bar,” he said, “you have been convicted of the offence of bigamy, that is to say, of marrying a woman while you have a wife still

alive, though it is true she has deserted you, and is still living in adultery with another man. You have, therefore, committed a crime against the laws of your country, and you have also acted under a very serious misapprehension of the course which you ought to have pursued. You should have gone to the Ecclesiastical Court and there obtained against your wife a decree a mensa et thoro. You should then have brought an action in the Courts of Common Law and recovered, as no doubt you would have recovered, damages against your wife's paramour. Armed with these decrees you should have approached the legislature, and obtained an act of Parliament, which would have rendered you free, and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. It is quite true that these proceedings would have cost you many hundreds of pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the court upon you therefore is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the assizes."

In 1857 all jurisdiction over divorce and over "all causes and suits and matters matrimonial" were taken from the Ecclesiastical Courts and vested in a court called the Divorce court.[1] The Lord Chancellor, the chief justices, and the senior puisne judges of the Courts of Common Law, and the judge of the court of Probate were made the judges of the court. The judge of the court of Probate was made the judge ordinary of the court.[2] In some cases he could sit alone, in others he must sit with one of the other judges of the court. When he sat alone there was an appeal to the full court.[3] An appeal to the House of Lords from decrees of dissolution or nullity of marriage was provided in 1868.[4]

In this court was vested the jurisdiction and powers of the Ecclesiastical Courts, the powers of the legislature to grant an absolute divorce, the powers of the Common Law Courts to award damages in an action for criminal conversation.[5] The latter action was abolished.[6] In addition a wife deserted by her husband was enabled to apply to the magistrate for a protection order.[7]

The act has been in the opinion of the person most qualified to judge a complete success. Sir Francis Jeune writes,[1] "Probably few measures have been conceived with such consummate skill and knowledge, and few conducted through Parliament with such dexterity and determination. The leading opponent of the measure was Mr. Gladstone, backed by the zeal of the High Church party, and inspired by his own matchless subtlety and resource. But the contest proved to be unequal. After many debates, in which every line, almost every word, of the measure was hotly contested . . . it emerged substantially as it had been introduced. Not the least part of the merit and success of the act of 1857 is due to the skill which, while effecting a great social change, did so with the smallest possible amount of innovation."

(*b*) Testamentary.

The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and administrator. All these branches of their jurisdiction could be exercised only over

personal estate; and this abandonment of jurisdiction to the Ecclesiastical Courts has tended, more than any other single cause, to accentuate the difference between real and personal property. Even when the Ecclesiastical Courts had ceased to exercise some parts of this jurisdiction, the law which they had created was exercised by their successors.

We shall consider (1) the origin and extent of the jurisdiction of the Ecclesiastical Courts, and (2) the decay of this jurisdiction.

(1) *The origin and extent of the jurisdiction of the Ecclesiastical Courts.*

(*a*) Jurisdiction over grants of Probate.

The origin of this jurisdiction is difficult to discover. Neither the civil nor the canon law sanctioned it.2 We hear nothing of it in England in the 12th century; and Selden says "I could never see an express probate in any particular case older than about Henry III."3 Testators rather sought the protection of the king or of some powerful individual; and the effect might be somewhat similar to that of a grant of probate in later law.1

But as early as the reign of Henry II. it is probable that jurisdiction in cases of disputed wills belonged to the Ecclesiastical Courts. Glanvil says definitely that this was the law in his day;2 and amid all the disputes of Henry II.'s reign, as to the limits of the jurisdiction of the Ecclesiastical Courts, no claim to exercise this species of jurisdiction was put forward by the king's courts.3 Once admit that the Ecclesiastical Courts have jurisdiction to decide cases of disputed wills, and a jurisdiction to grant probate will follow. At the same time old ideas die hard. Some lords of manors successfully asserted the right to have all the wills of their tenants proved in their courts. Possibly in some cases this is a survival from the days when, probate in the technical sense being unknown, the protection of a lord was sought for a will;4 though in other cases it may, as Professor Maitland suggests, have originated in later grants from the Pope.5

In a constitution of Archbishop Stratford of 1380, the jurisdiction is said to belong to the Church, "consensu regis et magnatum regis."6 Lyndwood says "de consuetudine tamen hæc approbatio in Anglia pertinent ad judices ecclesiasticos."7 Selden, too, considers that it rests upon immemorial custom; though he conjectures that it may have been handed over to the Church by a Parliament of John's reign.8 We shall see that this is more probably true of the jurisdiction over grants of the administration to one who has died intestate. But the fact that about this time the Ecclesiastical Courts got jurisdiction over grants of administration, over legacies, and, in some cases, over debts due by or to a deceased testator, may have been decisive in favour of this closely allied branch of the same jurisdiction.

(*b*) Jurisdiction over distribution of intestates' goods and grants of Administration.

Probably jurisdiction over the distribution of intestates' goods belonged originally to the temporal courts.1

In Saxon times the kindred who inherit would seem to have been the persons who superintended the distribution of intestates' goods.2 This is the arrangement which we find in Glanvil; and neither Walter de Map nor John of Salisbury mention this branch of the jurisdiction of the Ecclesiastical Courts, though they have much to say respecting them.3

A canon made at a council held at St. Paul's before Othobon4 (1268) speaks of "a provision made as to the goods of intestates which is said to have emanated from the prelates of the realm with the consent of the king and barons." In the opinion of Selden5 and of Professor Maitland6 this refers to § 27 of Magna Carta, which provides that the goods of an intestate shall be distributed by the hands of his near relations and friends "per visum ecclesiæ salvis unicuique debitis."7 This was the rule known to Bracton. "Ad ecclesiam et ad amicos pertinet executio bonorum."8 A claim to superintend the distribution made by the kinsfolk will without much difficulty become a claim to administer. And the claim was here peculiarly strong. The man who dies intestate will probably have died unconfessed.9 There could be no sure and certain hope as to the state of such a person. The Church should obviously see that the property, of which he might have disposed by will, is distributed for the good of his soul. Distribution by the kinsfolk "pro anima ejus" of Henry I.'s Charter; distribution "per visum ecclesiæ" of Magna Carta; actual administration by the Ordinary, perhaps mark the stages by which the Ecclesiastical Courts acquired jurisdiction. Up till Edward III.'s reign the court actually administered and made the distribution among those relatives of the deceased who were entitled. But its conduct was so negligent and even fraudulent that the legislature interfered.1 The court was obliged to delegate its powers to administrators, whom it was obliged to appoint from among the relatives of the deceased.2 Instead of distributing the estate the Ecclesiastical Court merely grants administration. These administrators were by the statute assimilated in all respects to executors. Like executors they are the personal representatives of the deceased.

(*c*) Jurisdiction over the conduct of the executor and administrator.

In the 13th century the Ecclesiastical Courts obtained jurisdiction over legacies, and in certain cases over debts due to or by a testator.

According to the civil law the bishop had a concurrent jurisdiction with the lay courts over legacies left in pios usus.3 There is a vague provision made by some council of Mentz which seems to give the bishop an indefinite right of interference.4 But in other countries this does not appear to have given to the Ecclesiastical Courts any jurisdiction beyond that over legacies left in pios usus. In Glanvil's time legacies could be recovered in the king's court.1 Selden gives specimens of writs of the time of Henry III. ordering executors to fulfil the wills of their testators.2 But it is possible that the royal courts assumed jurisdiction in some of these cases for special reasons. It is probable that, even in Henry II.'s reign, the Ecclesiastical Courts had a jurisdiction concurrent with that of the temporal courts. No writ of prohibition issued if a suit for legacies was begun in the Ecclesiastical Court. Selden said that he had seen none on the plea rolls of either Richard I., John, or Henry III.3 Both Bracton and Fleta state

definitely that no prohibition lies in such a case.4 In 1230 it was decided that a legatee could not recover in the king's court, but must sue in the Ecclesiastical Court.5

When the Ordinary was obliged by law to delegate its power over the goods of an intestate to an administrator, the Ecclesiastical Court naturally assumed jurisdiction over the due distribution of the estate by the administrator.

The Ecclesiastical Courts never possessed more than a limited jurisdiction over debts due to or by a testator; and that jurisdiction was effectively exercised only for a short time.6

When Glanvil wrote, the heir is the person liable to carry out the will and to pay the debts.7 In Bracton's time the heir must pay the debts to the extent of the chattels which he has received from the deceased, and he can sue the deceased's creditors.8 In the time both of Glanvil and Bracton the heir sues and is sued in the king's court. In the time of Bracton, however, the executor can sue on debts acknowledged in the testator's lifetime, because such debts are substantially the testator's goods. He can be sued if he has been directed in the will to pay the debts, because such direction amounts to something very like a legacy.1 Britton and Fleta limit the liability of the heir to cases where he has been specially bound to pay by the deed of his ancestor, or where the debt is owed to the king.2 It is clear that the heir is ceasing to be the person primarily liable to pay the debts of the deceased.

When the executor sues, or is sued, the proceedings take place in the Ecclesiastical Courts. The Ecclesiastical Courts naturally attempted to extend their jurisdiction to cover all actions by or against executors.3 But, in the late 13th and in the 14th and 15th centuries, the king's court refused to allow this extension. They gave rights of action to or against executors (and later), to or against administrators.4 The Ecclesiastical Courts thus lost jurisdiction over actions of this kind.

Indirectly, however, the position which the executor or administrator came to occupy in the king's court assisted the jurisdiction of the Ecclesiastical Courts. He gradually takes the place which the heir had occupied in the 12th century.5 He becomes primarily, and, at length, with one exception,6 solely liable to the creditors of the deceased. He becomes in fact the deceased's personal representative.

This new position taken by the executor or the administrator tended to develop the jurisdiction of the Ecclesiastical Courts over the administration of the estate. The executor or administrator was amenable to them; and he was now the personal representative. Thus we find that the Ecclesiastical Courts laid down rules intended to secure the creditors, the legatees, or those entitled on intestacy. The executor or administrator was compelled to make an inventory.7 He must account at the close of the administration;8 and in some cases he must give a bond to secure the production of the account.1 He was given remedies against those who detained the property of the deceased.2 Penalties were denounced against him if he appropriated the deceased's property.3 Like the tutor suspectus of Roman law he could be removed by the court if good ground of suspicion were shown.4

This jurisdiction of the Ecclesiastical Courts was clearly the consequence of the jurisdiction over probate, legacies, and the administration of intestates' effects which they had been allowed to assume in the 13th century. That they should have gained this jurisdiction about this time is not perhaps strange. As Selden points out,5 the clergy played a part—perhaps the most important part—in the events which led to the passing of Magna Carta. There were English precedents for the jurisdiction of the Ecclesiastical Courts—though not for their exclusive jurisdiction. The only serious rival to the Ecclesiastical Courts was the king's court. The judges of that court were generally clerics. They acted, it is true, loyally as temporal judges.6 But they cannot have been altogether opposed to "arranging a concordat" with the Ecclesiastical Courts, which eventually gave to the Ecclesiastical Courts in England a jurisdiction over matters testamentary, larger than that possessed by any other Ecclesiastical Courts in Europe. For, as Lyndwood says, this jurisdiction "de consuetudine Angliæ pertinet ad judices ecclesiasticos . . . secus tamen est de jure communi."7

(2) *The decay of the jurisdiction of the Ecclesiastical Courts.*

We have seen that, in the 14th century, the executor and the administrator had been granted rights of action, and had been rendered liable to be sued in the king's court for the debts due to and by the deceased. But the remedies given by the king's courts were by no means complete, till, at the end of the 16th and beginning of the 17th century, it was definitely decided, that executors and administrators could sue and be sued by the action of assumpsit.1 The extension of what was in its origin a quasi delictual action to the representative was no doubt caused by the fact that he would otherwise have had recourse to the court of Equity.2 This move on the part of the Common Law Courts made a recourse to the court of Equity unnecessary in this particular class of case. But, it was the extension of the equitable jurisdiction in other directions, which finally deprived the Ecclesiastical Courts of all effective jurisdiction, except that over probate and grants of administration. This extension was necessitated by the jealousy felt by the Common Law Courts for any rival jurisdiction. The jurisdiction of the Ecclesiastical Courts was crippled; and, as the court of Equity had succeeded in defeating the attempts made by the Common Law Courts to treat it,3 as they had treated the court of Admiralty,4 and the Ecclesiastical Courts, it was able to offer more complete and better remedies.

The Common Law Courts had made it almost impossible for the Ecclesiastical Courts to act at all. They would not allow the truth of the inventory to be enquired into.5 They would not allow the creditors to examine into the truth of the executor's accounts because he had a remedy at common law.6 They issued writs of prohibition against all who sued upon the bonds taken to secure the production of a proper account.7 We are not surprised, therefore, to find that applications were made at the end of the 15th century to the Chancellor in cases which involved the taking of accounts.8 The Chancellor could also assist the plaintiff by enforcing discovery against the executor.9 The extension of the doctrine of trusts enabled the court to control the personal representative in the interest of all who claimed under a will or an intestacy, whether they were creditors or legatees.1 It was therefore in the court of Chancery, and not in the Ecclesiastical Courts, that the rules relating to the powers, rights and duties of the personal representative have grown up. The court followed the

rules of the Ecclesiastical Courts and of the Common Law Courts respectively when they were applicable.[2] But it was the procedure of the court of Chancery which made it possible to distinctly conceive the complicated equities which arise in the administration of an estate. It was the rules evolved by the court which provided for their adjustment.

The statute of Distributions, it is true, attempted to strengthen the jurisdiction of the Ecclesiastical Courts with a view to secure the proper distribution of the effects of an intestate. It enabled the Ecclesiastical Courts to call administrators to account, and gave the judge power to take bonds for this purpose.[3] But the superior procedure of the court of Chancery prevailed.[4] The Ecclesiastical Courts in practice retained jurisdiction only over grants of probate and administration. When, in 1857, their jurisdiction in matters testamentary was taken away, it was provided that the Court of Probate then established should have no jurisdiction over legacies, or over suits for the distribution of residues.[5]

The Act of 1857 established a court of Probate, presided over by a single judge, to whom was given the rank and precedence of the puisne judges of the superior courts.[6] It was provided that he should be the same person as the judge of the court of Admiralty.[7] He was given the jurisdiction to make grants of probate and administration formerly exercised by the Ecclesiastical Courts.[1] An appeal from his decision lay to the House of Lords.[2]

(3) Jurisdiction over matters of exclusively ecclesiastical cognisance.

The Ecclesiastical Courts still have jurisdiction over many matters of exclusively ecclesiastical cognisance, such as questions of doctrine and ritual, ordination, consecration, celebration of divine service, disputed application for faculties.[3] They formerly had jurisdiction over many questions concerning ecclesiastical property such as tithes, church dues, dilapidations. But recent statutes have much curtailed their jurisdiction over these matters.[4] Over one species of ecclesiastical property the temporal courts have always kept a firm hand. From Henry II.'s day the advowson has been regarded as real property, and subject to the jurisdiction of the temporal courts.[5] It would appear from the Constitutions of Clarendon that Henry was at that time prepared to allow the Ecclesiastical Courts jurisdiction over property held in frankalmoigne.[6] But in the 13th century this jurisdiction was denied to them. All questions relating to land, other than consecrated soil, became the subjects of temporal jurisdiction, and subject to rules of temporal law.[7] The barons at the council of Merton refused to change these rules as to legitimacy in order to bring them into harmony with the law of the church. Up to the 17th century a man might, if his parents had subsequently married, be legitimate for some purposes, without being capable of inheriting English land.[8]

The process by which the Ecclesiastical Courts enforced obedience to their decrees was excommunication. It was to the spiritual courts what outlawry was to the temporal courts. If the excommunicate did not submit within 40 days, the Ecclesiastical Court signified this to the crown, and thereon a writ de excommunicato capiendo[1] issued to the sheriff. He took the offender and kept him in prison till he

submitted. When he submitted the bishop signified this, and a writ de excommunicato deliberando issued.

The temporal consequences of excommunication were serious. The excommunicate cannot do any act which is required to be done by a probus et legalis homo. “He cannot serve upon juries, cannot be a witness in any court, and, which is worst of all, cannot bring an action either real or personal, to recover lands or money due to him.”[2] An act of Elizabeth’s reign improved the procedure on the writ de excommunicato capiendo.[3] In 1813 it ceased to exist as part of the process of the Ecclesiastical Court to enforce appearance, and as a punishment for contempt. For it was substituted the writ de contumace capiendo.[4] The rules applying to the older writ were made applicable to the new. Excommunication is still a punishment for offences of ecclesiastical cognisance; and, on a definitive sentence for such an offence, the writ de excommunicato capiendo can still issue; but it is provided that a person pronounced excommunicate shall not incur any civil penalty or incapacity, except such imprisonment (not exceeding six months) as the court pronouncing the excommunication may direct.[5]

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30.

THE HISTORY OF THE ADMIRALTY JURISDICTION[1]

By Thomas Lambert Mears[2]

THE Admiralty Court had its origin in the authority of the Admiral, of whom the judge was the deputy.

The title of admiral,[3] to indicate the *custos maris*[4] of earlier times—that is, the officer exercising the jurisdiction of the Crown in respect of the command and charge of the sea, either during a particular expedition or over a particular district—was not used in England as an official description before the year 1286,[1] and the first patent of Admiral of England conferred upon a subject would appear to date from 1386.[2] The command of the English seas was then divided, as had previously been the case with the *custodes maris,* between several admirals, with limits to the north, south or west from the mouth of the Thames;[3] but owing to the necessity for the defence of the coast, especially of the county of Kent, which was particularly liable to invasion, and the importance of commanding the eastern entrance of the English Channel, special privileges, liberties and franchises were from early times bestowed on the so-called Cinque Ports, Dover, Hastings, Romney, Hythe and Sandwich, to which the two ancient towns of Winchelsea and Rye were added in the time of Richard I.[4] In 1294 Gervoise Alard, of Winchelsea, was Capitaneus and Admirallus of the fleet of the Cinque Ports, and of all other ports from Dover to Cornwall.[1] It is said that "the office of Admiral of the Cinque Ports is more ancient than the office of Lord High Admiral," and that he had "all the authorities, rights, and royalties belonging to an admiral annexed to his office."[2] The Court of Admiralty of the Cinque Ports, locally situated at Dover,[3] still exists, as it was not included in the sweeping changes effected by the Municipal Reform Act.

The authority of a Lord High Admiral depended upon his commission.[4] He was sometimes instituted for life and sometimes during pleasure,[5] and it would follow from his position in command of the fleet[1] that his jurisdiction was originally of a disciplinary and administrative character, limited to the crews of the vessels under his direct orders, offenders being brought before him to "undergo and receive what the law and custom of the sea wills and requires";[2] whilst commissioners were appointed to try offences committed by others on board the ships of the fleet; but it is alleged that, before the time of Henry I.,[3] in the case of indictments for felony, the admiral or his lieutenant sent a capias to the marshal of the court, or to the sheriff, to take the offender, and a procedure is indicated similar to that described by Bracton[4] as applicable to cases of homicide where the accused person has taken flight. It is further stated[5] that in the same reign (Henry I.) the admirals[6] of the north and west were summoned to Ipswich, and ordinances were made, with the concurrence of the temporal lords, respecting the *criminal* jurisdiction to be exercised by the commanders of the fleets within the seas belonging to the Kings of England.[1]

The perquisites to which the admiral was entitled, in addition to his pay, were so numerous as to require separate investigation, and "a suit in the Admiralty was originally an inquisition of office for ascertaining and securing to the Lord High Admiral such part of his revenue as consisted of droits,"[1] the suit being analogous to the inquisition of office concerning the droits of the Crown, which, being part of the King's casual revenue, was restricted to the Court of Exchequer.[2] The droits or perquisites formerly attaching to the office of Lord High Admiral, as enumerated in their later patents,[3] consisted of flotsam, jetsam, ligan,[4] treasure, deodands,[1] derelicts found within the admiral's jurisdiction, all goods picked up at sea, all fines, forfeitures, ransoms, recognizances and pecuniary punishments, all sturgeons, whales, porpoises, dolphins, and grampuses, and all such large fishes, all ships and goods of the enemy coming into any creek, road, or port by stress of weather, mistake, or ignorance of the war, all ships seized at sea, salvage, together with a share of prizes.[2]

Some writers assert that the starting point of the admiral's jurisdiction in *civil* suits dates from an ordinance of Edward I., to the effect that "any contract made between merchant and merchant, or merchant or mariner beyond the sea, or within the flood mark, shall be tried before the admiral and nowhere else";[3] but half a century more was spent in efforts by reference to arbitration, and by treaty, to meet the difficulties which arose with foreign sovereigns over cases of alleged piracy and spoil, and it was not until the battle of Sluys, in 1340, gave Edward III. temporary maritime supremacy, that he was in a position to constitute an independent Court of Admiralty with power to deal with causes for which, in the case of a plaintiff foreigner, the Courts of common law afforded no redress.[1]

The result was that the Admiralty Court acquired jurisdiction in piracy, wreck, capture of royal fish, and obstructions to rivers; all matters previously dealt with by the chancellor, to whom petitions to the King in council were referred, and who, with a view to certifying the King thereon, would either dispose of the whole cause himself, as in the case of piracy, which was deemed specially within his purview,[2] or direct an issue, for example, as to piracy or no piracy, or as to the ownership of property and ships spoiled, to the King's Bench, or to commissioners of oyer and terminer with ordinary juries or merchants and mariners, according as the commissions directed the trial to be *secundum legem et consuetudinem regni angliæ,* or *secundum legem mercatoriam* or *maritimam.*

In the case of piracy, of which suits now became frequent in the Court of Admiralty, the criminal aspect was disregarded, the proceedings being for restitution,[3] and no preliminary conviction was required, as was the case where the Lord High Admiral proceeded *pro interesse suo,* upon his royal grant of *bona piratarum.*[1]

In the bundle of documents known as the *Fasciculus de superioritate maris*[2] is one, dated 12 Edw. III., from which it would appear that the King held a consultation with three commissioners as to what laws and ordinances should be observed by his Courts in maritime matters.

The law of the sea, to which the attention of Edward III. was now directed, consisted of those unwritten usages of seafaring men, combined with lingering memories of the

so-called law of Rhodes, filtrated through the law of Rome,[3] which, in the course of centuries, by the agency of the Consular Courts of the Mediterranean, had crystallised into "customs of the sea."

The growth of this law, or usages of the ports, was favoured by its recognition from early times as distinct from the law of the land, and, on the downfall of the Western Empire, the so-called barbarians who settled in Gaul, Spain, Africa, and Italy, did not interfere with the existing Roman law, but the legislation took the peculiar turn of becoming personal instead of territorial—that is, each individual, in matters not provided for by the laws of the conquerors, was judged according to the laws and customs of the nation to which he belonged.[1] In this way the municipal institutions which had been fostered by the Romans themselves preserved their vitality, and tended to strengthen the force of the local customs, so that they even overrode the law in matters in which they were deemed exclusive; but as time went on difficulty seems to have been experienced in keeping up these cherished customs by oral tradition, so that about the eleventh century a general tendency exhibited itself to reduce them to writing.[1]

That Courts of the sea followed a law distinct from that of the land is recognised in the Assises of Jerusalem, which date from the reign of Godfrey de Bouillon, the contemporary of Henry I. of England.[2] These chapters on maritime law embody the customs of the sea of the Levant, and were drawn up for the benefit of the immigrant Frankish people who followed in the wake of the first Crusade, and established themselves in Syria at the beginning of the twelfth century. The Courts of the sea were presided over by burghers of the same nationality as the litigants. They followed a different procedure to that of the Courts of the land, and they adjudicated in civil disputes on maritime matters[3] without regard to the usual mode of proof by wager of battle, which was unknown in the Levant. Where the plaintiff's were merchants suing other merchants not possessing (like the Genoese, Venetians, or Pisans) the privilege of special Courts of the sea of their own nationality, they were required to sue in the Court of the King, that is, in the "Court of the chain," which took cognizance of maritime matters and was in the nature of an instance Court of Admiralty with a procedure of its own.

The English municipal institution known as the borough lent its influence to the maintenance of the traditions of a general law in matters of international commerce and navigation. At Ipswich, which was an important maritime borough in the time of Edward the Confessor, a Court sat daily to administer the law merchant between strangers, and between burgesses and strangers, and from tide to tide to administer maritime law to passing mariners. The Domesday of Ipswich is the earliest extant record we posses of any borough Court, with elective officers sitting regularly and administering a customary law of the sea.[1]

Concurrently with this borough system, which in England transformed the personal union known as the guild into a local association, the communal system was growing up on the other side of the channel, and increased in importance in the western provinces of France after they became subject to the Kings of England. In particular King John, as Duke of Acquitaine, granted a charter to Oleron,[2] confirming the

liberties of that commune, and under these privileges the *probi homines,* who assisted the judge in questions arising out of the law of the land, were, in the case of the law of the sea, nautical men (*prud'hommes*) familiar with the customs of the sea. The Coutumier of the Commune of Oleron[1] shows that there was a Court administering the law maritime not only in suits between foreigners and burgesses of Oleron, but in causes where both litigants were foreigners.[2] The judgments of this Court were reduced to writing by the prud'hommes of the commune in the twelfth century. They are the earliest extant mediæval sea laws we possess after the ordinances of Trani;[3] and it may be assumed that these judgments of the sea, or customs of Oleron, were the outcome of the privileges granted by the Dukes of Guienne to the commune of Oleron prior to the marriage of Eleanora, daughter of William, Duke of Guienne, with Henry II. of England, when the island passed into the possession of the British Crown. Amongst these privileges was that of the prud'hommes of the commune exercising jurisdiction in maritime matters, and adjudicating upon them in the Court of the mayor according to the usages of the sea and the custom of merchants and mariners.[4] Some difficulty has been raised as to the time when these judgments of Oleron were introduced into England owing to the terms of the above-mentioned record, known as the *Fasciculus,* according to which it would seem that part of the object of the consultation which King Edward III. had with the Commissioners was the upholding of the laws and statutes, "which were by the Lord Richard, formerly King of England, on his return from the Holy Land, corrected, interpreted, and declared, and published in the island of Oleron";[5] but whether these judgments were so published as laws at that time or not, it seems clear that, prior to the consultation in question, the judgments of Oleron were in use in the City Courts which administered the law merchant and the law maritime, as two copies exist in the archives of the City of London, the writing of which is as early as the reign of Edward II.[1]

The judgments of Oleron are inserted in Part C. of the Black Book of the Admiralty as a code of maritime law.[2] They are preceded by thirty-nine rules or orders relating to the Admiralty, some of which go back to the reign of Henry I.[3] and Richard I.,[4] and which were probably translated from Latin into French by the compilers of the Black Book, as French was the language of seafaring men in the time of Edward III.[5] After Article 39 in Part C. follow thirty-four articles, of which twenty-four are identical with the most ancient version of the rolls or judgments of Oleron,[6] whilst the ten following seem peculiar to the English Admiralty, unless these were deemed part of the laws of Oleron, as seems possible from the record of an appeal from the Mayor's Court of Bristol[1] in 24 Edward III., in which two of these articles would appear to be relied on as part of those laws. The next eighteen articles of the Black Book, lettered D., are stated in the recital in the preamble to be articles of a maritime inquest held at Queenborough in 49 Edward III. (1375) to ascertain and settle certain points of maritime law "as they have been used in ancient times"; and the jurats, in answer to the sixteenth article of inquiry in respect of the right of lodemanage (pilotage), return that "they know of no better advice or remedy, but that if it be from this time used and done in the manner which is contained in the law of Oleron." The first twenty-four articles of the laws of Oleron as set out in the Black Book do not contain any provision for the punishment of a pilot for failure of duty; but the thirty-third and thirty-fourth articles specially provide for the payment of damages by a pilot, and for his punishment in the event of the loss of the ship through his default.[2] It would,

therefore, appear that these ten articles were regarded as part of the laws of Oleron in the time of Edward III.1

From the records it would seem that, at this time, the civil jurisdiction in Admiralty included torts and offences on the high seas, on British seas, and in ports within the ebb and flow of the tide, matters of prize,2 contracts within the laws of Oleron1 and causes arising on the seashore and in ports. In 1361 the Council held that, by the common law, felonies, trespasses, and injuries done on the sea should be tried by the admiral by the law maritime, and not according to the common law;2 but the extension of the admiral's jurisdiction, founded on the theory accepted by the common lawyers at this time, that all matters arising outside the jurisdiction of the common law—that is, outside the body of a county3 —were inside the jurisdiction of the Admiralty,4 led to disputes between the Admiral's Court and the "Courts of the Seaports" exercising a franchise jurisdiction,5 these disputes being heightened by the irregularities committed by the Court of the Earl of Huntingdon, Admiral of the West;1 and in 1389 and 1391 two statutes were passed defining and limiting in favour of the common law courts, first, the things with which the admiral might meddle, and, secondly, the places to which his jurisdiction might extend. The 13 Rich. II. st. 1, c. 5, refers to the complaints made of encroachments by the admirals and their deputies and of their holding sessions in divers places within and without franchises, impoverishing the common people. It then proceeds to enact that they "shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." This was followed two years later by the statute 15 Rich. II. st. 2, c. 3, by which it was declared that "the admiral's court shall have no manner of cognizance, power, nor jurisdiction" . . . "of contracts, pleas, and quereles and all other things done or arising within the bodies of counties as well by land as by water, nor of wreck of the sea,"1 nevertheless "of the death of a man and of mayhem done in great ships being hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea (*infra primos pontes*), and in none other places of the same rivers, the admiral shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the king."

As it was found that these limitations were not duly observed, the Commons petitioned against the admiral,1 and a statute was passed in 1400 (2 Hen. IV. c. 11) providing a remedy for the party aggrieved by proceedings against him in the Admiralty Court, in cases not clearly within the jurisdiction of that Court, not only against the plaintiff but against the judge and the officers of the Court, by action in the common law courts with double damages; the statute further enacted that the statutes of Richard "be firmly holden and kept and put in due execution."2

The leading idea in these statutes is the distinction between things done in the realm and on the high seas, and this distinction gave rise to the determined efforts on the part of the common law courts, persisted in through centuries, to prevent the Admiralty Court taking cognizance of contracts made in this country relating to maritime matters, and dealing with them according to the civil law so as to encroach upon the jurisdiction of the tribunals at Westminster and interfere with the institution of trial by jury. Two causes operated, the one to oppose, and the other to aid, the efforts of the Admiralty Court to retain its jurisdiction. The opposition arose from the

strong dislike of the people at large to proceedings savouring of the civil law in disregard of the institution of trial by jury; the favouring cause lay in the technical process of the common law courts hampering their procedure and limiting their jurisdiction, so that in maritime cases there was a tendency to resort to the Admiralty Court to obtain a speedy and satisfactory remedy.

As a magistrate, the judicial powers of the Lord High Admiral as defined by patent3 were extravagantly large, and included the power to take cognizance of all causes, civil and maritime, within his jurisdiction; to arrest goods and persons; to preserve public streams, ports, rivers, freshwaters and creeks whatsoever within his jurisdiction, as well for the preservation of the ships as of the fishes; to reform too strait nets and unlawful endings and punish offenders; to arrest ships, mariners,1 pilots, masters, gunners, and any other persons whatsoever able and fit for the service of the ships, as often as occasion shall require and wheresoever they shall be met with; to appoint vice-admirals, judges, and other officers *durante bene placito;* to remove, suspend, or expel them and put others in their places as he shall see occasion; to take cognizance of civil and maritime laws and of death, murder, and mayhem.2

The patent of the Lord High Admiral also specially gave him the power to act by deputy, and according to the opening paragraph of the Black Book of the Admiralty,1 "When one is made admiral, he must first ordain and substitute for his lieutenants,2 deputies, and other officers under him, some of the most loyal, wise, and discreet persons in the maritime law and ancient customs of the seas3 which he can anywhere find, to the end that by the help of God and their good and just government the office may be executed to the honour and good of the realm"; and according to the documents connected with the Admiralty of Sir Thomas Beaufort, 13 Hen. IV.:4 "In the first place the lieutenant-general shall make oath to the high admiral to do right and due justice to all manners of parties complaining in the court of admiralty, as well to plaintiffs as to defendants, without having to do more for one party than the other, and he ought to make summary and hasty process from tide to tide, and from hour to hour, according to the law marine and ancient customs of the sea, without observing the solemnity of the law, and without mixing law civil with law maritime there where it may be equitable, knowing the right of the parties." He is further directed to imprison or otherwise punish those putting themselves in opposition to the Admiralty, to appoint deputies, surveyors, and guardians of the office of Admiralty for all the coasts of the sea,5 and hold inquests upon the coasts of the sea touching the law marine, and if there is an Admiral of the North and another of the West, they shall each have a lieutenant-general.

In 1360 occurs the first intimation of the erection of that central maritime tribunal which Edward III. proposed to create, for when John Pavely was appointed *capitaneus et ductor* of the fleet with disciplinary powers, he acquired, in addition, the right of holding pleas *secundum legem maritimam.*1 Shortly afterwards in the same year, when Sir John Beauchamp was made Admiral of all the fleets, his patent contained a further power to appoint a deputy *in causis maritimis;*2 and the judge held his place by patent from the Lord High Admiral, but when there was no admiral, by direct commission from the Crown.3 The earliest extant patent appointing a judge to hear cases in the Admiralty Court, is in the time of Edward IV. (1482). He is

empowered "*ad cognoscendum procedendum et statuendum de et super querelis causis et negotiis omnium et singulorum de iis quœ ad curiam principalem Admirallitatis nostrœ pertinent.*"[4]

In 1509 and subsequent years, Henry VIII. made treaties with France providing for special tribunals to speedily try piracy claims, which had become very frequent. In England, the Earl of Surrey (Lord High Admiral), Cuthbert Tunstall (Master of the Rolls), and Christopher Middleton (judge of the Admiralty Court) were appointed judges. In the commission (1519) appointing them[5] the procedure is directed to be, in accordance with the terms of the treaty between Henry VIII. and the French King, speedy and informal, and the same words are employed to indicate this procedure in the patents of the Lord High Admiral of this period. Similar terms are used in the so-called Valencian Regulations, in which the Consuls of the Sea were directed to decide the causes brought before them "briefly, summarily, and forthwith, without the noise or formality of a judgment, looking solely to the truth of the facts, according as has been accustomed to be done after the usage and custom of the sea";[1] and Mr. Justice Story says[2] "that the Admiralty of England, and the maritime Courts of all the other powers of Europe, were formed upon one and the same common model, and that their jurisdiction included the same subjects as the Consular Courts of the Mediterranean . . . described in the Consolato del Mare,[3] these consular Courts proceeding according to the forms of the civil law, and being regulated by the ancient customs of the sea."

According to the Valencian Regulations included in the Consolato del Mare, as published in 1494, the jurisdiction of the consuls of the sea extended to "all questions concerning freight, damage to cargo laden on board ship, mariners' wages, partnerships in shipbuilding, sales of ships, jettison, commissions entrusted to masters or to mariners, debts contracted by the master who has borrowed money for the wants or necessities of his vessel, promises made by a master to a merchant, or by a merchant to a master, goods found on the open sea or on the beach, the fitting out of ships, galleys, or other vessels, and generally all other contracts which are set forth in the customs of the sea."[1]

In exercising jurisdiction "over all contracts which had to be determined according to the usage and custom of the sea," the Court,[2] under the Valencian Regulations, allowed oral proceedings up to and including judgment, and in the case of mariners' wages and bonds they always were oral; but in the case of claims propounded in writing, a copy was transmitted by the officer of the Court to the defendant to be answered within a fixed term either by way of defence or counterclaim, unless the defendant objected to the jurisdiction, in which case, after consultation, the consuls either overruled the objection or remitted the parties to the competent judge; and if the defendant was a stranger the plaintiff could require security to meet the judgment, otherwise the defendant was liable to imprisonment, and the consuls were themselves liable to satisfy the judgment if they had failed to take security and the defendant absented himself. If the cause proceeded, the plaintiff replied or answered the counterclaim, and for the conduct of these proceedings assignations were made every three or more days as convenient. An oath that the action or defence was not based on false pretences could, if demanded, be then put to either party.[1] In respect of matters denied, a first delay of ten days was allowed for proof, or four times that period if

necessary, that is, four delays from ten to ten days, if an oath was taken that the fourth delay was not for the purpose of protracting the cause, and a reasonable time was granted if required for the production of witnesses who were at a distance. When these periods had elapsed, and the evidence had been published, the consuls, subject to exceptions to the character of the witnesses produced, and subject to the production of written evidence, appointed a day to give judgment, and caused the pleadings and proceedings to be read to mercantile experts, viz., the prud'hommes of the merchants, and to maritime experts, viz., the prud'hommes of the sea, and if their advice was the same they proceeded to pronounce sentence; but if, after the two sets of prud'hommes had consulted together, they did not agree, the consuls decided according to the written customs of the sea under the advice of the prud'hommes of the sea.2 There was no condemnation in the costs of the proceedings unless (after ad 1460) one of the parties had been guilty of bad faith, and the judgment was conclusive unless the party aggrieved appealed within ten days, either orally or in writing, to the judge of appeal to whom the proceedings were transmitted. After taking counsel with a different set of prud'hommes of the merchants and of the sea, the judge of appeal within thirty days gave a final judgment in writing (whether the proceedings were oral or not) and condemned the appellant in the respondent's costs of the appeal if he confirmed the sentence of the consuls.

Interlocutory proceedings could be carried on before one consul, but a decree or order required to be given by both. After ad 1334 the consular judges acquired the power of enforcing their sentences, and the party condemned had ten days within which to pay or disclose unencumbered moveable goods, otherwise the Court took possession of moveable goods designated by the other party, whether seagoing vessels or other chattels, and sold them, the successful litigant being paid the amount due to him out of the proceeds, together with the costs of execution, on his finding sureties to return the money in case of a prior claim or better right being established; but if the successful party swore that he could not find sureties, proclamation was made that anyone having any claim to the thing sold or the proceeds, should prove his claim within thirty days, and if no claimant appeared the sureties were dispensed with. If the condemned party had no moveables, but had immoveable property, a request was made by the consuls to the competent judge to levy upon such property according to the form of the laws of the city or the custom of the place where the property was situated.

At this period the customs of the sea, as collected in the book of the Consulate of the Sea of Barcelona in 1494, together with the Gotland sea laws,1 called the maritime laws of Wisby,2 and the judgments of Oleron,3 formed a continuous chain of maritime law from the ports of the Baltic, through the North Sea, and along the coast of the Atlantic to the eastern shores of the Mediterranean, and the practice detailed above in the case of the Valencian Regulations may be assumed to indicate generally the mode in which suits in maritime matters were conducted on the continental seaboard. In England the records of the High Court of Admiralty do not begin until 1524,1 and details of the early practice are not forthcoming; but it seems probable that the *Praxis Curiae Admiralitatis Angliæ* of Clerke2 deals with a state of things that had been in force for a considerable period before the first edition of his work. He states that the actions instituted in the Admiralty Court were commonly between merchants

of this country, or foreigners, or masters of ships and mariners, and that all the proceedings in civil and maritime causes were summary.3 The action, he says,4 commenced with the judge's warrant obtained by the plaintiff, made out in the name of the Lord High Admiral,5 drawn up by the registrar and directed to the marshal to arrest the defendant6 and keep him in custody until he appeared on the day and place specified before the Lord High Admiral or his deputy the judge. The warrant was executed by the marshal, if the defendant resided in London or the suburbs, otherwise by an officer of the city, town, or village where he dwelt, and the defendant was released on giving security by bond for his appearance, the amount for which the sureties were liable being fixed by the sum for which the action was instituted, *e. g.,* five pounds. The warrant was then returned to the judge indorsed with the person's name who executed it, together with the day and place. On the day appointed the defendant, or his proctor, appeared with his sureties, but if without the sureties the defendant was imprisoned during the pending of the suit, or until he gave security, or unless his oath was accepted. A proctor was then appointed, as in ecclesiastical causes, to carry on the cause, with power to produce sureties and to obtain same from the adverse party. The proctor of the plaintiff exhibited his proxy in writing,7 and if the defendant had not appeared accused him of contumacy. The defendant was then called three times by the marshal, and on non-appearance the judge decreed the penalty of the bond and ordered the defendant into custody until he had satisfied the penalty, of which the plaintiff was allowed a reasonable sum in consideration of the suit being retarded. If the plaintiff did not appear, the defendant or his proctor applied to have the case dismissed with costs and his bond cancelled. The judge then, after the plaintiff had been called three times, either decreed accordingly, or that the plaintiff should not be heard until the costs were paid, or allowed the case to stand over to another court day, or (usually) summoned the plaintiff for a convenient day on pain of final dismissal, with costs. If both parties appeared, the defendant claimed a libel with sureties to be given by plaintiff, and the judge assigned the next court day for both parties to bring in their sureties, the defendant's sureties being jointly and severally bound by bond to the judge or to the registrar for the appearance of the defendant as often as his presence was required until judgment, for the payment of costs, to confirm the acts of the proctor, to submit to the jurisdiction of the Court, renouncing all privileges and exemptions, and acknowledging themselves indebted to the plaintiff in the sum for which the action was brought, or such smaller sum as the judge fixed, conditioned that if the plaintiff cast the defendant, the defendant would pay the principal sum and taxed costs.1 The plaintiff was required to give sureties that he would prosecute the suit, and if cast pay the defendant's costs, that he would ratify the acts of his proctor, and appear personally as often as required. The proctors of both parties could protest against the sureties produced by the opposite side as unknown and insufficient, and the principal party entered into a bond, usually in double the sum, in respect of all the matters for which his sureties were bound, and undertook to indemnify them. The plaintiff's proctor gave in the libel, and asked for a decree, that is, a citation, for the defendant to answer the articles of the libel. If the defendant absconded, his sureties were called upon to produce him under the penalty of their bond, which the judge could either enforce or require further steps to be taken to give the defendant notice of the citation. Similar steps could be taken against the sureties of the plaintiff if he did not proceed. The grant of a commission to examine witnesses within or without the kingdom was applied for if necessary, and at the discretion of

the judge the oath of calumny could be administered to either of the parties. The principal party and his witnesses were produced and sworn, as in ecclesiastical causes, to undergo their examination at the time appointed by the judge, under a pecuniary penalty, such as fifty shillings or five pounds, according to the gravity of the case. If a witness on being tendered his expenses refused to appear, a decree for his imprisonment until he should appear was issued, and the judge could commit the proctor, the principal party, or a witness for contempt. Matters of defence and of exception were then proceeded with, and the suppletory oath was usual in maritime causes. After sentence the proctor of the successful party applied to have the sentence put in execution and the costs taxed, but if the defendant had absconded the monition would be addressed to the bail to pay the thing adjudged and costs within a given time or to be taken into custody; or if the defendant lived beyond the sea or had no fixed domicile, so that he could not be admonished, the judge could cite the bail to show cause why the sentence should not be put in execution.

By Title 24 of Clerke's Praxis, if the defendant could not be personally arrested in a civil cause by reason of being out of the kingdom, or because he had absconded, and he had any goods, wares, ship, or part of a ship, or vessel upon the sea, or within the flux and reflux of the sea, a warrant could be taken out to arrest such goods or such a ship belonging to the defendant debtor, in whose hands soever they were; and upon the attachment of such goods the debtor was cited specially in respect of the goods, and generally all others who had or pretended to have any right to, or interest in, the said goods, to appear on such a day to answer the plaintiff in a certain maritime and civil cause.[1]

The marshal or other officer of the judge, who arrested the goods, at the same time cited the defendant and all others having or pretending to have any right or interest in the goods to appear, and indorsed a return of the day and place of execution, together with a schedule of the goods arrested.

Proclamation was then made three times for the persons specially and generally cited. On their non-appearance, the judge pronounced them contumacious and declared them to have incurred the first default.

In the case of arresting goods of the debtor in the possession of others, or a debt owed by another person to the debtor, the proceedings were carried on between the plaintiff and the person in whose possession the goods were, as in an ordinary maritime cause for debt up to the fourth default, when, the plaintiff having declared upon and by what contract the debt arose, the goods arrested were by decree directed to be appraised, and the plaintiff, after giving security to answer any person or persons laying any claim to the goods so recovered within the term of the following year, was put in possession of the goods to the value of his demand, or, if not sufficient to answer the whole, as far as they would go towards it.[2]

To prevent the plaintiff being put in possession of the goods and to obtain their release, the defendant or a third person, to whom the goods arrested belonged, must appear and give security before the first decree in contumacy was pronounced. The goods were then returned to the defendant or the intervener, and the action proceeded

as in an ordinary maritime cause for debt. If goods had been taken by enemies or pirates, and afterwards brought into this kingdom, or goods were taken possession of by another, or goods consigned from an agent abroad were detained by another, the owner could obtain a warrant to arrest the goods as his own proper goods, citing the detainers and all others pretending to any interest in them to answer in a civil and maritime cause. The warrant was then executed and returned, and after security had been given by the owner, and the goods had been appraised, they were on the fourth default adjudged to the owner as his own proper goods, and he was put in possession of them. If the goods arrested did not belong to the plaintiff, the owner could plead his possessory right and apply to have the arrest taken off. If the plaintiff justified, the question of the right of possession was tried and possession decreed by a definitive sentence to the person proving his right to the possession; but the party aggrieved or a third person intervening could, on giving security, claim *in petitorio,* and, proceeding as in other maritime causes, prove his interest in the goods and obtain a decree with costs, the goods in the meantime, whilst the proceedings *in possessorio* or *in petitorio* were going on, being sequestrated by the Court, and, if perishable, appraised and sold, the proceeds being handed to the successful party.

In the case of goods arrested by several persons, but not sufficient to answer their respective debts, the creditor first commencing the proceedings was preferred, and if anything remained over it went to the second.

Appeals lay from inferior judges or vice-admirals to the Lord High Admiral and his High Court of Admiralty, and an appeal lay to the King's Majesty and the Court of Chancery[1] from a definitive sentence of the judge of the Admiralty Court, or from an interlocutory decree having the force of one, the application to be made either at the time *vivâ voce* before the judge, or within ten days before a notary public.

The respondent was then arrested until he gave sufficient bail for his appearance, whilst the judge, the registrar and all others in general were inhibited from further proceeding with the cause. The appellant and respondent then gave bail, as in the Court below, to abide the decree of the Court, to pay costs and confirm the acts of the proctor, and the instrument of appeal was proceeded with as in ecclesiastical causes, substituting imprisonment or pecuniary punishments for sentence of excommunication. If the appeal was not prosecuted within the term allowed, or if in the Court of first instance the proceedings were not terminated within three years, the Court of Appeal or the judge discharged the respondent or the defendant from further attendance with costs.

The mode of exercising jurisdiction in the Admiralty Court was, therefore, "in the manner familiar to . . . all Courts regulated by the civil law (that is) either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel,"[1] that is to say, the procedure described by Clerke recognises no distinction between actions *in rem* and actions *in personam,* for where the person against whom a warrant was issued could not be found, or lived in a foreign country, and goods were seized (Roscoe's Ad. Prac. p. 40) by the Court to answer the debt, these goods were not specific goods subject to a lien; but the seizure was made for the purpose of

compelling appearance, in a way analogous to the proceedings by foreign attachment under the charters of the cities of London and Dublin. Hence if a foreigner owed money in England, and any ship of his came into a British harbour,[1] or any goods of his were found in these realms, they were seizable by his creditors, the process of attachment going not only against goods in the actual possession of himself, his factors or agents, but also against those in the hands of his debtors; but the process was a proceeding *in rem* in the sense that if the defendant did not appear the "suit could go on without in any way touching the person,"[2] and that by the operation of the judgment the defendant was deprived of his property in the chattel,[3] unless he appeared, in which case the proceedings went on in the ordinary course as an action *in personam*.[4]

During the next few years of the reign of Henry VIII. the Admiralty Court acquired considerable addition to its power in civil suits, for though the trial of criminal causes was withdrawn in 1537,[1] there was a stronger assertion by the admiral, in virtue of the royal prerogative, of a jurisdiction in maritime and commercial matters,[2] which was expressed in plain terms in his patent, the usual limitations under the statutes of Richard II. being omitted and the clause inserted "*statutis in contrarium non obstantibus*." In 1541, by statute 32 Hen. VIII. c. 14, cognizance was expressly given to the Admiralty to try summarily questions of charter-parties and affreightments arising from the negligence of mariners, including the trial of cases on contracts made abroad, bills of exchange, insurance, average, freight, non-delivery of cargo, damage to cargo, negligent navigation, and breach of warranty of seaworthiness.

In the next reign (Edward VI., 1547), the letters patent of the admiral include "any thing, matter, or cause whatsoever done or to be done as well upon the sea as upon sweet waters and rivers from the first bridges to the sea throughout our realms of England or Ireland or the dominions of the same."

In 1570 the Admiral complained that the common law courts were encroaching, and Queen Elizabeth wrote to the Mayor and Sheriffs of London that this was "very strange" and that they were to forbear from intermeddling with causes arising out of contracts upon and beyond the seas.[1] In 1575 a special commission was issued to the Admiralty empowering it to hear cases on charter-parties, bills of lading, bills of exchange, insurance, freight, bottomry, necessaries for ships and contracts binding ships, others being prohibited from taking cognizance of such pleas, and an agreement[2] is alleged to have been come to between the Admiralty Court and the common law judges as to the limits of jurisdiction, according to which, after sentence pronounced by the Admiralty Court, no prohibition was to be granted at common law unless applied for within next term, and the judge of the Admiralty Court was to be allowed to appear and show cause against the prohibition, and further that the judge of the Admiralty, according to ancient order, as hath been taken by King Edward I. and his Council, and according to the letters patent of the Lord High Admiral for the time being, and allowed by other kings of the land ever since, and by custom time out of memory of man, may have and enjoy cognition of all contracts and other things, arising as well beyond as upon the sea, without let or prohibition, and the Admiralty Court was to have cognizance of breaches of charter-parties made to be performed

upon and beyond the seas according to 32 Hen. VIII. c. 14, though such were made within the realm.[1]

In 1585, on the death of the Earl of Lincoln, the Lord High Admiral, the question arose whether the judge of the Admiralty Court could sit and decide cases during the vacancy: Queen Elizabeth was advised that he could, as the judge was appointed by letters patent from the Crown, so that he was judge of the Admiralty "be there an admiral or no admiral;" but the Queen, *ex abundanti cautelâ,* issued a special commission.[2]

In 1586 the power of the Court of the admiral was strengthened by 28 Eliz. c. 11, which enacted that all the offences therein mentioned "as thereafter should be done upon the main sea, or coasts of the sea, being no part of any county, and out of any haven or pier, shall be tried by the Lord High Admiral;" but the power exercised by the admiral was regarded by the nation as a dangerous unconstitutional usurpation, and in particular in respect of contracts the right of proceeding by process *in personam* was resisted, so that the jurisdiction asserted by the Admiralty over claims as to the supply of necessaries and materials to ships and over charter-parties was steadily undermined, for unless the contract was actually made or the goods actually supplied upon the high seas, a prohibition issued, as in *Cradock's Case,*[3] in the reign of James I., where a prohibition was granted on the ground that the suit *in personam* in the Admiralty by a material man in respect of necessaries supplied to a ship was in respect of a contract made at 5, Katherine's Stairs, London, in the body of a county, though by the statute of 13 Richard II. the admiral could only meddle with things upon the sea. The rivalry, amounting to jealousy between the Common Law Courts and the Admiralty, was accentuated by the hostility of Sir Edward Coke, who evinced, with considerable show of reason, a dislike to both Chancery and Admiralty. In the controversy, though it may be open to question whether the original statutes of Richard were not directed principally to torts, they were construed literally by Coke, and in his answers to the complaints addressed to the Crown early in the reign of James I. by the Lord High Admiral, against the restraints imposed by the Common Law Courts upon his jurisdiction, Coke cites a number of authorities[1] to show that charter-parties, policies of insurance and maritime contracts, though of foreign origin, were not within the Admiralty jurisdiction, and lays down a rule to determine whether or not any given contract is within the Admiralty jurisdiction, viz.: whether the Common Law Courts have exercised, and can exercise, jurisdiction over the same contract, that is to say, whether the party had a common law remedy. The civilians vainly urged, on behalf of the Admiralty, that, consistently with the statutes of Richard, its jurisdiction extended (1) over torts and injuries committed upon the high seas, in ports within the ebb and flow of the tide, and in great streams below the great bridges, that is, that the jurisdiction should depend upon locality; (2) over all maritime contracts arising at home or abroad, that is, that the jurisdiction should depend upon subject-matter; (3) over matters of prize and its incidents; but the Courts of Common Law held that the words "*infra primos pontes,*" in respect of the water of rivers, applied only to death or mayhem, and not to actions;[2] that the words "upon the sea" referred to the water below low-water mark when the tide was out, and up to high-water mark when the tide was in (*infra fluxum et refluxum maris*), and divided the jurisdiction between the admiral and the common law accordingly, that is, on the sea

coast, the water between high and low water mark, when the tide is in, is not in the body of a county,[1] and, whilst not attempting to prohibit the Court of Admiralty with reference to wrongs committed on the high seas, they enforced by prohibition[2] the construction of the statutes of Richard, so as to limit the jurisdiction of the Admiralty to contracts made upon the high seas, to be executed upon the high seas, in respect of matters in their nature maritime, and even as to prize the exclusive authority of the Admiralty was not finally admitted until the case of *Lindo* v. *Rodney*.[3]

Coke further attempted to destroy the Admiralty jurisdiction over contracts made beyond the seas by alleging that they were cognizable by the Court of the Lord High Constable and Earl Marshal (Court of Chivalry),[1] but it would seem that the judicial functions of this Court were limited by stat. 13 Rich. II. c. 2, to contracts touching deeds of arms and war, and the Admiralty Court succeeded in maintaining its right to entertain suits to enforce the judgments of foreign Admiralty Courts, and to proceed *in rem* upon bottomry bonds executed in foreign parts.[2]

Coke retired from public life in 1629, and, though a heated contest went on with respect to prohibitions between the Admiralty Court and the common law judges, a compromise was effected in 1632 by the concurrence of the twelve judges of England to certain resolutions, which contained a very favourable interpretation of the extent of the Admiralty jurisdiction, and which, after adoption by the Privy Council, were approved by the King.[3] They were to the effect that:—"(1) If suit shall be commenced in the Court of Admiralty upon contracts made, or other things personal, done beyond the seas, or upon the sea, no prohibition to be awarded. (2) If suit be before the admiral for freight, or mariners' wages, or for breach of charter-parties, for voyages to be made beyond the seas; though the charter-party happen to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted: but if the suit be for the penalty; or if the question be, whether the charter-party were made or not, or whether the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the King's Courts at Westminster, and not in his Court of Admiralty. (3) If suit be in the Court of Admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.[1] (4) Although of some of those causes arising upon the Thames beneath the first bridge, and divers other rivers beneath the first bridge, the King's Courts have cognizance; yet the Admiralty has jurisdiction there, in the points specially mentioned in the statute of 15 Richard II. And also, by exposition of equity thereof, he may enquire and redress all annoyances and obstructions in these rivers, that are any impediment to navigation or passage to or from the sea; and also may try personal contracts, or injuries done there, which concern navigation upon the sea, and no prohibition is to be granted in such cases. (5) If any be imprisoned, and upon *habeas corpus* brought—if it be certified that any of these be the cause of his imprisonment, the party shall be remanded."

During the Commonwealth the office of Lord High Admiral was abolished and the above resolutions disregarded; but it was subsequently found convenient to define the jurisdiction, and, accordingly, an ordinance (to continue for three years), in 1648, after referring to the public inconvenience to trade through "the uncertainty of the

jurisdiction in maritime causes," enacted "that the Court of Admiralty shall have cognizance and jurisdiction against the ship or vessel with the tackle, apparel, and furniture thereof, in all causes which concern the repairing, victualling, and furnishing provisions for the setting of such ships or vessels to sea, and in all cases of bottomry, and likewise in contracts made beyond the seas concerning shipping or navigation or damages happening thereon, or arising at sea in any voyage; and likewise in all cases of charter-parties, or contracts for freight, bills of lading, mariners' wages, or damages in goods laden on board ships, or other damages done by one ship or vessel to another, or by anchors, or want of laying of buoys, except always that the said Court of Admiralty shall not hold pleas, or admit actions upon any bills of exchange, or accounts betwixt merchant and merchant or their factors."[1]

This ordinance was made perpetual in 1654, and three judges were appointed to preside over the Court;[2] but it fell with the other Acts of the Commonwealth upon the restoration of Charles II.

The common law judges seem to have discovered that the Crown and the Admiralty had gained a decided advantage in the interpretation put upon the statutes of Richard II., and accordingly the above resolutions were treated as not being a correct exposition of those statutes, and also as a nullity by reason of their not being an adjudication on any particular case before the Court.[3] In spite of the presentation of numerous petitions in support of the Admiralty jurisdiction and of the efforts of the judge of the Admiralty Court, Sir Leoline Jenkins,[4] in the reign of Charles II., the effect of the denial of the authority of these resolutions, coupled with the refusal to allow parties to proceed in Admiralty who were summoned at common law to answer as to maritime matters, and the issue of prohibitions to the Admiralty Court against proceeding on any contract made on land to be performed at sea, or made at sea to be performed on land—that is, not wholly and exclusively done on the sea—so limited the actual jurisdiction in Admiralty at this time that Sir Matthew Hale says[5] that it "is confined by the laws of this realm to things done upon the high sea only: as depredations and piracies upon the high sea, offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea; but touching contracts, or things made within the bodies of English counties, or upon the land beyond the sea,[1] though the execution thereof be in some measure upon the high sea—as charter-parties, or contracts made even upon the high sea—touching things that are not in their own nature maritime, as a bond or contract for payment of money, &c., these things belong not to the admiral's jurisdiction; and thus the common law and the statutes of 13 Rich. II. c. 5, 15 Rich. II. c. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea." On the other hand, Chief Justice Holt speaks of the common law as "too severe against the Admiralty."[2]

Another mode of ousting the Admiralty jurisdiction in contract was that of putting down by prohibition the practice of the Admiralty Court, which, in order to get cognizance of a cause, feigned that contracts really made on land were made at sea. This was in fact only imitating the fictitious venue introduced at common law to remove the technical difficulty, which embarrassed the common law Courts, arising from the necessity of laying a venue to every action. In this way a concurrent

jurisdiction was obtained by the Courts of common law in all cases of marine contracts as the conusance of contracts and other things done upon the sea was "made triable at the common law, by supposing the same to have been done in Cheapside,"[3] and as the locality of the matter or contract was not essential to the merits, the fiction was not traversable. Blackstone (in whose time the jurisdiction in Admiralty, besides being excluded within the body of a county, only extended to causes of action, in their nature maritime, arising on the high seas)[4] observes[5] that "it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the suit from the Court of Admiralty to those of Westminster Hall."

In the exercise of the jurisdiction in prize causes, the great reputation of Lord Stowell,[1] who was appointed judge in 1798, drew public attention to the Admiralty Court.[2] Still, in respect of the instance Court, Browne, [3] writing in 1802, is driven to admit that the Admiralty jurisdiction in contract was limited to marine contracts, that is, contracts (1) made upon the sea, (2) whose consideration was maritime,[4] and (3) not ratified by deed, nor under seal; and, with reference to personal contracts, he says that "at present the Admiralty acts only *in rem,* and no person can be subject to that jurisdiction but by his consent, expressed by his entering into a stipulation." He then refers to Keble[5] for the statement "that without a stipulation the Admiralty has no jurisdiction at all over the person"; and he quotes Godbolt[6] that "the first process in the Admiralty is against the ship and goods, and the libel must not be against the person." He adds the observation of Mr. Justice Buller—who accounts for the Admiralty being allowed to proceed on an hypothecation bond sealed abroad by the fact that the common law could give no remedy, there being no personal covenant for the payment of the money—that "in the struggles between the Court of Admiralty and the common law Courts respecting the extent of their respective jurisdictions, the common law Courts have said, that if the parties have bound themselves to answer personally, the Admiralty cannot take cognizance of the question";[1] and in a suit in the Admiralty by one part-owner to oblige another to sell a ship, Chief Justice Lee said (on an application for a prohibition), "that Court has no such power, for that would be proceeding *in personam.*"[2] Browne supplements this by further admitting[3] that "the Admiralty has in a great measure dropped its claim to taking cognizance of charter-party and freight, and suits by material men, and almost all other proceedings upon contract, except those for recovery of seamen's wages, or enforcing bottomry bonds"; in a word, it may be said that personal contracts had ceased to be cognizable in Admiralty, and that the principle contended for by the civilians (viz., that, in contract, the jurisdiction ought not to depend upon locality, nor upon the object affected, but upon the subject-matter, that is, whether the contract, though made upon land, or affecting the person, was in its nature maritime) had essentially failed;[4] and Browne sums up[5] the jurisdiction in the instance Court of Admiralty at the beginning of the nineteenth century as "confined in matters of contract to suits for seamen's wages, or those on hypothecations; in matters of tort to actions for assault, collision, and spoil; and in quasi-contracts to actions by part-owners for security, and actions of salvage"; but where the ship had been sold for other claims, and the money was in the registry, so that the master could not raise money on the bottom of the ship to satisfy demands which had been legally incurred, the practice had grown up of allowing the

claims of material men and shipwrights, and even of the master himself, to be paid out of the proceeds.[6]

A decision, however, of the Privy Council,[1] in the year 1835, declared this practice illegal, and so took away the last vestige of Admiralty jurisdiction in the case of necessaries. From that date the material man, who in early times could maintain a suit against the ship, had no longer any *locus standi* in the Admiralty Court. His only remedy was at common law, and there, unlike the mortgagee, whose position was that of a secured creditor, the material man could proceed only against the shipowner, not against the ship.[2]

These restrictions on Admiralty jurisdiction, and the inconvenience caused to litigants by the absence of any original jurisdiction over contracts under seal—so that the Court was unable to entertain questions of title or of mortgage, with the result that though the ship was under arrest or its proceeds in the registry, the rights of mortgagees were often adjudicated upon in a different cause in a different Court, together with the difficulties arising out of claims for salvage, questions of damage, demands for towage, which, if relating to matters within the body of a county were solely cognizable in the Courts of Common Law, and if proceeded with in the Admiralty Court subjected that Court to prohibition—led, in 1840,[1] to the passing of the first of the Admiralty Court Acts, 3 & 4 Vict. c. 65, the object of which was to give jurisdiction in civil matters to the Admiralty in the body of a county, prevent the Court being prohibited, and by restoring the ancient jurisdiction of the Admiralty, give litigants the option of proceeding by the more summary process of that Court, instead of compelling them to resort to an action at law.

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PROCEDURE

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31.

THE OLDER MODES OF TRIAL[1]

By James Bradley Thayer[2]

WHEN the Normans came into England they brought with them, not only a far more vigorous and searching kingly power than had been known there, but also a certain product of the exercise of this power by the Frankish kings and the Norman dukes; namely, the use of the inquisition in public administration, *i. e.,* the practice of ascertaining facts by summoning together by public authority a number of people most likely and most competent, as being neighbors, to know and tell the truth, and calling for their answer under oath. This was the parent of the modern jury. In so far as the business of judicature was then carried on under royal authority, it was simply so much public administration; and the use of the inquisition came to England as an established, although undeveloped, part of the machinery for doing all sorts of public business. With the Normans came also another novelty, the judicial duel,—one of the chief methods for determining controversies in the royal courts; and it was largely the cost, danger, and unpopularity of the last of these institutions which fed the wonderful growth of the other.

The Normans brought to England much else, and found that much of what they brought was there already: for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods, only less worked out. Looking now at these and at the Norman additions, what were the English modes of trying questions of fact when the jury came in, and how did they develop and die out? Some account of these things will serve as a background in trying to make out the jury.

I. The great fundamental thing, to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all the accounts of our earliest law. In these courts it was not the presiding officers, one or more, who were the judges; it was the whole company: as if in a New England town-meeting, the lineal descendant of these old Germanic moots, the people conducted the judicature, as well as the finance and politics, of the town. These old courts were a sort of town-meeting of judges. Among the Germanic races this had always been so; nothing among them was more ancient than the idea and practice of popular justice.[1] This notion among a rude people carried with it all else that we find,—the preservation of very old traditional methods, as if sacred; a rigid adherence to forms; the absence of a development of the rational modes of proof. Of the popular courts Maine says, in the admirable sixth chapter of his “Early Law and Custom,” while speaking of the Hundred Court and the Salic Law: “I will say no more of its general characteristics than that it is intensely technical, and that it supplies in itself sufficient proof that legal technicality is a disease, not of the old age, but of the infancy of societies.” The body of the judicial business of the popular courts, seven

and eight centuries ago, lay in administering rules that a party should follow this established formula or that, and according as he bore the test should be punished or go quit. The conception of the trial was that of a proceeding between the parties, carried on publicly, under forms which the community oversaw. They listened to complaints which often must follow with the minutest detail certain forms "*de verbo in verbum,*"1 which must be made probable by a "fore-oath," complaint-witnesses, the exhibition of the wound, or other visible confirmation. There were many modes of trial and some range of choice for the parties; but the proof was largely "one-sided," so that the main question was who had the right or, rather, the privilege of going to the proof. For determining this question there were traditional usages and rules, and the decision of it was that famous *Beweisurtheil,*2 which disposed of cases before they were tried. Since the trial was a matter of form, and the judgment was a determination what form it should take, the judgment naturally came before the trial. It determined, not only what the trial should be, but how it should be conducted and when, and what the consequence should be of this or that result.

In these trials there are various conceptions: the notion of a magical test, like the effect of the angel's spear upon Milton's toad—

> "Him thus intent, Ithuriel with his spear
> Touched lightly; . . . up he starts,
> Discovered and surprised;"

that of a call for the direct intervention of the divine justice (*judicium Dei, Gottesurtheil*); that of a convenient form or formula, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rigmarole in a game—good, at all events, for reaching a practical result; that of regulating the natural resort of mankind to a fight; that of simply abiding the appeal to chance. There was also, conspicuously and necessarily, the appeal to human testimony, given under an oath, and, perhaps, under the responsibility of fighting in support of it. But what we do not yet find, or find only in its faint germs, is anything such as we know by the name of a trial, any determination by a court which weighs this testimony or other evidence in the scale of reason, and decides a litigated question as it is decided now. That thing, so obvious and so necessary, as we are apt to think it, was only worked out after centuries.1

II. Something must be said of a preliminary matter, of that institution of the complaint-witness,—called also, as some other things were called, the *Secta,*2 —which has been the source of much confusion. This had a function which was a natural and almost necessary feature of the formal system of proof.3 When the proof was "one-sided," and allotted to this man or that as having merely the duty of going through a prescribed form to gain his case, it was a very vital matter to determine which party was to have it. If there was to be a trial, it might, indeed, be a privilege to go to the proof; and yet, as the form was often clogged with technical detail and had little or no rational relation to the actual truth of what was involved in the charge, it might be very dangerous and burdensome to be put to the necessity of going through with it. The forms of trial might also involve bodily danger or death. Not every complaint or affirmative defence, therefore, was allowed to put an antagonist to his

proof: there must be something to support it. This notion is fixed in the text of John's Magna Carta (art. 38), in 1215: *Nullus ballivus ponat de cetero aliquem ad legem*[4]*simplici loquela sua, sine testibus fidelibus ad hoc inductis.*[5]

This sort of "witness," it must be noticed, might have nothing to do with the trial; he belonged to that stage of the preliminary allegations, the pleading, where belonged also profert of the deed upon which an action or a plea was grounded. But just as rules belonging to the doctrine of profert crept over in modern times, unobserved, into the region of proof, under the head of rules about the "best evidence"[1] and "parol evidence," so the complaint-witnesses were, early and often, confused with proof-witnesses—a process made easy by the ambiguity of the words "*testis,*" "*secta,*" and "witness." The complaint-proof was thus confused with the old "one-sided" witness-proof, with the rational use of witnesses by the ecclesiastical courts, and with the proof by oath and oath-helper.

One complaint-witness seems originally to have been enough, and in the procedure leading to the duel or the grand assize one was always enough; but generally two or more were required; and as in the duel the witness might be challenged, so in other trials the defendant could stake his case on an examination of the complaint-witnesses, and if they disagreed among themselves he won. Apart from this, the complaint-witnesses need not be sworn; they might be relatives or dependents of the party for whom they appeared. As they were not necessarily examined at all, so in later times they were not even produced, and only the formula in the pleadings was kept up. In this form, as a mere expression in pleading, *et inde producit sectam,* the *secta* continued to live a very long life; so that within our own time we read as the third among Stephen's "principal rules of pleading," that "the declaration should, in conclusion, lay damages and allege production of suit. . . . This applies to actions of all classes. . . . Though the actual production has for many centuries fallen into disuse, the formula still remains, . . . 'and therefore he brings his suit,' " etc.[1] It even survived the Hilary rules of 1834.

It was the office of the *secta* to support the plaintiff's case, in advance of any answer from the defendant. This support might be such as to preclude any denial, as where one was taken "with the mainour" and the mainour produced in court,[2] or where the defendant's own tally or document was produced, or, as we have noticed, where a defendant chose to stake his case on the answers of the *secta.* Documents, tallies, the production of the mainour, the showing of the wound in mayhem, all belong under this general conception. The history of our law from the beginning of it is strewn with cases of the profert of documents. This last relic of the principle of the Saxon fore-oath and the Norman complaint-witness was not abolished in England until 1852.[1]

A few cases will illustrate what has been said about these things. In 1202[2] in the King's Court, an appeal was brought for assaulting the plaintiff and wounding him with a knife in the jaw and arm, "and these wounds he showed,[3] and this he offers to prove . . . by his body." In 1226[4] William seeks to recover of Warren twelve marks on account of a debt due from his father for cloth, *et inde producit sectam que hoc testatur.* Warren comes and defends, and asks that William's *secta* be examined. This is done, and the *secta* confess that they know nothing of it, and moreover they do not

agree (*diversi sunt in omnibus rebus*); and William has no tally or charter and exhibits nothing, and it is adjudged therefore that the defendant go quit. In 1229[5] Ada demands of Otho eleven pounds, which her father had lent him, and makes profert of a tally, and produces a *secta* which testifies that he owes the money. Otho denies it, and is adjudged to make his proof with compurgators—*defendat se duodecima manu.*[6] A case in 1323 draws attention to the exact effect of the complaint-proof.[1] A woman claimed dower, alleging that her husband had endowed her *assensu patris,* and put forward a deed which showed the assent. The defendant traversed; some discussion followed as to how the issue was to be tried, and as to the effect of the deed. Counsel for the defendant said, "The deed which you show effects nothing beyond entitling you to an answer." . . . Counsel for the plaintiff: "True, but . . . he can only have such issue as the deed requires."

With the gradual discrediting of party proof and the formal procedure, the *secta* steadily faded out. The "Mirror," which appears to have been written not long before 1290,[2] says: "It is an abuse that a plaint should be received and heard where there are no suitors presented to testify that the plaint is true."[3] As early as 1314[4] we find counsel saying that the Court of Common Bench will not allow the *secta* to be examined. Yet ten years later,[5] a demand for examining the *secta* reveals the fact that the plaintiff has none; and this defeats his claim, as it had defeated a plaintiff's claim in 1199.[6] Finally, in 1343,[7] in an action of debt for money due, partly under a bond and partly by "contract," the court refused an examination of the *secta.* We read: "*Rich:* As to the obligation, we cannot deny it; as to the rest, what have you to show for the debt? *Moubray:* Good suit (*secta*). *Rich:* Let the suit be examined at our peril. *Moubray:* Is that your answer? *Rich:* Yes, for you furnish suit in this case of contract in lieu of proof of the action. *Moubray:* Suit is only tendered as matter of form in the count; wherefore we demand judgment. Sh. (J.):[1] It has been heard of that suit was examined in such cases, and this opinion was afterwards disapproved (*reprove*). Sh. (J.):[1] Yes, the same Justice who examined the suit on the issue [*pur issue*] saw that he erred and condemned his own opinion. *Gayneford:* In a plea of land the tendering of suit is only for form, but in a plea which is founded on contract that requires testimony, the suit is so examinable [*tesmoinable*] that, without suit, if the matter be challenged, the [other] party is not required to answer. Sh. (J.): Certainly it is not so; and therefore deliver yourselves. *Rich:* No money due him," etc. The thing is evidently antiquated by this time. And yet, as we saw, it continued as a form in pleading for nearly five centuries longer.

III. The old forms of trial (omitting documents) were chiefly these: (1) Witnesses; (2) The party's oath, with or without fellow-swearers; (3) The ordeal; (4) Battle. Of these I will speak in turn. They were companions of trial by jury when that mighty plant first struck its root into English soil, and some of them lived long beside it. But, as we shall see, while that grew and spread, all of these dwindled and died out.[2]

(1) *Trial by Witnesses.*—This appears to have been one of the oldest kinds of "one-sided" proof. There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge's mind.[1] Certain transactions, like sales, had to take place before previously appointed witnesses. Those who were present at the church door when a woman was

endowed, or at the execution of a charter, were produced as witnesses. In case of controversy it was their statement, sworn with all due form before the body of freemen who constituted the popular court, that ended the question.2 In order to show the purely formal character of this sort of proof in the period of the Frankish kings, even where counter-witnesses were allowed, Brunner refers to a capitulary of Louis le Débonnaire, of the year 819, quoted below in a note. It will be observed that while he who suspects that witnesses produced against him are false may bring forward counter-witnesses, yet if the two sets differ hopelessly, the only solution of the difficulty that offers is to have witnesses from each side fight it out together.3

An English illustration of the old trial by witnesses, of the date of 1220-1, and bearing marks of antiquity then, is found in the Liber Albus,1 where, before Hubert de Burgh and his associate justices, the citizens of London answer as to the way in which certain rents may be recovered in London, viz., by writ of "Gavelet," in which, if the tenants deny the *servitium,* the claimant shall name *sectam suam, scilicet duos testes,* who are to be enrolled, and produced at the next hustings. "And if on this day he produce the witnesses and it is shown by them *ut de visu suo et auditu,* . . . the complainant shall recover his land in demesne." This is also incorporated in the "Statute of 'Gavelet' " usually referred to as 10 Edward II. (1316).2

But even earlier than this, here, as also in Normandy,3 the old mere party proof by witnesses had, in the main, gone by. Things indicate the breaking up and confusing of older forms; anomalies and mixed methods present themselves. The separate notions of the complaint *secta,* the fellow-swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and the assize run together. It is very interesting to find that, as the Norman law contemporaneous with our earliest judicial records shows the same breaking up and confusion as regards this sort of trial which we remark in England, so it is the same classes of cases in both countries that preserve the plainest traces of it. "In my opinion," says Brunner,4 "undoubtedly we are to include under the head of the formal witness-proof these: (1) The proof of age; (2) The proof of death; . . . (3) The proof of property in a movable chattel."

(*a*) *Age.*—In a case of 1219, in the Common Bench,1 where the defendant alleged the minority of the plaintiff, the plaintiff replied that he was of full age, and thereof he put himself on the inspection of the judges, and if they should doubt about it he would prove it either by his mother and his relatives, or otherwise, as the court should adjudge. The judges were in doubt, and ordered that he prove his age by twelve legal men, and that he come with his proof "on the morrow of souls."2 Now these twelve are not at all a "jury," for the party selects them himself. At the page of Bracton's treatise where he cites this case, he tells us that in these cases the proof "is by twelve legal men, or more if there be need, some of whom are of the family . . . and some of whom are not;" and he gives the form of oath, which is a very different one from that of the jury. First, one of them swears that the party is or is not twenty-one if a man, or fourteen or fifteen if a woman—*sic me Deus adjuvet et sancta Dei evangelia;* and then in turn each of the others swears that the oath thus taken is true.

In a peculiarly interesting part of his great work on the jury, Brunner points out that the old witness-proof was in some cases transformed at the hands of the royal power

into an inquisition, so that the witnesses were selected by the public authority, as they were in the ordinary jury.3 We seem to see this way of blending things in the English process *de aetate probanda.* In 13974 we read, after the statement that the king's tenants, on coming of age, in order to recover their lands must sue out a writ of *aetate probanda,* that those who serve on the inquest must be at least forty-two years old, "and shall tell signs to prove the time of the birth, as that the same year there was a great thunder, tempest, or pestilence, and the like; and all these signs shall be returned by the sheriff." And the reporter puts it as a query whether, since this is proof by witnesses (*per proves*), there may be less than twelve. The requiring of the age of forty-two points to the idea that they must have been of an age to be a witness when the child was born. By 15151 this doubt seems to have been settled: "It was agreed that the trial of his age shall be by twelve jurors; but in giving their verdict every juror should show the reason inducing his knowledge of the age, such as being *son gossipe,* or that he had a son or daughter of the same age, or by reason of an earthquake or a battle near the time of the birth, and the like." Quaint illustrations of these examinations, of the year 1409, are found in the *Liber de Antiquis Legibus.*2 In one of these cases, relating to a woman's age, each of the twelve makes his statement separately, and each is asked how he knows it. One, sixty years old, says that he fixes the age by the fact that he saw the child baptized; they had a new font, and she was the first person baptized from it. Another, a tailor of the same age, says that he held a candle in the church on the day of baptism, and also made the clothes which the mother wore at her purification. Two others, over fifty, fix the day by a great rain and flood which made the river overflow, and filled the hay with sand. Two others recollect that their hay from six acres of meadow was carried away by the flood. Two others remember it by a fire that burned a neighbor's house. Another by the fact that he was the steward of the child's grandfather, and was ordered by him to give the nurse who told him the news twenty shillings; and so on. Similar details may be found in a record of 12973 and in manorial documents of 1348.4 It is easy, then, to see how in this sort of case the old proof by witnesses should gradually fade out into trial by jury; for the old jury was nothing but a set of triers made up of community witnesses selected by the king's authority. The old mode of trying age by the inspection of the judges, which we saw in 1219, was practised long; but the general rule became established in all such cases that the judges, if in doubt, might refer the matter to a jury.1

(*b*) *Ownership of Chattels.*—There were other sorts of transformation. We have seen2 how the old law could admit counter-witnesses without destroying the formal nature of the proof. With the refinement of procedure, affirmative defences came to be more distinctly recognized; each party had to produce a complaint *secta.* There grew up the practice (whether by consent of parties or otherwise) of disposing of the case by examining these, and deciding it according as one *secta* was larger than the other, or composed of more worthy persons; and, if it was impossible to settle it on such grounds, of going to the jury. The *secta* in such cases turned into proof-witnesses. It was chiefly such a class of cases, presently to be mentioned, that brought down into our own century the *name* of "trial by witnesses," and the fact of a common-law mode of trial which had not sunk into the general gulf of trial by jury.

In 1234-5[3] there came up to the king's court a record of proceedings in the hundred court of a manor of the Bishop of Salisbury. A mare had been picked up in the manor, and one William claimed her in the hundred court and took her, on producing a sufficient *secta* and giving pledges to produce the mare and abide the court's order for a year and a day, according to the custom of the manor. One Wakelin de Stoke then appeared as claimant, and the steward required each to come on a day with his *secta.* They came, *et Wakelinus producit sectam quod sua est, et similiter Wilhelmus venit cum secta sua, dicens quod sua fuit et ei pullanata* (*i. e.,* foaled). The hundred court, finding itself puzzled and not knowing *cui incumbebat probacio,* postponed judgment *pro afforciamento habendo* (*i. e., semble,* in order that the parties might increase their sectas). Then Wakelin appeared with a writ removing the case to the king's court at Westminster. At Westminster William produced his *secta,* and they differed *in multis, et in tempore et in aliis circumstanciis,* some of them saying that William bought the mother of the mare four years ago, and she was then pregnant with her and had a small white star on her forehead; and some that it was six years ago and she had no star; and some agreeing in the time but differing about the mark,—some of them saying she had no star, but only some white hairs on her forehead, and some that she had no star at all. Wakelin produced a *secta* that wholly agreed, all saying that on such a day, four years back, Wakelin came and bought a sorrel (*soram*) mare with a sucking colt, and gave the colt to one John to keep. They were questioned about marks, and entirely agreed in saying that the colt had the left ear slit and part of the tail cut off, and that she was black. A view was taken of the colt, and she was not more than four years old at most, or three years and a half at least. Then an official of the manor, Thomas de Perham, said that Wakelin, before he saw the mare in question, told her color and all the marks by which she could be identified, and that William, when he was questioned, did not know her age, and said nothing distinct, except that she was foaled to him. The case, however, went down again for judgment, because the Bishop of Salisbury claimed his jurisdiction; *et quia secta quam Wilhelmus producit non est sufficiens nec aliquid probat et quia loquela incepta fuit infra libertatem episcopi . . . concessa est ei et teneat unicuique justiciam.*[1]

(*c*) *Death.*—But the typical sort of case, and the longest-lived, is what Selden instances[2] when he says: "But some trials by our law have also witnesses without a jury; as of the life and death of the husband in dower and in *cui in vita.*" This continued in England until the end of the year 1834. A case or two will illustrate this proceeding.

In 1308[1] Alice brought a *cui in vita,* and Thibaud, the tenant, answered that the husband was living. The woman offered proof that he was dead, hanged at Stamford; the tenant the same, that he was alive, *issint que celui que mend provereit mend avereit.* "Alice came and proved her husband's death by four *juretz,* who agreed in everything; and because Thibaud's proof was *mellour et greyneure* than the woman's proof, it was adjudged that she take nothing by her writ." In Fitzherbert,[2] what seems to be the same case is briefly referred to, and there we read that they were at issue, *issint cesti que mieulx prove mieulx av.;* and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof "*fuit greindr* than the demandant's, it was awarded," etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other, and left a total of

four to the credit of the tenant, a result which made his proof the better.[3] This old catch of *qui mieulx prove mieulx av.,* a pretty certain badge of antiquity, appears again sixty years later. A woman brought an appeal for her husband's death. The defendant said he was alive. The parties were directed to bring their witnesses, *et celui qui meuch prova meuch av.*[4] In 1560, in the interesting case of Thorne *v.* Rolff,[5] we have an instance where, in dower, issue was taken on the death or life, and the parties were called on to inform the court "*per proves,* [*i. e.,* witnesses] *ut oportet.*" The demandant brought two, "who were sworn and examined by Leonarde, second prothonotary." These statements are entered in full on the record, which is all given in Benloe's report. The two statements occupy about a page of the folio. Then it is recorded that the tenant produced no witnesses, and the court admits what is offered, as *bonam, probabilem et veram probationem,* and gives judgment for the demandant. Dyer connects this with the old law by citing Bracton, 302, where he speaks of deciding in such cases according to the *probatio magis valida.* The number, rank, and position of the witnesses are what Bracton alludes to.[1] But it is probable that by the time of Thorne *v.* Rolff the rational method of conducting the "trial by witnesses" had taken place; for Coke, half a century later,[2] in enumerating "divers manners of trials," designates this as "trial *by the justices* upon proofs made before them;" and so Comyns, a hundred years afterwards.[3] Blackstone, however, later in the last century,[4] and Stephen,[5] pour back again this new wine into the old bottles and call this wholly modern thing by the old name of "trial by witnesses." Blackstone's explanation of it shows little knowledge of its history. At last this venerable and transformed relic of the Middle Ages was abolished in England, when real actions came to an end by the statute of 1833.

(2) *Trial by Oath.*—As the Anglo-Saxons required from a plaintiff the taking of a fore-oath, so the defendant was allowed sometimes to clear himself merely by his own oath; the case was "tried" by that alone. But the great mediæval form of trial by oath was where the party swore with oath helpers—compurgation. In the Salic Law, that "manual of law and legal procedure for the use of the free judges in the oldest and most nearly universal of the organized Teutonic courts, the court of the hundred,"[6] in the fifth century, we find it.[7] It continued among the Germanic people in full force. These fellow-swearers were not witnesses; they swore merely to the truthfulness of another person's oath, or, as it was refined afterwards, to their belief of its truth. It was not requisite that they should have their own knowledge of the facts. Although constantly called by the ambiguous name *testis,* they were not witnesses. They might be, and perhaps originally should be, the kinsmen of the party.[1]

In our own early books this was a great and famous "trial," and its long survival has made it much more familiar to the modern English student than some of its mediæval companions. It was the chief trial in the popular courts, and as regards personal actions, in the king's courts, where, in real actions also, it was resorted to in incidental questions.[2] In the towns it was a great favorite. An early and quaint illustrations of it is found in the Custumal of Ipswich, drawn up about the year 1201 by way of preserving the old usages of the town, and again compiled a hundred years later because of the loss of the older copy.[3] In debt between citizens of the town, the party who had to prove his case was to bring in ten men; five were set on one side and five on the other, and a knife was tossed up in the space between them. The five towards

whom the handle lay were then set aside; from the other five one was removed, and the remaining four took the oath as compurgators.

In criminal cases in the king's courts, of the graver sort at any rate, compurgation is thought to have disappeared in consequence of what has been called "the implied prohibition" of the Assize of Clarendon, in 1166.4 But it remained long in the local and in the ecclesiastical courts.1 Palgrave2 preserves as the latest instances of compurgation in criminal cases that can be traced, some cases of 1440-1, in the Hundred Court of Winchelsea in Sussex. They are cases of felony, and the compurgation is with thirty-six neighbors. They show a mingling of the old and the new procedure. On April 4, 1435, Agnes Archer was indicted by twelve men, sworn before the mayor and coroner to inquire as to the death of Alice Colynbourgh. Agnes *adducta fuit in pleno hundredo . . . modo felonico, nuda capite et pedibus, discincta, et manibus deligatis; tendens manum suam dexteram altam, per communen clericum arreinata fuit in his verbis* (and then follows in English a colloquy): "Agnes Archer, is that thy name? which answered, yes. . . . Thou are endyted that thou . . . felonly morderiste her with a knyff fyve tymes in the throte stekyng, throwe the wheche stekyng the saide Alys is deed. . . . I am not guilty of thoo dedys, ne noon of hem, God help me so. . . . How wylte thou acquite the? . . . By God and by my neighbours of this town." And she was to acquit herself by thirty-six compurgators to come from the vill of Winchelsea, chosen by herself.3

The privilege of defending one's self in this way in pleas of the crown was jealously valued by the towns; it was easier and safer than the jury. London had it in its charters. In the few Anglo-Saxons words of the first short charter granted by the Conqueror and still "preserved with great care in an oaken box amongst the archives of the city,"4 there is nothing specific upon this. But in the charter of Henry I., s. 6, the right of a citizen is secured in pleas of the crown, to purge himself by the usual oath; and this is repeated over and over again in charters of succeeding kings.1 Henry III, in his ninth charter, cut down the right, by disallowing a former privilege of the accused to supply the place of a deceased compurgator by swearing upon his grave.2 There was the "Great Law," in which the accused swore with thirty-six freemen (six times, each time with six), chosen, half from the freemen of the east side of the rivulet of Walbrook, and half from the west; they were not to be chosen by the accused himself, nor to be his kinsmen or bound to him by the tie of marriage or any other. The accused might object to them for reasonable cause; they were chosen and *struck,* much after the way of a modern special jury. The "Middle Law" and "Third Law" were like this, but had eighteen and six compurgators respectively.3 In civil cases of debt and trespass, compurgation with six others was the rule in London; or, if the defendant was not a resident, with only two others. If he had not two, then the foreigner was to be taken by a sergeant of the court to the six churches nearest, and to swear in each.4

In the king's courts, the earliest judicial records have many cases of this mode of trial; *e. g.* in 1202, in the Bedfordshire eyre, where, in an action for selling beer in the borough of Bedford by a false measure, the defendant was ordered to defend herself "twelve-handed;" and she gave pledges to make her "law" (*vadiavit legem.*)5 In 1382,6 among the measures of relief from litigation following acts done in the recent

insurrections, people charged with trespasses are allowed *purgare se* by three or four fellow-swearers. In Wales the *assache* was in existence in 1413, requiring the oath of three hundred persons, and it was found necessary in St. 1 Henry V. c. 6, to relieve those who had been loyal in a late rebellion from the hardships of so formidable a "trial."

From being a favored mode of trial, this "law," or, as it is commonly called, "wager of law," from its preliminary stage of giving pledges to perform it, steadily tended to become a thing exceptional; not going beyond the line of the precedents,1 and within that line being a mere privilege, an optional trial alongside of the growing and now usual trial by jury. In the newer forms of action it was not allowed, and finally it survived mainly in detinue and debt.2 Yet within a narrow range it held a firm place.3 In 1440,4 in debt for board, Yelverton, for plaintiff, tried to maintain that the defendant could not have his law of a thing "which lies in the conusance of the pais." But the court held otherwise and the defendant had his law. In 1454-5,5 there was a great debate among the judges over a demurrer to a plea of non-summons in a real action, with "ready to aver *per pais.*" It was insisted by Prisot (C. J.) that this lay in the knowledge of the pais, and that all such things should in reason be triable by the jury. He admitted, however, that the practice had been otherwise. His associates, Danvers and Danby, agreed with him; while Moile and Ayshton pressed strongly the more conservative doctrine. "This will be a strong thing," said Moile; "it has not been done before." "Since waging law," said Ayshton, "has always been practised, and no other way, this proves, in a way, that it is *un positive ley.* All our law is directed (*guide*) by usage or statute; it has been used that no one wages his law in trespass, and the contrary in debt; so that we should adjudge according to the use," etc. No decision in the case is reported. But Brooke, in his Abridgment, in the next century, gives the latter view as *optima opinio.*1

In 1492,2 Sebastian Giglis "merchaunt of Venyce," complains to the Chancellor against Robert Welby, as having exposed him to the repayment of money advanced to Robert by a third party at the plaintiff's request, by waging his law "as an untrue Cristenman," when sued for it by this third party, who has now come upon the plaintiff and demands it of him. Robert had signed a "bill" for it, but nothing under seal. Robert's answer admitted receiving the money, but set forth that he was acting as an agent of King Richard III. and "wrote a bill of receipt . . . to the intent that the said bill . . . might have been a remembrance to the said late King for repayment of the said sum." After a hearing the Chancellor decreed that inasmuch as the defendant admitted receiving the money and showed no payment or exoneration, or any reasonable ground for being exonerated, he should pay the money *to the plaintiff.* The effect of this case seems to be overstated by Spence,3 in saying that the merchant was relieved "from the consequences of the defendant having waged his law. . . . This interference of the Court of Chancery no doubt had its effect in causing this ancient mode of proof . . . to go into disuse." The case is, indeed, very significant, but it will be remarked that the court by no means directly relieved the party himself, who had lost by a good and established form of trial. It relieved Sebastian, and not the plaintiff in the other litigation.

A century later, in 1587,4 when compurgation had become less usual, and, in the eyes of the Chancellor, almost archaic, we read that the Star Chamber refused to deal with one who was alleged to have sworn falsely in making his law; "the reason was because it was as strong as a trial. And the Lord Chancellor demanded of the judges if he were discharged of the debt by waging of his law; and they answered 'yea.' But Manwood (C. B.) said that it was the folly of the plaintiff, because that he may change his action into an action of the case upon an assumpsit, wherein the defendant cannot wage his law." In his report of Slade's Case (1602) Coke remarks1 that courts will not admit a man to wage his law without good admonition and due examination.

After another century this procedure still keeps its place, but it is strange, and the profession has lost the clue. In 1699, in the Company of Glaziers Case,2 in debt on a by-law, the defendant had his law. When he came with his compurgators, the plaintiff's counsel urged that the court need not receive him to his oath if he were swearing falsely or rashly; "*sed, per* Holt, C. J., 'We can admonish him, but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows.' " The reporter takes the pains to describe the details of the proceedings, as if they were unfamiliar;3 and at the end of it all he adds: "*Per* Northey (plaintiff's counsel), this will be a reason for extending indebitatus assumpsits further than before. Holt, C. J. We will carry them no further." In the next case,4 where, in a similar matter, two or three years later, the court refused wager of law in debt on a by-law, Holt, C. J., said that the plaintiff's counsel yielded too much in the Glaziers Case: "It was a gudgeon swallowed, and so it passed without observation." In 1701-2 came a great case,1 where, in debt on a city bylaw, for a penalty for refusing to serve as sheriff, the defendant offered to make his law with six freemen of the city, according to the custom of London. The plaintiff demurred. Much that was futile was said of wager of law. We are told by Baron Hatsell2 that it lies only "in respect of the weakness and inconsiderableness of the plaintiff's . . . cause of demand . . . in five cases: first, in debt on simple contract, which is the common case; secondly, in debt upon an award upon a parol submission; thirdly, in an account against a receiver; . . . fourthly, in detinue; . . . fifthly, in an amerciament in a court baron or other inferior courts not of record." Holt rationalized the matter in a different way:3 "This is the right difference, and not that which is made in the actions, viz., that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant's wrong; . . . for if debt be brought and . . . the foundation of the action is the wrong of the defendant, wager of law will not lie." And again,4 "The secrecy of the contract which raises the debt is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law."

In the latter half of the eighteenth century it was nearly gone. Blackstone tells us: "One shall hardly hear at present of an action of debt brought upon a simple contract," but of assumpsit for damages, where there could be no wager of law; and so of trover instead of detinue. "In the room of actions of account a bill in equity is usually filed. . . . So that wager of law is quite out of use; . . . but still it is not out of force. And therefore when a new statute inflicts a penalty and gives . . . debt for recovering it, it is usual to add 'in which no wager of law shall be allowed:' otherwise an hardy delinquent might escape any penalty of the law by swearing that he had never incurred or else had discharged it."1

The validity of this ancient trial was, indeed, recognized by the Court of Common Pleas in 1805,2 but in 1824, when for the last time it makes its appearance in our reports,3 it is a discredited stranger, ill understood: "Debt on simple contract. Defendant pleaded *nil debet per legem.* . . . Langslow applied to the court to assign the number of compurgators. . . . The books [he says] leave it doubtful. . . . This species of defence is not often heard of now. . . . Abbott, C. J. The court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. . . . Rule refused. The defendant [say the reporters] prepared to bring eleven compurgators, but the plaintiff abandoned the action." It had turned out, then, to be not yet quite a ghost; and so in 18334 it was at last enacted by Parliament "that no wager of law shall be hereafter allowed." Palgrave5 had lately pointed out with accuracy the old and the later legal situation: "An inquest or jury, in civil causes, was never adopted according to the usual course of the popular courts of Anglo-Saxon origin, unless by virtue of the king's special precept." In an action begun there by the writ which empowered the sheriff to act as the king's justiciar, an inquest might be summoned; "but if the suit was grounded upon a plaint the opinion of the suitors or the compurgatory oath constituted the common-law trial. . . . The same rule was observed in the manorial courts, in which by common right all pleas were determined by wager of law. . . . Even in the king's court the incidental traverses in a real action, such as the denial of the summons by the tenant, were always determined by compurgators; and in all personal actions wager of law was the regular mode of trial, until new proceedings were instituted which enabled the judges to introduce the jury trial in its stead. But this silent legislation has not destroyed the Anglo-Saxon trial [his preface is dated Feb. 1, 1832]; it is out of use, but not out of force; and it may, perhaps, continue as a part of the theory of the law until some adventurous individual shall again astonish the court by obtaining his privilege, and by thus informing the legislature of its existence, insure its abolition."

(3) *The Ordeal.*—Of trial by the ordeal (other than the duel) not much need be said. Nothing is older; and to this day it flourishes in various parts of the world. The investigations of scholars discover it everywhere among barbarous people, and the conclusion seems just that it is indigenous with the human creature in the earliest stages of his development.1 Like the rest, our ancestors had it. Glanvill,1 for instance (about 1187), lays it down that an accused person who is disabled by mayhem *tenetur se purgare . . . per Dei judicium . . . scilicet per callidum ferrum si fuerit homo liber, per aquam si fuerit rusticus.*2 This was found to be a convenient last resort, not only when the accused was old or disabled from fighting in the duel, but when compurgators or witnesses could not be found or were contradictory, or where for any reason no decision could otherwise be reached.

In our earliest judicial records the ordeal is found often. The earliest of these cases which is assignable to any precise year is one of 10 Rich. I. (1198-9),1 where, on an appeal of death, by a maimed person, two of the defendants are adjudged to purge themselves by the hot iron. But within twenty years or so this mode of trial came to a sudden end in England, through the powerful agency of the Church,—an event which was the more remarkable because Henry II., in the Assize of Clarendon (1166) and again in that of Northampton (1176), providing a public mode of accusation in the

case of the larger crimes, had fixed the ordeal as the mode of trial. The old form of trial by oath was no longer recognized in such cases in the king's courts. It was the stranger, therefore, that such quick operation should have been allowed in England to the decree, in November, 1215, of the Fourth Lateran Council at Rome. That this was recognized and accepted in about three years (1218-19) by the English crown is shown by the well-known writs of Henry III. to the judges, dealing with the puzzling question of what to do for a mode of trial, *cum prohibitum sit per Ecclesiam Romanam judicium ignis et aquae.*2 I find no case of trial by ordeal in our printed records later than Trinity Term of the 15 John (1214). We read then of several cases.1 One Ralph, accused of larceny, is adjudged to purge himself by water; he did clear himself, and abjured the realm. And so in another exactly like case of murder. It was the hard order of the Assize of Clarendon that he who had come safely through the ordeal might thus be required to abjure the realm, a circumstance which recalls the shrewd scepticism of William Rufus when he remarked of the *judicium Dei* that God should no longer decide in these matters,—he would do it himself.2 In a third case a person was charged with supplying the knife with which a homicide was committed, and was adjudged to purge himself by water of consenting to the act. He failed, and was hanged.

In England, then, this mode of trial lived about a century and a half after the Conquest, going out after Glanvill wrote, and before Bracton. The latter is silent about it.

The "Mirror," written, as Maitland conjectures, between 1285 and 1290, regrets that it has gone by. "It is an abuse," says the writer, "that proofs and purgations are not made by the miracle of God where no other proof can be had."1 In 1679 a defendant astonished the court by asking to be tried by the ordeal.2

The conception which was at the bottom of the ordeal and compurgation is often misunderstood. Thus Palgrave3 says that under the arrangements of the Assize of Clarendon "the ordeal was, in fact, only a mode of giving to the culprit a last chance of escaping the punishment of the law." And so Stubbs:4 "The ordeal, in these circumstances being a resource following the verdict of a jury acquainted with the fact, could only be applied to those who were to all intents and purposes proved to be guilty." No, the ordeal was simply a mode of trial; or, as they phrased it in those days, of clearing one's self of a charge. And so, while it gave way, after the Lateran Council decree, to trial by jury, the old accusing jury persisted and still persists.

Modern civilization occasionally feels nowadays the want of some substitute for these old tests, in cases where there is very strong ground of suspicion, but full legal proof is wanting. Compare the convenient ecclesiastical compurgation, *e. g.* in the sentence of the Archbishop of Canterbury, in 1631, in Hooke's case.5 After deciding against Hooke on some points he adds: "For his simony I vehemently suspect him, and therefore [he is] to purge himself 7[a]*manu.*"

(4) *Trial by Battle.*—This is often classified as an ordeal, "a God's judgment," but in dealing with our law it is convenient to discriminate it from the ordeals, for the battle has other aspects than that of an appeal to Heaven. Moreover, it survived for centuries

the ordeal proper. It had, also, no such universal vogue. Although it existed among almost all the Germanic people, the Anglo-Saxons seem not to have had it;6 but with the Normans it came into England in full strength. In Glanvill, a century after the Conquest, we see it as one of the chief modes of trial in the king's courts: "A debt . . . is proved by the court's general mode of proof, viz., by writing or by duel."1 "They may come to the duel or other such usual proof as is ordinarily received in the courts," etc.2 Of the inferior courts, also, we are told that in a lord's court a duel may be reached between lord and man, if any of the man's peers makes himself a witness and so champion.3 He, also, who gave the judgment of an inferior court might, on a charge of false judgment, have to defend the award in the king's court by the duel, either in person or by a champion.4 And so elsewhere.

There is sufficient evidence that it was, at first, a novel and hated thing in England. In the so-called "Laws of William the Conqueror," it figures as being the Frenchman's mode of trial, and not the Englishman's. In a generation after the Conquest, the charter of Henry I. to the city of London grants exemption from it; and the same exemption was widely sought and given, *e. g.,* in Winchester and Lincoln.5 The earliest reference to the battle, I believe, in any account of a trial in England, is at the end of the case of Bishop Wulfstan *v.* Abbot Walter, in 1077.6 The controversy was settled, and we read: "Thereof there are lawful witnesses . . . who saw and heard this, ready to prove it by oath and battle." This is an allusion to a common practice in the Middle Ages, that of challenging another's witness;7 or perhaps to one method of disposing of cases where adversary witnesses were allowed, and these contradicted each other. Brunner8 refers to this, with Norman instances of the dates 1035, 1053, and 1080, as illustrating a procedure which dated back to the capitulary of 819, quoted above.9 Thus, as among nations still, so then in the popular courts and between contending private parties, the battle was often the *ultima ratio,* in cases where their rude and unrational methods of trial yielded no results.

In a great degree it was for the purpose of displacing this dangerous, costly, and discredited mode of proof that the recognitions—that is to say, juries in their first organized form—were introduced. These were regarded as a special boon to the poor man, who was oppressed in many ways by the duel.1 It was by enactment of Henry II. that this reform was brought about, first in his Norman dominions (in 1150-52), before reaching the English throne, and afterwards in England, sometime after he became king, in 1154. Brunner (to whom we are indebted for the clear proof of this) remarks upon a certain peculiar facility with which the jury made head in England, owing, among other reasons, to the facts (1) that the duel was a hated and burdensome Norman importation, and (2) that among the Anglo-Saxons, owing to the absence of the duel, the ordeal had an uncommonly wide extension, so that when, a generation later than the date of Glanvill's treatise, the ordeal was abolished, there was left an unusually wide gap to be filled by this new, welcome, and swiftly developing mode of trial.2 The manner in which Glanvill speaks of the great assize is very remarkable. In the midst of the dry details of his treatise we come suddenly upon a passage full of sentiment, which testifies to the powerful contemporaneous impression made by the first introduction of the organized jury into England.3

Selden has remarked upon the small number of battles recorded as actually fought.[1] The society which bears his honored name is now bringing to light cases of which he probably never heard.[2] Such traces of the duel and the ordeal in England as are found before Glanvill's time are collected in Bigelow's valuable *Placita Anglo Normannica.* Very early cases from Domesday Book, compiled by William within twenty years of the Conquest, are found here.[3] Selden refers to a civil case in Mich. 6 Rich. I. (1194), as "the oldest case I have read of."[4] This may be the case in Vol. I. of the *Rotuli Curiae Regis,* 23-24, 26, which appears to be the earliest one reported in the judicial records. Although the demandant here *hoc offert probare versus eum per Radulphum filium Stephani, qui hoc offert probare ut de visu patris sui per corpus suum sicut curia consideraverit,* and the defendant came and defended the right and inheriting of (the plaintiff), *et visum patris Radulphi filii Stephani, per Johannem . . . qui hoc offert defendere per corpus suum consideracione curiae,*—yet the case appears to have gone off without the battle, on another point. But this record shows the theory of the thing. The plaintiff offers battle and puts forward a champion who is a complaint-witness, and who speaks as of his personal knowledge or, as in this case, on that of his father,[5] and stands ready to fight for his testimony. Before the battle the two champions swear to the truth of what they say.

In the mother-country, Normandy, one might hire his champion; but in England, theoretically, it was not allowed. In 1220 one Elias Piggun was convicted of being a hired champion, and lost his foot—*consideratum est quod amittat pedem.*[1] What was thus forbidden seems, however, to have been much practised, and finally, in 1275, the struggle to prevent it came to an end by abandoning any requirement that the champion be a witness. The St. West. I., c. 41, reads: "Since it seldom happens that the demandant's champion is not forsworn in making oath that he or his father saw the seisin of his lord or ancestor and his father commanded him to *deraign,* it is provided that the demandant's champion be not bound to swear this; but be the oath kept in all other points."

The Year Books indicate small use of the trial by battle in later days. One sign is the particularity with which the ceremonial is described, as if it were a curiosity. Thus in 1342-3, and again in 1407,[2] in criminal appeals, the formalities of the battle oath and subsequent matters are fully given. And in 1422[3] the ceremony in a battle between champions is described with curious details, down to the defaulting of the tenant on the appointed day. In 1565 Sir Thomas Smith[4] tells us, of this mode of trial, that it was not much used, but "I could not learn that it was ever abrogated." This was only six years before the famous writ of right, in Lowe *v.* Paramour,[5] which furbished up this faded learning. Dyer has a pretty full and good account of that case; but Spelman's Latin[6] is fuller and very quaint. The trial in a writ of right, he tells us, repeating with precision the doctrine of four centuries and a half before, is by duel or the assize; *utrunque genus hodie insuetum est sed duelli magis.*[1] Yet, he goes on, it chanced that this last was revived in 1571, and battle was ordered, *non sine magna jurisconsultorum perturbatione.* Then comes a curious detailed account, setting forth, among other things, how Nailer, the demandant's champion, in his battle array, to the sound of fifes and trumpets, on the morning of the day fixed for the battle, *Londinum minaciter spatiatur.* It has been said that Spelman was present at Tothill Fields on that day with the thousands of spectators that assembled; he does not say so, I believe, but

he writes with all the vivacity of an eye-witness. The demandant made default. Another like case occurred as late as 1638, but again there was no fight.[2] Efforts to abolish the judicial battle were made through that century and the next, but without result. At last came the famous appeal of murder in 1819,[3] in which the learning of the subject was fully discussed by the King's Bench, and battle was adjudged to be still "the constitutional mode of trial" in this sort of case. As in an Irish case in 1815,[4] so here, to the amazement of mankind, the defendant escaped by means of this rusty weapon. And now, at last, in June, 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when all the rest of Christendom had abandoned it.[5]

As to the grand assize, also,—that venerable early form of the jury which Henry II. established, with its cumbrous pomp of choosing for jurymen knights "girt with swords,"[1] —it is convenient to notice, at this point, that it went out at the end of 1834, with the abolition of real actions.[2]

We have now traced the decay of these great mediæval modes of trial in England. What, meantime, had been happening to the jury?

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32.

THE KING'S PEACE IN THE MIDDLE AGES[1]

By Sir Frederick Pollock, Bart.[2]

(S. C.—Stubbs, Select Charters, 8th Ed. 1895)

ALL existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished. First, revenge approved as no more than adequate, or disapproved as excessive, by rough public opinion, and, even when deemed legitimate, constantly leading to reprisals and fresh feuds; next, revenge limited by customary rules and tempered by the alternative of accepting compensation of a fitting amount; then a rule compelling the injured party, or his kindred if he was slain, to be content with compensation on the proper scale if duly tendered and secured; then the addition of punishment, or substitution of punishment for compensation, turning the avenger into a prosecutor who must hand over the business of execution to public authority; finally the staying of the private avenger's hand, and the repression of crime by direct application of the power at the disposal of the State: all this may be seen, or more or less distinctly traced, in the history of criminal jurisdiction and law in many lands, and is abundantly exemplified in our own.

We find it already established in the eleventh century[3] that the king reserves a certain number of the greater crimes for his own jurisdiction. In the twelfth century the list is considerably increased, and may be said to include all serious offences against the person other than open manslaying, and also highway robbery, besides breaches of the king's special protection, false moneying, and other contempts of his authority.[1] The omission of homicide in general, so strange to modern ways of thinking, is accounted for by the fact that the rights of the kinsfolk were still supposed to be exercisible. Secret killing,[2] especially by poison or supposed witchcraft, for to this the name of murder seems at first to have been attached, could easily be reserved for the king's peculiar jurisdiction because the ancient process of an actual or commuted blood-feud, assuming as it did that the facts were notorious or at least easily verifiable, had no adequate means of dealing with such cases. But there can be little doubt that the anomaly of leaving open homicide to the kindred and the popular courts was already obsolete in practice by the time when the list in question was set down by an antiquary who perhaps would not have approved the innovation. Murder, indeed, had acquired the curious transitional meaning of a homicide committed by an unknown person for which the hundred had to pay a fine because the slain man was presumed to be a Frenchman, or more frequently, by a compendious technical usage, the fine itself.[3]

These claims on behalf of the Crown were quite consistent with the lords of private jurisdictions having power of criminal justice extending in many cases even to life and death. Indeed their exercise of such powers could be justified only by the highest theory of the king's power. It was because the king had them himself, to begin with, that he could grant them over to any great lord whom he chose to favour. On the whole the practical result was that the pursuit of serious crime was taken away from the old local courts and came under the control of the king's judges and officers.

The precise manner in which this was brought about is under the cloud which envelopes most of the details both of Anglo-Saxon institutions and of their transition to Anglo-Norman forms. But it is certain that early in the twelfth century the compiler of the so-called laws of Henry I. represented the old system of blood-feud, tempered by acceptance of wergild and a very moderate amount of royal interference, as still in force; while in the last quarter of the same century, at latest, we find that the greater crimes have acquired the Norman name of felony; the prosecution of them is conducted, under the name of "appeal," by the persons who under the older law might have taken up the feud, but the procedure is under the king's authority as soon as started, and cannot be dropped without leave; the mode of trial, where the fact is denied, is by the Anglo-Norman judicial combat (or, from the early part of the thirteenth century onwards, by the verdict of a jury at the option of the accused); and the conclusion, if the accused be proved a felon by failing in the battle or by verdict, is the sentence and execution of public justice. One grim piece of archaism remained far into the middle ages to mark the original place of tribal or family revenge. "By the ancient law," said Tirwhit, one of Henry IV.'s judges, in 1409, "when one is hanged on an appeal of a man's death, the dead man's wife and all his kin shall drag the felon to execution." "That has been so in our own time," added Chief Justice Gascoigne.[1]

As to the name of the proceeding, "appeal" originally meant accusation. In its application to disputing the judgment of a court, it meant not seeking the judgment of a higher court, as it has come to do in modern times, but charging the judges personally with giving a wilfully false judgment, or the witnesses with perjury. The charge might in either case have to be made good by combat, and down to the end of the twelfth century this was a possible course in all inferior courts.[2] Solemn acts of authority must stand, right or wrong; a judgment once made in due form is as the law of the Medes and Persians, which altereth not. You may have, at most, a personal remedy against individuals who have abused their office. A power vested in one court to reverse or vary the judgment of another was not within the conception of early English or Frankish law. Such a notion is of slow and comparatively modern growth in England. The modern usage of the word "appeal" as implying this notion seems to be not older than near the end of the thirteenth century, and to occur first, as might be expected, with reference to ecclesiastical procedure.[1]

To return to what concerns us at present, it was well understood in the thirteenth century that the criminal "appeal" was no longer a mere act of private vengeance. The king had to be satisfied for the breach of his peace as well as the aggrieved party for the injury. Hence, as Bracton expressly tells us, the death or default of the appellor did not make an end of the proceedings. On the contrary, the effect was to send the accused to be tried by a jury without the option of battle. The king takes up the charge

on behalf of his own peace, as he well may and ought, for the words of the appeal are that the act complained of was done "wickedly and in felony against the peace of our lord the king." And the accused may not offer to defend himself by his body, "since the king fights not, nor has none other champion than the country." Thus it only remained for the accused to put himself on a jury, no other mode of proof being possible.[2] But in this matter, as we shall presently see, Bracton and his masters were too enlightened for their age; and their sensible practice had to give way to an almost incredible combination of pedantry and barbarism.

Meanwhile the old public justice, applicable to cases where there could be no question of blood-feud—practically, that is, to theft—was becoming the king's justice too. The men of the hundred who charged a suspected offender on the strength of their own knowledge, or of common fame, now acted under the direction of the king's officers; and the withdrawal of religious sanction from the ordeal by the Church in 1215 brought the further proceedings under the same authority by the downright need of some new regulation. The action of the Lateran Council was promptly enough[1] acknowledged by the king's calling for appropriate measures. It seems likely that the ordeal was already discredited. In the twelfth century clerical narrators not only exalted the merits of the saints by whose intercession men were miraculously healed after having failed in the ordeal and suffered as felons, but almost went out of their way to assert the victim's innocence, though the miracle might well enough have been represented as the reward of an offender's subsequent contrition. The so-called judgment of God was now regarded as a possibly oppressive or fraudulent judgment[2] which might call for supernatural redress. On the other hand the temporal power was not disposed to regard acquittal on a trial by ordeal as conclusive in the prisoner's favour. A man of bad repute who had been sent "to the water" on a charge of murder or other grave crime by the witness of the county was not treated as innocent by the later twelfth-century practice. Under Henry II.'s ordinance, he had to leave the kingdom and be content not to forfeit his goods.[3] A mode of trial so little respected had become untenable. When ordeal was put out of the way, to all seeming unregretted by any one, there was no method of final proof to set in its place other than the new and royal method of inquest. If the accusing body had been turned into the final judges of the fact, some sort of inquisitorial procedure would probably have been the result, and the Grand Jury might have become an official staff with a Public Prosecutor at its head. But the law maintained the old view that the indictment, as from this point we may begin to call it, was only the voice of common fame, which was enough to put a man in jeopardy but not to condemn him. The prisoner was entitled to call for a final vote of the lawful neighbours, to "put himself on the country." The same men might now be asked for their definite opinion, but they were reinforced by jurors of another hundred and of four townships. If the combined jurors declared that they positively thought the prisoner guilty, he stood condemned. Only in the middle of the fourteenth century were members of the jury of indictment prohibited from serving on the jury of trial.[1]

It will be observed that the new process is brought into play, in point of form, by the prisoner's action. He is not sent to a jury as he would have been sent to the ordeal; he puts himself upon its verdict. Before long the question arose what was to be done with a prisoner who would not put himself on the verdict of a jury in the case of either an

appeal or an indictment; this is not a question directly before us now, but it was inevitable and gave much trouble. When the "judgment of God" by ordeal ceased to be available it seemed, on the whole, to the medieval English mind that the prisoner—except where the facts were too manifest to need further proof—could not be required, as matter of strict right, to submit himself to any form of human judgment. Bracton, as we saw, was bold on the side of common sense in the case of an appeal; as to an indictment he only says it seems the prisoner can be compelled to defend himself by the country for want of other manner of proof. Some bold and enlightened judges, probably Bracton among them, were prepared to dispense with consent or enter a fictitious consent to be tried by a jury on the prisoner's behalf.2 But the formalist view prevailed: namely that trial by the country could not be without the prisoner's submission, but refusal to submit was an independent offence, in the nature of contempt of the king's authority, for which the recusant might be punished in any manner short of death: imprisonment, rigorous imprisonment under conditions barely compatible with living, or, as the practice appears to have been settled in the course of the fourteenth century, with aggravations amounting to death in fact though not in terms. In this way respect for the letter of the subject's rights and dread of usurping jurisdiction led the judges to the clumsy and barbarous expedient of the *peine forte et dure,* which, to the law's disgrace, remained possible, and was sometimes put in force, down to quite modern times.1 But, strange as were the limitations imposed by the logic of thirteenth-century lawyers on the king's jurisdiction, the jurisdiction had in substance come to the king's hands. What remained in Bracton's time of the old system of private and vindictive prosecutions became absorbed in one or another of the new varieties of civil procedure devised by the clerks in the king's chancery and sometimes by the judges themselves.

We have mentioned the exceptional case—perhaps not so very exceptional in days when open violence was frequent—of a crime being too manifest for any formal proof to be required. A few words of explanation must now be added. For more than a century after the Conquest, and much later in some local jurisdictions, the stern rule of the popular courts against open and notorious crime held its ground. A criminal taken red-handed was not entitled to any further defence or trial before the king's justices, whether he were a murderer with his bloody weapon or a robber with the stolen goods, "seised," as men then said, "of the murder or theft," so that the fact was undeniable before the lawful men who apprehended him. This was deliberately confirmed as late as 1176:2 and the jurisdiction, as long as it existed, remained with the county court save in the case of crimes specially reserved for the Crown. In the Gloucestershire records of 1221 we read that certain evil-doers slew a servant of the Bishop of Bath in his master's house. Four men charged with the killing were taken with stolen goods, the murder having, it seems, been incidental to theft or housebreaking. Records show this as a very common state of things: and, as there was nothing more to be lost by adding murder to robbery, already a capital offence, we need not be surprised. The men admitted the death, and were summarily hanged, not for the murder, which was not within the county court's jurisdiction, but for the manifest theft, which was.1 The same rule was applied by the king's judges to manslaying, down to the middle of the thirteenth century.2 It was not necessary that the judgment should be rendered immediately, but only that the damning circumstances of the offender's arrest "super factum" should be promptly recorded by

good witness. The written records of such cases are of a simplicity befitting the summary character of the proceeding: "Wakelin Ralph's son slew Matilda Day with a knife, and was taken thereupon with the knife all bloody, and this is witnessed by the township and twelve jurors, and so he cannot deny it; let him be hanged; he had no chattels."

An important exercise of the king's increasing control over criminal business was the constitution or definition (it is not certain which, nor very material) of the office of coroner in 1194.3 The most important function of the coroner was from the first the holding of inquests on the bodies of persons who had died by violence or accident, or in circumstances giving rise to suspicion; and that function continues to this day as part of the machinery of our criminal law, side by side with the jurisdiction of justices of the peace and to some extent overlapped by it, but not superseded. In the Middle Ages the coroners also exercised judicial powers in criminal and sometimes in civil business, which did disappear, partly under the express prohibition of Magna Carta, whereby neither the coroners nor the county court were to hold pleas of the Crown,1 partly by disuse as the office of a justice of the peace was brought into working order. They supervised the execution of capital justice in the privileged jurisdictions of lords who had that franchise, and thus had more extensive rights than the sheriff, who, by the terms of such local privileges, was excluded from interference within their bounds. Being the king's officers, but elected by the men of the county, the coroners formed a direct link between the Crown and the people and a check on the intermediate lords.2

With a year of the creation or better settlement, whichever it was, of the office of coroner, we hear of knights being assigned in each county to take an oath of all men over fifteen years of age for the maintenance of the king's peace and the effectual pursuit of evil-doers.3 The relation of these keepers of the peace to the sheriff and the coroners (if indeed they were always different persons from the coroners) is not very clear. However, they were the predecessors of the conservators of the peace first appointed under authority of Parliament in 1327, and known as justices of peace (we now say "of *the* peace," but the shorter form was the common one down to the eighteenth century) from the time, about a generation later, when distinctly judicial functions were conferred on them by further legislation. The office of justice of the peace is the most ancient of which it can be said that its powers and duties are wholly derived from statutes.

For more than two centuries after the Conquest the king's peace itself was liable to interruption by the death of the reigning king. It perished with him; the new king was not deemed to be fully king, nor so styled, until he had been crowned; and during this interregnum there was no power available to preserve order but the resources of the old popular jurisdiction, doubtless more and more enfeebled by the diminution of their importance in normal times. Evil-doers were not slow to seize such an opportunity when it came. We read in the English Chronicle, under the date of 1135, that on the death of Henry I. "there was tribulation soon in the land, for every man that could forthwith robbed another." But when Edward I. succeeded to the throne in November, 1272, being then far away from England on the crusade, the danger and inconvenience of allowing such an interregnum were perceived to be intolerable; and

the king's council forthwith caused his peace to be proclaimed throughout the kingdom, declaring the reason in his name in these words: "for rendering justice and keeping of the peace we are now and henceforth"—not merely after coronation—"debtors to all and sundry folk of this realm."[1] It must have seemed a bold measure at the time, but its wisdom was so manifest that it was not merely accepted as a temporary and extraordinary remedy, but became a conclusive precedent for all future demises of the Crown. The doctrine of the king's peace being put in suspense by the king's death does not seem to have been ever heard of again.

One reason for the ease with which the reform was made may perhaps have been that its omission would have thrown the machinery of justice out of gear more extensively and conspicuously than at any previous time. The writ of trespass was fast coming into use in the course of Henry III.'s reign. During the twenty-two years between the middle of the century and his death it became common.[2] We think of an action of trespass nowadays as a purely civil remedy, a means of recovering damages if the plaintiff succeeds; and that was no doubt its main object and advantage even from the first. But it was also a penal and semi-criminal proceeding, and preserved traces of this character down to modern times. The trespass was complained of and dealt with as a punishable breach of the king's peace, and the plaintiff was bound to allege force and arms and breach of the peace in order to give the king's court jurisdiction; without those words it was only a matter for the county court. In fact this action was, in its original form, closely connected with the distinctly criminal procedure by way of "appeal" for felony. One might almost regard it, using the analogy of modern French procedure, as the civil side of such an appeal, which became separated by some ingenious experiment or happy accident, and started on a new career of its own. To regard the king's peace as capable of temporary suspension in 1272 would have been to deprive suitors of a remedy which was already becoming popular, and showing the first promise of its vast future developments. It belongs to another context and a later period to see how forms of action derived from the semi-criminal writ of trespass became the most ordinary and efficient instruments of purely civil justice in dealing with questions of property and contract.

It will be observed that there was no centralized authority, as indeed there still is none, for dealing with the prevention or detection of crime. Royal justice aimed not at superseding local administration, but at controlling and stimulating it. The work of the king's officers in every department of public law, and of the local officers and courts who were bound to assist them, was kept up to a generally uniform standard by the periodical journeys of the king's itinerant judges. The more general and searching visitations have to be distinguished from the minor judicial delegations. There were frequent missions of learned persons charged only to dispose of certain kinds of pending causes and matters, usually the "assizes" introduced in Henry II.'s time, and developed in the course of the thirteenth century, for the recovery of land from wrongful possessors. Judges might even be sent out to take only one particular named case, under a special commission as we should now call it.[1] Their authority depended on the terms of the commission in each case, as the authority of justices of assize does to this day; the difference is that the commissions of justices of assize (who superseded the justices in eyre at a later time, and must not be confounded with them) have run in a fixed form for centuries, whereas the heads or articles of the eyre were

subject to variation. Some sort of routine, however, was acknowledged early in the thirteenth century. More especially, there was a general and comprehensive mission with unlimited jurisdiction and a wide administrative authority to see that the Crown got its dues of every kind, which took place at intervals of some years in every part of the country. This may conveniently be called a general eyre; it involved a rigid scrutiny of the criminal records of the county since the last visitation, and commonly produced a good many fines. These, and the burden of entertaining the justices and their retinue, caused the advent of a general eyre to be anything but welcome. Attempts were made to establish a custom not to have it in the same place more than once in seven years.[1] On these occasions the county court was summoned, but acted in the subordinate capacity of giving information and deputing its chief men to talk over business with the judges, and, we may well suppose, to be instructed by them in the latest royal improvements of procedure and finance.[2] The men of the county were answerable for having all the Crown's business properly brought before the itinerant justices; and that business would include everything, from forfeitures of felons' goods to complaints of sales by unauthorized measure or petty extortions by bailiffs. Directly or indirectly, there was always an eye to the king's dues. As Mr. Maitland says, "a distinction between the doing of penal justice and the collection of the king's income is only gradually emerging. The itinerant judge of the twelfth century has much of the commissioner of taxes."[3] Failure to find criminals, what with murder-fines and amercements for failing to produce one's townsmen, was more fruitful of revenue than judicial sentences. Unpleasant as the whole process was for the country-side, for it was a costly forced purchase of justice at best, there must have been a great deal of civic education in it.

So far we have only hinted at the transformation of the jury in criminal cases from a special commission of inquiry into a regular and necessary tribunal, and from a piece of superior administrative machinery into a popular and representative institution. Many details are still obscure, but we know that the process was substantially completed about the middle of the thirteenth century. What interests us just here is to observe that nothing but the king's power, half consciously guided by the necessities of the time, could have accomplished this. There were no means available for reforming the hopelessly antiquated procedure of the old popular courts, and indeed there was still, in the modern sense, no legislature at all. Executive and judicial authorities, under the king's direction, had to innovate for themselves in the lines of least resistance. As early as 1166,[1] the old accusation by the common report of the country-side became a "presentment" by definite persons representing the local knowledge of all classes, who were bound to inform the king's judges or the sheriff. In our time the Grand Jury no longer consists of twelve of the more lawful men of the hundred and four of the more lawful men of every township; but it still exists, it is still called a Grand Inquest as its most official and solemn name; the foreman is sworn "as foreman of this Grand Inquest for our Sovereign Lady the Queen and the body of this county." The form of the oath still binds the grand jurors to present any crimes undiscovered by the officers of the law which may come to their notice otherwise than by being expressly given them in charge; that is, to accuse any one whom they suspect of having committed a crime even if no one has taken steps to prosecute him; and though there is no occasion to do this in modern times, grand juries not unfrequently make presentments of what they conceive to be the opinion of the county as to the

increase or decrease of criminal offences, or desirable amendments of the criminal law in substance or administration. It is to be remarked that the form of the oath is not of Anglo-Saxon or popular, but of Frankish and official origin.[1] There was nothing about the procedure in any way repugnant to popular tradition or habits; nevertheless it was new, royal, and in ultimate parentage exotic. Not the pretence of an impossible freedom from foreign elements, but the power of assimilating exotic material to serve its own purposes and to be leavened with its own constant spirit, was already, as it has ever since been, the real glory of our Common Law. Sometimes it is asked, what is the use of a grand jury nowadays? The question ought, perhaps, rather to be whether the saving of a little trouble and expense would be an adequate compensation for abolishing a dignified and at worst harmless function which has been part of the machinery of justice in England for more than eight centuries. However, the grand jury is sometimes able to stop an obviously malicious or frivolous prosecution and spare an innocent person the pain and scandal of going into the dock.

The petty jury acquired its modern position, that of a body of judges appointed to decide on the facts according to the evidence and not otherwise, only by a gradual process. As regards the criminal jury we still know little of the details. In the fifteenth century the functions of jurymen were coming near their present character; in the sixteenth we have a description of the course of a trial which, but for the prisoner not being allowed to employ counsel against the Crown, would be accurate in all essentials at this day. Sir Thomas Smith,[2] writing chiefly for the information of learned foreigners, insists on the public and oral character of the procedure, a matter of commonplace to Englishmen but strange to men living under systems derived from the later Roman law. “All the rest” (except the written indictment) “is done openly in the presence of the judges, the justices” [of the peace], “the inquest, the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositors and witnesses what is said.” As has already been hinted, there was nothing about the origin or the early forms of the jury, or in particular of the criminal jury, to make it in any sense a popular institution. There was no manifest reason why it should not become a mere instrument of official power, as indeed the Tudor sovereigns and their ministers tried to make it in affairs of state. There was no obvious probability that the verdicts of juries would be just, or independent, or free from corruption. Indeed they were far from satisfying all these conditions in the disorderly times of the later Middle Ages. No one could even have assigned any definite reason, down to the fourteenth century, why a jury should not hold a private inquiry out of Court; and while the procedure was unsettled, there were one or two practices tending that way which might conceivably have become the model instead of first being exceptional and then disappearing. But the national instinct for publicity prevailed. The most Norman and the most royal element in the machinery of justice became a security against royal encroachment, a bulwark of freedom so beloved of Englishmen that pious fable ascribed its introduction to the hero-king Alfred.

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33.

THE METHODS OF THE ROYAL COURTS OF JUSTICE IN THE FIFTEENTH CENTURY[1]

By Hubert Hall[2]

WESTMINSTER.—THE KING'S COUNCIL

THE following morning Richard de Anesti was awakened at an early hour by his brother, with a message from the Treasurer that he should lose no time in presenting himself in the Hall of Rufus, on account of the great concourse of barons and knights and clerks, learned in the civil law, who should be attracted by the grandeur and novelty of this ceremony. Without any delay, therefore, Richard donned the richly jewelled dress which it befitted one of his rank to assume on such an occasion, and taking advantage of his present familiarity with the clerks of the King's Chapel, he enjoyed the privilege of hearing early mass, attended by the King and his household; after which he followed in the royal train that filed through the private entrance at the south end of the Great Hall. The lower part of the spacious building was already densely crowded with a brilliant company, but the upper end was kept clear by the marshals for the accommodation of the councillors and the distinguished suitors whose cause they were about to decide. Here the King took his seat on a lofty decorated throne prepared for the occasion, having on either side a bench richly draped, on which, and on two other benches at right angles to them, the prelates, earls, and barons who had received summonses to attend the Council, were placed in due order of precedence,—the Archbishop of Canterbury, the Justiciar, Richard de Luci, the Vice-chancellor, Master Thomas Brown, Ralph the physician, and several other distinguished persons, occupying seats on either side of the throne; whilst several clerks, furnished with material for writing, occupied a place where they could be easily overlooked by the Vice-chancellor and Master Thomas.

Meantime the less dignified clergy, deans and archdeacons and canons, had ranged themselves on the right side of the hall, and the great body of the king's tenants-in-chief and other lay personages similarly on the left; those in front seated on low benches, and those behind standing, in order to obtain a better view of the proceedings.

Richard de Anesti himself had taken a position with several officers of the Receipt immediately behind his patron, the Treasurer, who sat near the end of the bench on the right of the throne. Presently a flourish of music announced the approach of the exalted suitors, who entered the Hall by the great door at the north end in three separate divisions.

First came the referees, chosen by both parties indifferently, whose mission it was to guarantee the adherence of the two kings to the present arbitration on pain of

forfeiture of several important castles on either side, while it was their further duty to convey an impartial and authoritative report of the decision of the English king to the two contending sovereigns. These referees were four in number—a bishop and a lord, with whom were joined two principals of the Orders of the Knights of the Temple and of St. John. These legates, in their robes of office, preceded by heralds and banners of both countries, and followed by a body of clerks bearing membranes of parchment and ink-horns, advanced slowly up the centre of the hall, and after making a deep obeisance to the King, took the places reserved for them on his right hand. They were immediately succeeded by the embassy of Castille, comprising a bishop and several nobles of high rank, with numerous clerks learned in the law, the rear being brought up by a mounted knight in complete armour, preceded by a herald and attended by two squires on foot, who appeared as the champion of Castille. The embassy of Navarre followed in like order at a convenient distance.

Then the advocates of both parties having taken their places immediately in front of the throne on either side, the King opened the proceedings by referring to the previous Council at Windsor, at which the conditions of the arbitration and the formal statements of claim had been concluded, and the final hearing of the matter had been adjourned to the present meeting. Wherefore, he concluded, it was open to both parties to dispute in turn upon their respective allegations, before judgment was pronounced. At this announcement, the Bishop of Palenza rose and claimed the favour of the King and his Council on behalf of a native advocate of great repute, who was prepared to argue the cause of his master, Alphonso of Castille.

The King having signified his assent, the advocate referred to came forward and addressed the council with great fluency in choice Castilian Latin, interspersed with quotations from legal authorities. This discourse, which embraced a statement of the lineage of the kings of Castille and Navarre, and a narrative of the historical events connected with the violent usurpation of the territories now claimed by King Alphonso, was illustrated by references to numerous original charters and other documents, which, being handed in from time to time by the Bishop of Palenza, were read aloud by the Vice-chancellor, after which they were closely inspected by Henry himself.

When the Castilian advocate had concluded his argument, an advocate on the side of the King of Navarre replied at length in similar style, denying the allegations of his adversary, and advancing a counter claim to other territories of which his master had been forcibly dispossessed by King Alphonso or his ancestors, supporting also his contention by reference to documentary evidence. In the course of both arguments, the King frequently interrupted, demanding an explanation in clerical Latin of certain passages. The councillors also seemed to exhibit marked signs of impatience from time to time, and at length, almost before the Navarrese had well concluded his speech, Richard de Luci addressed the King to the effect that, without any disrespect to the representatives of the powerful and virtuous princes here present, it was plain that the bishops and barons whom the King had summoned to assist in the decision of this cause were unable to comprehend the allegations of either side any more than if they were spoken in a barbarous tongue, and, therefore, it seemed to him desirable that the advocates should be required to use the Norman tongue, which, he added, was

held in most esteem in the courts of divers Christian kingdoms. To this proposition the Bishop of London offered as an amendment that clerical Latin should be admitted; but this was negatived by a murmur of dissent amongst the lay nobility present, and a lively interchange of views followed on both sides. The King, however, put a stop to the discussion in a peremptory manner, and gave his decision in favour of admitting clerical Latin, but only in written allegations, with which each party was to furnish the Council within three days, in order that when these documents had been clearly explained and discussed by the Council, judgment might be given without further parley. Wherefore the present meeting was declared to be adjourned.

When the King had given this decision, the two embassies, without venturing any objection, withdrew in the same order as they had arrived, and their example was followed by the majority of those present. The chief topic of interest amongst the military part of the audience was the appearance of the two champions, of whose prowess in the wars against the Saracens many stories had been spread abroad, and the probabilities of the matter being referred to the battle was earnestly discussed on all sides. The clerical element, on the other hand, was anxious rather to argue the points of procedure that had arisen during the recent hearing, and especially the pretensions of the baronage that only the French tongue should be admitted. Concerning this subject, the Treasurer, who joined Richard as the King's retinue was leaving the hall, had much to say, advancing many reasons on either side, but himself leaning somewhat to that of the barons, on the ground that the record of every plea should be made in the vulgar tongue, as being a proclamation more solemn than any deposition in writing; though now, he added, matters were somewhat altered, except in the ancient franchises.

At this point Richard inquired of the Treasurer what difference existed between the sessions of the king's court before the king himself or before his justices. At which the latter replied as follows:

"You must know that the King sits in justice alone and supreme in all manner of causes, yet for the most part he uses to commit the hearing of the pleas of the subjects, and pleas of the Crown touching his revenue, or for the breach of his peace, and of the assizes of the realm, to his barons and justices; although I have known our King to preside in the matter of a convention made between two freeholders, whilst he has committed the judgment of an appeal of treason to the justices. But in those causes which concern the inheritance of lands and the encroachment upon his forests, and appeals in ecclesiastical causes, he is ever wont to hear and determine everything, with the assistance of his household or of the peers of the realm."

"And in which court," asked Richard, "is the greater wisdom discernible."

"Now, truly," replied the Treasurer, "I am in doubt as to an answer; for though the suitors benefit through the skill and precision of the presiding justices, yet it cannot be denied that our King himself is an incomparable judge of those things which are resolved by the course of the civil and canon laws. For in these causes he is both wise and subtle and resolute, so that none may gain any advantage over him in disputation,

as you would have seen had you been present at the hearing of the great cause between the Bishop of Chichester and the Abbot of Battle.”

“Nay,” said Richard, “but if you remember I was then present, being engaged in pursuing my own causes; and I have also heard of the King’s skill in deciding the matter of the inheritance of Earl Bigot in his late court at Windsor.”

“However,” the Treasurer resumed, “I do not otherwise commend those general processes, for a large assembly is in its nature incapable of judicial gravity; so that the sessions of such a body are generally attended with confusion and quarrels, and even with blows. As to this doubtless you are aware of the reason for the Archbishop’s absence to-day, him of York I mean, who is but now recovering from the wounds inflicted on him at the Council holden here last Easter.”

“I have heard some rumours of this dispute,” replied Richard, “but nothing plainly.”

“Then I will tell you,” said the Treasurer, “who was an eye-witness, though an unwilling one. The Council whereof I speak was convened by the Cardinal for the reformation of ecclesiastical abuses, and the King was present there with his sons, and all the bishops and abbots and chapters of the kingdom. And when all were assembled in the chapel of the infirm monks, here at Westminster, it was seen that those archbishops, and their suffragans and their monks, were arrayed against one another like hostile armies about to join battle. And presently the signal was given, when the Archbishop of Canterbury went forward to take his seat at the right hand of the Cardinal; for immediately the other Archbishop stood in his way, and claimed the dignity of that place as an ancient privilege of his Church; and because he still pressed forward, plucked him by the border of his pall. Whereupon the Bishop of Ely, who stood by, seized the aggressor by the back of his neck, and so held him fast, and his cap fell off and was broken. And at the same instant the servants of the Archbishop of Canterbury and others fell upon him, and threw him upon the ground and beat him, and trampled on him with their feet, so that he was rescued from their hands scarcely breathing. And by reason of this scandal, the King was compelled to make peace between them, and to send the Archbishop of Canterbury and the Bishop of Ely abroad with his daughter, as far as St. Gilles, whence they are only lately returned. But the Archbishop of York has little health and less desire to attend more councils.

“This then is the sum of that which you seek to know, that it is better, for the welfare of the whole community that there should be a constituted body, how small soever, to hear and resolve all causes at some fixed spot, rather than that the King should depute sundry of his courtiers to determine such matters, to whom the science of the Curia and of the Exchequer may perchance be wholly unknown. And it is certain that sooner or later these changes will become necessary, for in the multitude of our judges there is little wisdom and much guile. But concerning these things, I would desire you to hear Ranulph de Glanvill and his brethren, who have greater experience in them than we at the Exchequer.”

With such talk as this they reached the hall of the inner palace, where dinner was prepared, and where the King entertained at his own table the foreign legates, with

many prelates and nobles of the kingdom, and other clerks and laymen of his court, marshalled in due order of precedence. The fare indeed was modest, as befitted the beginning of Lent; but Richard was surprised at the infinite variety of fish that was served at each table: lordly salmon and great trout both sodden and baked with verjuice and spices, pike of three feet in length, roasted whole upon spits and stuffed with herbs and anchovies, eels in crust, potted lamperns, with tench, bream, and dace, and other common fish, all denizens of the river, and many of them long fattened in the fish stews that formed an important feature of the palace inclosure. Together with these was served almost every sort of sea fish that found its way to the riverside market. As soon as the banquet was ended, the King withdrew into his chamber for the purpose, it was understood, of conversation with the Spanish and Navarrese delegates respecting the political institutions of their respective countries, a subject of invariable attraction for this royal statesman.

Richard, learning that his friend the Treasurer was disposed for study, readily joined himself with a company of the younger courtiers present, who purposed, according to custom, to repair to the playing fields beyond the city walls, in order to initiate the Lenten tournaments always held there on Sunday afternoon—when the Court happened to be at London—between the chivalry not yet dignified by knighthood and the noble youths of the city. Accordingly, not long afterwards a gay cavalcade wended its way along the Strand towards the city, where, having fallen in with an equal number of the youths of the city mustered in the great square before the Church of St. Paul, the two squadrons proceeded towards the fields, followed by an immense concourse of spectators, both on foot and horseback.

Arrived at the appointed spot, where spacious lists had been prepared for the occasion, the tournament was opened by single courses between champions on both sides,—the citizens being, according to custom, the challengers. In this mimic warfare, however, neither steed nor rider was protected by armour, the latter having only a shield and a headless lance. The encounter, however, though bloodless, was an equal test of horsemanship and skill in the use of the lance, whilst the risk of severe falls and contusions was a sufficient proof of hardihood. As soon as the single contests were exhausted, and the champion who had displayed the greatest prowess had been proclaimed victor by the umpires, and rewarded with the prize of a gold chain, with which he was decorated by the fair hands of the daughter of one of the city magnates, a general engagement followed, the opposing bands vying in their display of skilful manœuvres, forming and wheeling and charging in several ranks, until at a given signal the combat was suspended, and the result was declared to be in favour of the courtiers, a verdict which excited some murmurs from the populace. Indeed Richard, who had remained an interested spectator of the tournament, having won his spurs many years before in the expedition against Toulouse, observed that an evident rivalry existed between the courtiers and citizens, which was not confined, as he was reminded by a recent tragedy, to a harmless encounter like the present. For as the former, after a joyous carousal and ceremonious farewell of the civic potentates, were returning again towards Westminster, the young heir of Bigot, next to whom he rode, asked if he intended on the morrow to witness the trial of John the Elder and those citizens, his fellows, who stood accused of housebreaking and other crimes against the king’s peace; of which, doubtless, he added, the murder of the brother of his father’s

old friend and companion in arms, the Earl Ferrers, when the Court first came to London, was one.

The sun had set behind the orchards and thickets of the Abbey before the party returned to Westminster; and immediately after supper Richard sought his couch, resolved upon being present at the expected trial of the recreant magnates of the city.

On the following morning, therefore, he rose early and waited upon his lord and patron, Richard de Luci, the justiciar, to whom the conduct of the trial belonged. Here he was informed by one of the deputy marshals of the Curia that the midnight robber, who had been previously wounded and secured, had been admitted as the king's prover, and that he had already denounced many of note amongst the younger citizens, some of whom had fled the city, and others were already taken, besides John the Elder, all of whom were lodged in the gaol of Newgate, and would be brought before the king's justices at Westminster that very morning. Upon hearing this news, Richard proceeded to the lodging of his kinsman, Ranulph de Glanvill, who, on learning his wishes, readily consented to accompany him.

Long before the hour appointed for the trial, a crowd of citizens had assembled in front of the palace gates, while more privileged courtiers had taken their stand in the body of the Hall itself. At the hour appointed for the proceedings of the court to begin, the Justiciar, Richard de Luci, entered, attended by various serjeants and officers, and also by several clerks and scribes who were prepared to endite a report of the proceedings in the rolls of the court. The Justiciar took his seat on the broad bench at the summit of the Hall, and the clerks occupied benches at a table immediately in front. Next the king's "prover" was brought in, unarmed, for, having lost his right hand in the manner before related, it was not intended that he should substantiate his accusation by a personal combat. After him followed the sheriff of London, William, son of Isabel, to whose custody the prisoners had been committed, and three or four of these wretches, half-naked and securely pinioned, under the escort of the sheriffs, serjeants, and the gaoler of the king's prison, were next brought up to the bar which divided the judges and clerks from the body of the court.

The proceedings which followed were short and simple in the extreme. The Justiciar rose and spoke a few words to the effect that the King was deeply moved to anger by the frequent contempts and crimes committed heretofore by divers malefactors of that city, which he was resolved to visit with condign punishment, as would presently be evident. At the conclusion of this significant preamble, the king's "prover" was pushed forward by the sheriff. Pale as death, with trembling limbs and faltering accents, he appealed John the Elder, and others his associates, for that they did by night within the king's peace, feloniously break into the lodging of a certain lord, namely the brother of the Earl of Ferrers, and him wounded, and dragged into the street, and killed with blows; and also for that the same did, not long afterwards, feloniously break into the lodging of another lord, namely Robert de Estutevill, and this he offers to prove as the court shall direct, being a man maimed. And the defendants, thus appealed, answered, and traversed the entire charge, word for word. Thereupon twelve citizens, who had been impanelled by the sheriff in open court, as dwelling in the same wards with the accused, and sworn to declare the truth of the

matter, came forward and stated that they held the said persons appealed in grave suspicion of guilt, who thereupon demanded the franchise of the city, namely, to clear themselves by the joint oath of their peers. But the Justiciar denied this claim, on the ground of the supreme jurisdiction of the king in his court, and decreed that they should clear themselves by the water, for such, he said, is the King's commandment, and that it be done suddenly.

The whole proceedings had not lasted ten minutes, and here were six men adjudged to a shameful death practically unheard, and with no appeal but to the justice of Heaven to work something like a miracle in their behalf, for such was the real meaning of the ordeal of water—a yet more desperate resource than the trial of the heated iron, though the accused had not even been permitted to choose between these implements of torture.

Thus thought Richard de Anesti as he found himself hurried along in the eager throng of sightseers which pressed towards the great doorway through which the officials and prisoners had already passed on their way to the place of torment.

It is related that in the old days of simple piety and austere faith before the Conquest, the ordeal was always performed as a solemn religious mystery in the interior of a church, and the Divine interposition on behalf of the innocent was invoked by prayer and fasting; but now the test had degenerated into a meaningless form of law—a straw carelessly dropped within reach of a sinking man. Therefore, without proceeding as far as the Church of St. Peter, the procession halted on the verge of the abbey precincts, where, in an excavation made for the purpose, a large copper filled with water was already steaming over a roaring furnace of pine logs. Here the prisoners were halted, and the sheriffs' serjeants bandaged each probationer's hand and arm with thick folds of linen, to the upper and lower joints of which the sheriff affixed his seal upon a thin disc of molten lead. Then the accused were called upon in turn to attempt the ordeal, which consisted in plunging the bandaged arm into the now boiling cauldron, so as to snatch away from the bottom a large white stone. This John the Elder successfully accomplished, but two out of his five associates were not so successful; for one of them being overcome by the heat of the furnace, or blinded by the smoke and flame, was unable to lay hold of the stone, and still groping for it with his arm, fainted with the pain, and would have been either boiled or roasted alive if the sheriff had not plucked him forth. This horrible sight so disconcerted the last of the accused, that, having advanced to the edge of the furnace, his courage failed him, and he piteously refused to make the required attempt. Thereupon he was adjudged guilty, and sentenced by the Justiciar to be hanged with the other prisoners who had failed to clear themselves in the manner required by custom. The four remaining prisoners who had braved the terrors of the ordeal were now respited in order that the judgment of God might be apparent from the inspection of their arms at the lapse of three days; for then he upon whose flesh appeared no mark of scalding was held to be unscathed by the water, and was discharged or banished, according to his character; but otherwise he was punished with the extreme rigour of the law. These then were now removed under a guard to prison, but the two already convicted, having been hurriedly tied by their feet to the tails of two horses, were dragged in that manner by the sheriffs and a mounted party towards the place of execution, followed by a large

part of the spectators both on horseback and on foot. Richard had no desire to be present at the final act of justice, but returned slowly towards the palace, still musing upon the problem which had been suggested by the recent scene, and which was nothing less than the possibility of the administration of justice in a spirit of equity and humanity.

He had not proceeded far before he was overtaken by Ranulph de Glanvill and his brother William, and together they returned to the White Hall, where they found the Treasurer and a few other clerks and courtiers awaiting the King's return from his daily hunting expedition, and here, after some conversation upon the subject of the late proceedings, Richard, addressing himself to the Treasurer, mentioned the objections which had occurred to him as a layman in the judgments of criminal presentments, inquiring whether this process was common to other kingdoms, and for what reason the great perfection displayed in the judgments of the Curia and Exchequer in other pleas had not been extended also to these; and, lastly, whether the evil were such a one as might be remedied. To which the Treasurer replied as follows:

"It is true that neither the providence of the king and his justices, nor the vigilance of the sheriffs and his other ministers, can wholly prevent those evils of which you have complained. But whether the laws themselves and the assizes of the kingdom are to blame therein, I will not willingly decide, but will refer you on this point to our most learned justice, your kinsman here."

Ranulph de Glanvill, who was thus appealed to, appeared to accept the Treasurer's challenge, for he immediately addressed himself to Richard in the following words:

"I admit," he began, "in part the truth of what you have spoken. But consider now that there is no similitude between the Common Pleas of the King's Court or at the Exchequer and the presentments of which you make mention, which notoriously are practised in the provincial courts, according to the ancient laws of the English, among which is this same trial by the ordeal, whereas the Curia and Exchequer are in their origin wholly Norman. But it is to be considered in respect of the ordeal, that if the accused be nobles or freemen, or burgesses, they shall have the appeal of battle, or the judgment of their peers, or the custom of their city; though truly our King is no respecter of persons, as you have just now seen, and thinketh that for men convicted by the oath of their neighbours, the ordeal is sufficient. So then this judgment is clearly to be laid to the charge of the English laws, and I myself who have read these laws throughout, believe that they are requisite to the state of this kingdom, and that they will continue with little change into after times. For the nature thereof is this: To preserve the peace of God, together with the king's peace, unto all men, wherein it is enjoined that the whole body of people shall be assisting, and therefore they are the best judges of their fellow's guilt or innocency, to which end also they solemnly invoke the judgment of God to declare the truth before the guilty are punished."

Richard could not help admitting the justice of these reflections, and because, he added, he himself had spent nearly six years in the prosecution of a single suit, it seemed at least a merit that justice should be expeditious even at the expense of outward ceremonies.

Then several courtiers who were present having marvelled greatly at the exceeding length of his suit, at their request, and with the permission of the Treasurer and the other great men there, Richard spoke as follows.

WESTMINSTER.—THE KING'S COURT

"It is now thirty years ago," Richard began, "that William de Sackville, my uncle, died, leaving to me and to one other a disputed inheritance. And the cause hereof was this: that the same William, long before, was contracted in the bond of matrimony with Albreda, daughter of Geoffrey de Tregoz, but notwithstanding this solemn vow, he soon afterwards married Adeliza, daughter of Aubrey de Vere, contrary to the laws of Holy Church. And thereupon Albreda, whom he had thus wronged, brought her suit in the ecclesiastical courts, and because she could not have justice done her there, she appealed thence to the Bishop of Winchester, being at that time the legate of our lord the Pope, by whom the truth of the matter was certified to the Court of Rome. And afterwards, by virtue of a certain rescript of our lord the Pope, sentence of nullity was pronounced in a synod held at London in the year of Our Lord 1143, and accordingly the said William returned to Albreda, and lived with her till his dying day. But although he thus submitted himself to the decree of Holy Church, and put away her with whom he had sinned, yet he continued to bear a great affection towards her, and especially to the daughter whom she had borne to him, by name Mabel. And many years after, being infirm with age and sickness, the said Mabel and her husband came to him and abode with him till his death, and afterwards entered upon all his manors and lands, on the pretext that the said Mabel took the same as his daughter and heiress. Moreover, they feigned that the said William, before his death, had repented of the evil that he had wrought towards Adeliza, having confessed the whole truth in the presence of the Abbot of Colchester and other religious persons, as follows. That he had by no means entered into that contract with Albreda, as had been supposed, but had received a release thereof from her father to himself and his father, by agreement on both sides, after which he married Adeliza openly in the face of the Church, who was driven from his house against his will by the subtle devices of Albreda, and of those who were in hope to inherit in default of his issue by her such as afterwards came to pass. Alleging further that the legate and those who were joined with him in pronouncing that sentence of nullity had been influenced therein by gifts.

"And because Mabel and her husband were in possession of my rightful inheritance, and would not even make a concord with me about the same, I sent a certain man of my own into Normandy for the King's writ, whereby I impleaded my adversaries. And when my messenger brought me the writ, I proceeded to Sarum, in order that it might be returned under the Queen's seal. And when I came back I heard that Ralph Brito was about to cross the water, so I followed him to Southampton to speak with him, in order that he might purchase for me the King's writ addressed to the Archbishop, because I knew that the plea would be removed into the Archbishop's court. And having returned from Southampton with the Queen's writ, I went to Ongar, and delivered the writ to Richard de Luci, who, having seen the same, gave me a day for pleading at Northampton on the eve of St. Andrew; and before that I sent Nicholas my clerk for Geoffrey de Tregoz, and for Albreda his sister, to wit she who had been my uncle's wife, whom he found at Berney, in Norfolk. And when the clerk returned,

I went to Northampton to open my pleadings with my friends and helpers, and hence Richard de Luci gave me another day at Southampton, on the fifteenth day. Afterwards Ralph Brito came from Normandy, and brought me the King's writ, whereby the plea was removed into the Archbishop's court, and I carried the writ to Archbishop Theobald, whom I found at Winchester; and then he gave me a day on the feast of St. Vincent, and that plea was held at Lambeth; and thence he gave me a day on the feast of St. Valentine the Martyr, and that plea was held at Maidstone. From thence he gave me a day on the feast of St. Perpetua and St. Felicity; and meanwhile I went to the Bishop of Winchester, to talk with him, so that he might certify the divorce which had been before him in the synod at London. And having received the bishop's certificate, I appeared on the day assigned to me prepared for pleading, and that plea was held at Lambeth. From thence he gave me a day on the Monday next after the Lætare Jerusalem. And meanwhile I went for Master Ambrose, who at that time was with the Abbot of St. Alban's, in Norfolk; and Sampson my chaplain I sent to Buckingham for Master Peter de Melide.

"Having thus secured the clerks above-named, I kept my day with my helpers at London. Thence the Archbishop gave me a day on Quasimodo Geniti Sunday; and meantime I sent John my brother beyond sea to the King's Court, because I was informed that my adversaries had purchased the King's writ not to plead until the King should return from beyond sea; and therefore I sent my brother for another writ, that my plea should not be stayed by reason of this writ of my adversaries. And in the meantime I went myself to Chichester, to talk with Bishop Hilary, so that he might testify to the divorce which had been pronounced in his presence by my lord of Winchester, in the synod at London; and I received his testimony, namely, the letters which he despatched to the Archbishop testifying the divorce.

"At London I kept my day with my clerks and witnesses and friends and helpers, and I remained there during four days, pleading every day. Thence he gave me a day on Rogation day, and when I kept it at Canterbury, my adversaries said that they would not plead on account of the summons of the King's army against Toulouse. So I followed the King, and I found him at Auvilar, in Gascony. And in this journey I waited thirteen weeks before I was able to have the King's writ to proceed with my pleadings. As soon as I had purchased the King's writ, I returned, and having found the Archbishop at Mortlake, I delivered the King's writ to him, and he gave me a day on the feast of St. Crispin and St. Crispianus, on which day I came to Canterbury; and from thence he gave me a day on the octaves of St. Martin, on which day I came to Canterbury. From thence my lord of Canterbury gave me a day on the feast of St. Lucia the Virgin; and meanwhile I sent Master Sampson my chaplain to Lincoln for Master Peter. But when my day came I was unable to plead on account of my illness; so I sent my essoigners, who had me excused at Canterbury. And thence a day was given me on the feast of St. Fabian and St. Sebastian, on which day I came to London, where my lord of Canterbury then was; and from thence he gave me a day on the feast of St. Scolastica the Virgin, and I kept it at Canterbury; and thence on Lætare Jerusalem, and I kept it at London; and thence on Misericordia Domini Sunday. And in the meantime I sent Robert de Furneis and Richard de Marci for Godfrey de Marci, and I myself went to the Bishop of Winchester, that I might obtain a more perfect certification of the divorce pronounced by him. And I found the bishop at Fareham,

by Portsmouth, and from thence I brought back with me Master Jordan Fantasma, here, and Nicholas de Chandos, that they might be able to testify by word of mouth what the bishop had also testified by his writ. And I kept my day at London, prepared to plead, and thence the Archbishop gave me a day on the Close of Pentecost. And meantime I went myself to the Bishop of Lincoln for Master Peter, who then was with him at Stafford, and I sent Sampson my chaplain for Master Steven de Binham, whom he found at Norwich. And thence I kept my day at Canterbury, prepared to plead with my clerks, witnesses, friends, and helpers; and there we pleaded for two days. From thence he gave me a day on the octaves of St. Peter and St. Paul, and I kept it at Wingham; and thence on the feast of St. Sixtus, and I kept it at Lambeth; and thence on the Decollation of St. John the Baptist, and I kept it at Canterbury; and thence on the feast of St. Luke the Evangelist. In the meanwhile I crossed the water that I might crave license from our lord the King to appeal to Rome; and having received the license, I appealed to Rome till Lætare Jerusalem. After this I sued for the Archbishop's writ of appeal; but he refused to give it me forthwith, but he gave me a day to receive it at Canterbury, on which day I came and received my writ, but without seal, so that I might show it to my advocates and obtain their opinion whether it was according to law. And afterwards I sent his writ, by Sampson my chaplain, to Lincoln, to show it to Master Peter. And afterwards I sent it to Master Ambrose, whom the messenger found at Binham. And when the writ was corrected by my advocates, I brought it again to Canterbury, that it might be sealed; but after seeing it, they refused to seal it as it was, but they gave me another also without seal. Thence, after I had received this writ, I went to show it to the Bishop of Chichester, and when I had heard his advice I returned. And then I sent the writ by Sampson my chaplain to Master Peter. I then sent the same writ again to Master Ambrose at St. Alban's; and when I had received their advice, and the writ being corrected, I went to the Archbishop at Wingham, and there my writ was sealed. And when I came back I sent John my brother to Winchester, in order that he might purchase the bishop's writ, certifying the divorce to the Holy Father, and I myself went to the Bishop of Chichester, whom I found at Salisbury, in order that he might certify the divorce by his writ addressed to the Holy Father in the same manner as he had done to the Archbishop. And a second time and a third time did I send my brother to Winchester before I could have an available writ. Thereafter I got my clerks ready, and sent them to Rome, to wit, Sampson my chaplain, and Master Peter de Littlebury, and one man to attend them. And when they came back I received from them the writ of our lord the Pope, and brought it to the Bishop of Chichester and the Abbot of Westminster, to whom the same was addressed, in order that my plea might be brought into their court. After they had seen the apostolical precept, they fixed a day for me to plead at Westminster in eight days of the feast of St. Michael. And I kept my day, with my advocates and witnesses and friends and helpers, and there we tarried three days before we pleaded, on account of the King's commands about which the abbot and the bishop were employed. And thence they gave me a day in eight days of St. Martin. In the meantime I sent John my brother for Godfrey de Marci, in order that he might attend as my witness, and he could not come, because he was ill, but he sent his son in his place. On the appointed day I came to London, prepared and ready to plead, because I thought that I should then obtain my judgment, and there we tarried five days, and then my adversaries appealed to the presence of the Holy Father himself till the feast of St. Luke the Evangelist. And I requested the instrument of appeal, and

they gave me a day at Oxford on the feast of St. Andrew. And I kept my day, and tarried there for nine days before I could obtain my instrument; and having received it, but without seal, I carried it to Master Peter at Lincoln, in order that he might correct it. The writ being corrected, I carried the same to the Bishop of Chichester at Winchester, on the octaves of the Epiphany, in order that it might be sealed there. But the bishop would not seal it, because the Abbot of Westminster was not there; but afterwards it was sealed at Westminster on Lætare Jerusalem. Afterwards I went to the Archbishop of York for his writ deprecatory, addressed to the Holy Father, and to the Bishop of Durham for his writ to the Holy Father and the cardinals; and I found them both at York. And I returned to the Bishop of Lincoln for his writ to the same, and afterwards to the Bishop of Winchester for his writ; and I found him at Glastonbury. And when the time of appealing drew nigh, having prepared my clerks, I sent them to the Court of Rome, where they tarried sixty-two days before they could have my sentence. And now, if you would know how they fared on that journey, Master Jordan here will tell you, who was there himself."

Hereupon the courtiers having entreated Master Jordan to relate what befell him at the Court of Rome, he complied with their request as follows:—

"As soon as I had received these commands from the knight my master here, together with the writs and allegations on our side, and twenty-five marks in silver for our expenses, I joined myself with Master Sampson, my lord's chaplain, and one man to attend us, and having prepared ourselves with horses and an outfit suitable to the journey, we slept that night in London. And on the following day we rode to Rochester, and on the next to Canterbury, and thence half a day's journey to Dover, where we took ship to Witsand. And thence, on the seventh day, because the ways were foul, we came to Paris, where for three days I frequented the English school, being desirous of embracing many of the scholars who were formerly my own. And thence we proceeded, but slowly, because of the forests and from fear of robbers, to Chalons; and thence, ten days' journey amongst the hills, to the hospice of the Great Mount. And thence gladly we fared by the plains to Pavia; and so by easy journeys to Cremona, and Parma, and Biterba, and on the fifth day we arrived at Rome. I will not speak now of the greatness of that holy city, which I then beheld for the first time, but will proceed to relate what befell us there, according to your wish.

"At the first I laboured for three days in the Curia, to obtain letters confirmatory; and after I had advanced many reasons on this behalf, our lord the Pope spoke to me benignly, promising that the same should be granted. And thereupon I made a gift to him of a silver cup, of the value of six marks. But when I daily prayed for the delivery of these letters, our lord the Pope was unwilling, because he would first hear our adversaries, who had been detained by the way. And when I still further importuned him, he answered sharply, 'Ye have had your answer,' to which I replied quickly, 'Yea, and a masterful one.' Then he in great anger inquired, 'Is it not also a just one?' Whereupon, casting down my eyes, I replied again, 'Lord, I know not.' But he forthwith commanded me to keep silence and to withdraw.

"After this I went to Piacenza, and afterwards to Pavia. And in the meantime our adversaries arrived in Rome, having been taken and plundered at Chalons. Therefore I

too returned to the city after visiting Bologna, where I engaged certain of the most learned doctors in the civil law in our behalf. And after I had returned the Court ordered that we should be prepared to plead on the third day from then; on which day, when we were all together before the Court, our lord the Pope said thus: 'Ye shall only speak to the matter and not of things immaterial.' And thereupon we made our allegations on both sides, and our answers thereto on both sides. And once our lord the Pope cut short our adversaries' allegation, saying fiercely, 'We want no long history!' so that their advocate, dismayed, lost the sense of his argument. And again, when they complained that I had engaged all the best advocates for our side, he laughed loudly, saying, 'There will never be found a lack of advocates in the Roman Court.' And when I spoke in my turn, knowing the fastidiousness of our lord the Pope, I spoke briefly and to the point; but at the end I wept somewhat, when I related the evils that we had endured. Whereupon, turning towards the cardinals, he laughed, and whispered something to them, whereat they laughed also. And because our adversaries especially denied the authenticity of certain transcripts of briefs formerly received by the legate in England, pronouncing the opinion of the Roman Court for the divorce to be decreed, our lord the Pope commanded that they should be given to him; and when he had seen them, he gave them into the hands of the cardinals, who also examined them, and finally they commanded the clerks to search for the counter briefs, and afterwards compared them with our transcripts, declaring them to be authentic. And when we had concluded our arguments, and were all seated, our lord the Pope asked if we had any further allegations, and I then demanded judgment in our cause. But he commanded us to depart and write out our allegations, and deliver them to him the same day. And after I had done this, with the help of my advocates, there remained nothing to be considered of save the sentence itself, to procure which, in our favour, was plainly beyond our skill, unless also it was due to the justness of our cause. Nevertheless, during the following week we implored the Divine aid with prayer and fasting and continual almsgiving. And Master Sampson greatly assisted us at this time by his remarkable piety. For he not only remained fasting for five days, during all which time he perambulated the holy places and shrines of the city, commending our cause to the pilgrims and other devout persons there, giving alms also to all needy persons, whether they had craved them or no, so that the fame of his good works was noised abroad throughout the city; but further, when we attended the Court again to receive sentence, kneeling in the door, he embraced the feet of each cardinal as he entered, as though he would wash them with his tears, so that all present, and even our adversaries, pitied his miserable condition.

"At length, about the ninth hour, our lord the Pope came forth from the inner council chamber with the cardinals, and because I saw that the ushers, whom I had loaded with gifts, smiled graciously upon me, I took heart. And when the cardinals were all seated, and we stood forth on one side, and our adversaries on the other, as had been our custom, our lord the Pope commanded, 'Stand ye together in the midst; for now there is no longer any strife betwixt you, since we have brought you into peace with one another.' And when we had come together, our lord the Pope began to recall the nature of our suit, and how, after full examination of our allegations and other writings, sentence had been prepared in the accustomed manner. Yet I then took no note of his speech, because I was not able to compose my senses, standing like one in a dream, until the principal prothonotary of the Court arose, and began the reading of

the sentence. But as soon as I heard the words, 'to our beloved son, Richard de Anesti,' then I was suddenly aware that we had gained our cause, for the sentence of the Court is ever wont to be addressed to the side that has prevailed. And when the sentence was read, we fell at the feet of our lord the Pope, and when we rose again, Master Sampson lay still at his feet like one dead, having fainted away through joy after his fasting. So we raised him up tenderly, and bore him away, and our lord the Pope ordered that we should receive the instrument to see, if it needed any correction; and having received his blessing, we departed joyfully.

"After this we received the command of our lord the Pope that we should not leave the city. Moreover, we owed forty shillings to the merchants of Rome, who demanded to hold our instrument and writings in pawn for the same. And being all of us suffering through illness, we cast lots which should return alone to England for succour and to bear our tidings. And the lot fell upon Master Sampson, who departed from the city secretly. After whose departure I daily implored the license and benediction of our lord the Pope, that I might depart also; but I could not obtain it because I had not yet visited him and the cardinals to bestow my gifts upon them, as the custom was. But because I was unable to do this for lack of means, and since my sickness increased daily, I borrowed forty shillings from a certain clerk of the Bishop of Lincoln, who was then attending the Court in the matter of the appeal of the Abbot and Convent of St. Alban's against the jurisdiction of the said bishop. And having redeemed our instruments from the merchants, I changed my dress, and craving the license of the holy Apostles Peter and Paul, and receiving the apostolical benediction, in the midst of the crowd, I departed secretly from the city. And each day till I had reached the hospice of the mount I was in fear lest I should be brought back; but at length, with the Divine protection, I reached England in safety."

At the conclusion of Master Jordan's narrative, which had been listened to with deep attention by every one present, Richard de Anesti again resumed his story at the point where it had been left off.

"When my clerks had returned from Rome, as you have just now heard, they delivered to me the sentence which confirmed the former one of adultery, whereof one instrument was directed to the Archbishop, another to Richard de Luci, and the third to me, and with these I went to my lord Richard de Luci, whom I found at Rumsey; and there we awaited the return of the King, who was about to come back from Normandy. Thence I followed the Court for three weeks before I could make fine with the King; and because the King was vexed on account of his Holiness not having directed any brief to him, I sent a messenger on the following day to the Holy Father for a writ directed to the King (which my messenger afterwards brought to me on the Close of Easter, at Windsor). After I had fined with the King, my lord Richard de Luci, by the King's precept, gave me a day for pleading at London, at Mid-Lent, and there was then a Council; and I came there with my friends and my helpers, and because he could not attend to this plea because of the King's business, I tarried there four days, and from thence he gave me a day on the Close of Easter, and then the King, and my lord Richard, were at Windsor; and at that day I came with my friends and helpers, as many as I could have, and in the meantime I sent my brother for Ranulph de Glanvill, and because my lord Richard could not attend to this plea

because of the great plea of Henry de Essex, the judgment was postponed from day to day till the King should come to Reading, and at Reading in like manner it was postponed from day to day till he should come to Wallingford. Afterwards, because my lord Richard was going with the King in his war against Wales, he removed my plea into the Court of the Earl of Leicester at London; and there I came. But because I could not get on at all with my plea, I sent to my lord Richard in Wales, to the end that he might order that my plea should not be delayed; whereupon, by his writ, he ordered Ogier, the King's server, and Ralph Brito to do justice to me without delay. So they gave me a day at London. There I kept my day with my friends and helpers, and from thence my adversaries were summoned by the King's writ, and by my lord Richard's writ, that they should come before the King. And we came before the King at Woodstock, and there we remained for eight days, and at last, thanks to our lord the King, and by the judgment of his Court, my uncle's lands were adjudged to me, being the sixth year since my suit began. Moreover, I had spent in these causes the whole of my substance, namely: for the expenses of my journeys and my living, and that of my messengers and others, £126 14*s.,* besides eight palfreys and pack-horses that were killed in those journeys, £6 6*s.* 8*d.;* and in gifts to my advocates and helpers in the Archbishop's Court, £21; and in the King's Court I spent in gifts, both of money and horses, £13; and to 'Ralph, the King's physician, I gave £21; and to the King a hundred marks of silver, and to the Queen a mark of gold for my fine. And besides the money I had of my own, I borrowed, of certain Jews at several times, the greater part of that which I spent; and I paid £32 1*s.* 9*d.* for the usance thereof; and, in short, after I had enjoyed my uncle's lands and goods for upwards of three years, I still owed fifteen marks of my fine to the King, and to Hakelot the Jew £27, the interest whereof had mounted up to £20 9*s.* Therefore, my lords, it seemeth to me that it is better for a man to have injustice done to him without much delay, than that he should lose, perchance, more than he has gained by due process of law."

At the conclusion of Richard's narrative of his famous law-suit, there was a renewal of the conversation upon judicial matters until the King's return from hunting caused a general dispersal of the courtiers.

In the course of the next few days the Court left London once more, but Richard chose to remain, partly because of the attraction offered by his pleasant intercourse with old friends amongst the clerks of Westminster and the canons of St. Paul's, and partly, also, because he was as yet unable to make any fine with the King; so that he was resolved to await the session of the Easter Exchequer before taking more active steps in his own business.

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34.

CRIMINAL PROCEDURE FROM THE THIRTEENTH TO THE EIGHTEENTH CENTURY[1]

By Sir James Fitzjames Stephen, Bart.[2]

HAVING in the last chapter traced the history of the courts of a criminal jurisdiction, I now proceed to the history of the procedure followed for the punishment of criminals. I shall give the history of each step in the procedure separately, and I intend in the present chapter to treat of the procedure from the arrest of the offender to his discharge or committal for trial. This consists of two stages, namely, the apprehension of the offender, closely connected with which is the law as to the suppression of offences, and the preliminary investigation before a magistrate, which results in the discharge, or committal for trial, or bailing of the supposed offender.

In each case, the law itself was as a matter of fact subsequent to the establishment of the officers or courts by which it was carried into execution. Also, in each case, after the practice of the officers or courts had gradually formed the law, alterations were made by statute both in the law itself and as to the officers and courts by whom it was to be administered.

[1]*The Apprehension Of Offenders And Suppression Of Offences*

I have described above the system for the apprehension of offenders and the prevention of crime which existed down to the time of William the Conqueror and his sons.

The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, "The King's Peace," the legal name of the normal state of society. This prerogative was exercised at all times through officers collectively described as the [2] Conservators of the Peace. The King and certain great officers (the chancellor, the constable, the marshal, the steward, and the judges of the King's Bench) were conservators of the peace throughout England, but the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace, the constable, each in his own district. During the reigns of Henry II., Richard I., John, Henry III., and Edward I., the system administered by these authorities (with the exception of the justices of the peace, who were not established till the reign of Edward III.) was elaborated and rendered more stringent than it had been before the Conquest by a long series of enactments.

The first of these was the 3 Assize of Clarendon issued by Henry II. in 1166, just 100 years after the Conquest. It was re-issued as the 4 Assize of Northampton in 1176, in the form of instructions to the six "committees of judges who were to visit the circuits then marked out." The provisions of the Assize of Clarendon bear more directly on the present subject than those of the Assize of Northampton.

1 The Assize provided that the sheriffs and justices should make inquiry upon the oath of twelve men from every hundred and four men from every township whether any man in any township was 2 a robber, murderer, or thief, or a receiver of robbers, murderers, or thieves; that every person so accused should be taken and brought before the sheriffs and by them before the justices, and that no lord of a franchise 3 "nec in honore etiam de Wallingeford" should interfere to prevent the sheriff from entering his franchise either to arrest accused persons or to examine the frank pledges and see that every one was a member of a frank pledge. The Assize of Northampton 4 enacts amongst other things that every robber on being taken is to be delivered to the custody of the sheriff, and in his absence to be taken to the nearest "castellanus" to be kept by him till he is delivered to the sheriff. The Assize also provides (art. 2) that no one is to be allowed to entertain any guest in his house, either in a town or in the country (neque in burgo neque in villâ), for more than a night unless the guest has some 5 reasonable excuse which the host is to show to his neighbours, and when the guest leaves, he must do so in the presence of neighbours and by day.

By the 6 Assize of Arms, issued in 1181, every one was bound to have certain arms according to his property. The justices, on their eyre, were to make the representatives of all hundreds and towns swear to give in a return showing the property of all persons in the neighbourhood, and which of them had the arms which, according to their property, they were bound to have. Those who had not such arms were to be brought before the justices to swear to have them by a given day, and "justitiæ facient dici per omnes comitatus per quos ituræ sunt, quod qui hæc arma non habuerint secundum quod prædictum est, dominus rex capiet se ad eorum membra et nullo modo capiet ab eis terram vel catallum."

The main object of these provisions no doubt was to provide a military force; but they were also intended to give the local authorities the means of suppressing violent crimes, for the persons so armed formed the power of the county (*posse comitatus*), which it was the duty of the sheriff in case of need to raise by hue and cry.

This is set in a striking light by a 1 passage in Bracton, which describes the steps to be taken on opening a commission of eyre by the justices in eyre. The representatives of the county having been convened, the justices were to make a speech to them. "In the first place, concerning the peace of our Lord the King, and the violation of his justice by murderers, robbers, and burglars, who exercise their malice by day and by night, not only against men travelling from place to place, but against men sleeping in their beds, and that our Lord the King orders all his faithful subjects, by the faith which they owe to him, and as they wish to preserve their own, to give effectual and diligent counsel and aid to the preservation of peace and justice and to the taking away and repression of the malice of the aforesaid." The principal persons are then to be taken apart, and are to be privately informed "that all persons of fifteen years of age and

upwards, as well knights as others, must swear that they will not receive outlaws, murderers, robbers, or burglars, nor consent to them, nor to those who receive them, and that if they know of such persons, they will cause them to be attached, and give information to the sheriffs and bailiffs, and, if hue and cry is raised upon them, will, as soon as they hear the cry, follow with their households and the men of their land." If the criminal is not taken on the spot, he is to be tracked. "Let them follow the track through their own land, and at the end of their own land show it to the lord of the next land, and thus let pursuit be made from land to land" (township to township) "with all diligence till the criminals are taken, and let there be no delay in following the track unless a difficulty arises by the coming on of night, or by other reasonable cause, and they must, according to their power, arrest those whom they suspect without waiting for the orders of the justice or the sheriff, and must inform the justices and sheriffs of what they have done. They must also swear that if any one comes into any village or town or elsewhere to buy bread or beer or other victuals, and is suspected of doing so for the use of criminals, they will arrest him and deliver him, when he is arrested, to the sheriff or his bailiffs. They must also swear that they will take in no one as a guest in their houses by night, unless he is well known, and that if they entertain any unknown person they will not permit him to leave on the morrow before it is clear daylight, and that in the presence of three or four of their nearest neighbours."

Bracton wrote in the reign of Henry III. In the time of Henry's son and successor the system embodied in these enactments reached its highest point of strictness. This appears from the provisions of the Statute of Winchester (13 Edw. 1, st. 2, c. 1, 2, 4, 5, 6), passed in 1285. [1] This statute enacts (ch. 2) that when a robbery is committed the hundred shall be answerable unless the robbers are apprehended within forty days, that in all walled towns the gates shall be shut from sunset to sunrise, that a watch should be set at each gate, and "that no man do lodge in suburbs from nine of the clock until day without his host will answer for him." All strangers passing the watch at night are to be arrested till morning. All roads are to be cleared, "so that there be neither dyke, underwood, nor bush whereby a man may lurk to do hurt" within 200 feet on each side of the road. Lastly, every man is to "have in his house harness to keep the peace after the ancient assize" (the Assize of Arms). The arms were to be viewed twice a year by constables chosen for that purpose, who were to present defaulters to the justices. The sheriffs and bailiffs were to follow the cry with proper horses and armour whenever it might be raised.

By this time frank pledge must have become obsolete. The Statute of Winchester makes no mention of it, nor does the Statutum Walliæ, nor indeed does any other statute with which I am acquainted treat it as an actually existing institution for keeping the peace. The name indeed continued and still exists. The view of the frank pledge, that is to say, the verification of the fact that the frank pledges were in full efficiency, and that every one belonged to such a body, was anciently one of the most important duties of the county and hundred courts and the courts leet. Hence, as the county and hundred courts were disused, the expression "the view of frank pledge" came to be synonymous with "court leet." The chief business transacted in these views of frank pledge or courts leet was the presentment of petty nuisances, and especially the "assiza panis et cerevisiæ," violations by bakers and brewers of rules as to the quality of their bread and beer. It is in this sense that frank pledge is referred to

in the [1] Parliament Rolls, and that the expression is used by Coke. The "Statute for View of Frank Pledge" (18 Edw. 2, ad 1325) specifies thirty-four such articles as to which stewards were to inquire in their leets.

Shortly the system just described was as follows. Upon the commission of a felony any one might arrest the offender, and it was the duty of any constable to do so. If the offender was not arrested on the spot, hue and cry might and ought to be raised. The sheriff and constables from the earliest times, the justices of the peace from the beginning of the reign of Edward III., were the officers by whom the cry was to be raised. In order to render the system effective, every one was bound to keep arms to follow the cry when required, all towns were to be watched and the gates shut at night, and all travelling was put under severe restrictions.

The Assize of Arms and the [1] Statute of Winchester fell into disuse, but the right of summary arrest in cases of felony continues to this day to be the law of the land, and though the sheriff's personal intervention in the matter has practically fallen into disuse, the justices, and the constable are still the authorities by whom the system is worked.

One great alteration was made in the system just described between the fourteenth and the seventeenth centuries. During that period, summonses and warrants superseded the old hue and cry which practically fell into disuse. The history of this substitution is curious.

Justices of the peace were first instituted in 1326. Their duties were described in the most general terms. They were by 1 Edw. 3, c. 16, "assigned to keep the peace." By 34 Edw. 3, c. 1 (1360), they were empowered "to take and arrest all those they may find by indictment or suspicion and put them in prison." But neither in these nor any other early statute with which I am acquainted is there any provision which enables them directly to take an information as to the commission of a crime and issue a summons or warrant for the apprehension of the suspected person.

The statutes above quoted give them no other authority for the apprehension of offenders than was by the common law inherent in every constable and indeed in every private person. By degrees, however, the practice of issuing warrants came into use. The general authority of the justices in all matters relating to crime and indeed to the whole internal government of the country was firmly established by a great variety of statutes, and it would be natural that their directions should be taken when a crime was committed. It would also be more natural for the justice to authorise the constable to undertake the actual arrest of the offenders than to do it himself, and it might often be convenient, if a suspected person was to be searched for in more directions than one, to give written authority to various persons for the purpose.

This would be specially convenient in the case of a hue and cry. If offenders were to be followed from township to township, the different constables of each being required to join, a written authority from a known public officer like a justice of the peace would be a great convenience. The phrase[1] "grant a hue and cry" was apparently in common use in the seventeenth century for granting a warrant, but the

granting of warrants was afterwards recognised by2 various statutes, and was finally set upon an3 indisputable statutory foundation in 1848 by 11 & 12 Vic. c. 42, ss. 1, 2, 8, &c. The effect of these provisions is that, where a complaint is made to any justice that any person has committed any indictable offence, the justice may issue a summons to such person, or, if he thinks it necessary, and if the charge is made on oath, and in writing, a warrant for his apprehension.

The power of the justices to issue such process was however disputed for centuries. In 4 Hawkins's *Pleas of the Crown,* many authorities upon the subject are referred to, and a very qualified and hesitating conclusion is reached, that "perhaps it is the better opinion at this day that any constable or private person to whom a warrant shall be directed from a justice of the peace to arrest a particular person for felony or any other misdemeanour within his jurisdiction may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, and whether he were indicted of the same offence or not, and whether any felony were in truth committed or not." This hesitation is explained by the difference of opinion between Coke and Hale upon the subject. 1 Coke maintained that, before the statutes of Philip and Mary authorising justices to examine witnesses when a person was arrested for felony, "a justice of the peace could not make a warrant to take a man for felony unless he be indicted thereof." He also maintained that the only warrant which the statutes of Philip and Mary could be taken to authorise by implication (they say nothing at all about warrants) were warrants to constables to see the king's peace kept upon the occasion of the apprehension of the person suspected by the person having suspicion. Coke goes so far as to maintain that upon such a warrant the constable would not be justified in breaking open a door, "for it is in law the arrest of the party that hath the knowledge or suspicion."

2 Hale referring to this passage, says that Coke "hath delivered certain tenets which, if they should hold to be law, would much abridge the power of justices of the peace, and give a loose to felons to escape unpunished in most cases." He then proceeds to refer to the statutes of Edward III., and argues in substance that as at common law a private person might and a constable ought to arrest supposed felons upon suspicion without warrant, the justice might do so *à fortiori,* in virtue of the general terms of the statutes, and that he might also "issue a warrant, to apprehend a person suspected of felony though the original suspicion be not in himself, but in the party that prays his warrant, and the reason is because he is a competent judge of the probabilities offered to him of such suspicion." This opinion prevailed in practice long before any necessity arose for inquiring whether it was well founded in theory. That it was highly expedient that justices of the peace should act judicially in issuing warrants admits of no question at all. That it was intended that they should do so when the statutes under which they were first appointed were enacted seems to me unlikely. If such had been the intention of the legislature, it is probable that they would have been authorized and indeed required to proceed in the same manner as coroners, namely, by summoning inquests; but, however this may be, the whole subject is now set on a perfectly plain foundation by the statutes already referred to.

Whilst the duties of private persons, constables, and justices were being gradually ascertained, the law as to the circumstances which would justify an arrest for felony

was being elaborated. In an earlier chapter I have given some illustrations of the manner in which all sorts of criminals, and especially all thieves, were regarded in very early times as enemies to be put to death almost like wild animals. It would not be worth while to trace minutely the steps by which this general and crude view of the subject was gradually reduced to the shape in which it now stands. Questions continually arose as to whether a person who had killed another in resisting apprehension was guilty of any offence at all, and, if guilty, whether the offence of which he was guilty amounted to murder or manslaughter. These cases were decided from time to time according to a variety of distinctions suggested by the circumstances of each particular case, a long detail of which may be found in [1] Hale's *Pleas of the Crown* which is still the leading authority as to the general principles of the subject, though subsequent decisions and enactments have to some extent modified Hale's conclusions. [2] The result of his inquiry may be thus stated:—

1. Any person may arrest any person who is actually committing or has actually committed any felony.

2. Any person may arrest any person whom he suspects on reasonable grounds to have committed any felony, if a felony has actually been committed.

3. Any constable may arrest any person whom he suspects on reasonable grounds of having committed any felony, whether in fact any such felony has been committed or not.

The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

As to the degree of force which may be used in order to arrest a criminal, many questions might be suggested which could be answered only by way of conjecture. Two leading principles, however, may be laid down with some confidence, which are also to be collected from Hale. The first is [1] that if a felon flies or resists those who try to apprehend him, and cannot otherwise be taken, he may lawfully be killed. [2] The second is that a person who makes an arrest because it is his legal duty to do so is more readily justified in using violence for the purpose than a person who is under no such duty. If A kills B, whom he suspects on probable grounds of having committed a felony, though in fact he has not, and whom he cannot otherwise arrest, it appears probable that A is guilty of manslaughter if he is a private person, but if A is a constable following a hue and cry, his act is justifiable because he acts in the discharge of a legal duty.

The common law as to the arrest of prisoners remained substantially unaltered for a great length of time. It is indeed in force at this day with some few modifications, to be stated immediately; but since it reached the state of development just described,

changes of the greatest importance have been made in the position of the officers by whom it is put in force. These changes I now proceed to notice.

From the earliest times to our own days, there were two bodies of police in England, namely, the parish and high constables, and the watchmen in cities and boroughs. 1 The parish constables, under various names (borsholders, head-boroughs, tithingmen, chief pledges, &c.), were probably the successors of the old reeves, who with their four men represented the township on all occasions at the beginning of our legal history. In each hundred and in many franchises there were also high constables, or similar officers with other names, who were to the hundred or franchise what the parish constables were to the township. These officers continued to be appointed till within the last few years. The duties of the high constables came to be almost nominal, consisting principally in issuing various notices under different statutes, and they were relieved of them almost entirely in 1844 by the 7 & 8 Vic. c. 33, ss. 7 & 8. The office itself was practically abolished in 1869 by 32 & 33 Vic. c. 47. The parish constables continued to be appointed till 1872, when their appointment was rendered unnecessary (except in some special cases) by 35 & 36 Vic. c. 72; but from the time when the Statute of Winchester and the Assize of Arms became obsolete till the year 1829, they were the only body of men, except the watchmen in cities and boroughs, charged with the duty of apprehending criminals and preventing crimes.

The watchmen in towns were first established by the Statute of Winchester, and the powers of the town magistrates depended originally upon their charters, which were often silent on the subject of watchmen. At a time which I am not able to fix with precision, but which from 2 expressions in the Report of the Municipal Corporation Commission I think must have been in the latter part of the last century, it became customary to pass Local Improvement Acts, by which the management of matters connected with the police of towns was usually vested in a body of trustees or commissioners distinct from the corporation itself. There were great differences in the manner in which these powers were allotted. The following passage occurs in the report already quoted:—3 "In a very great number of towns there are no watchmen or police officers of any kind except the constables, who are unsalaried officers. They are sometimes appointed at a court leet, more frequently by the corporate authorities. The police, and the powers conferred by local acts for paving, lighting, and watching the town, are seldom exclusively in the jurisdiction of the corporation; sometimes they are shared by the corporate authorities and commissioners; sometimes they are vested in commissioners alone." A striking illustration of the confusion thus produced is given in 1 Colquhoun's *Treatise on the Police of the Metropolis.* He observes:—"At present the watchmen destined to guard the lives and property of the inhabitants residing in near 8,000 streets, lanes, courts, and alleys, and about 152,000 houses, composing the whole of the metropolis and its environs, are under the directions of not less than above seventy different trusts, regulated by perhaps double the number of local acts of parliament (varying in many shades from one another), under which these directors, guardians, governors, trustees, or vestries, according to the title they assume, are authorized to act, each attending only to their own particular ward, parish, hamlet, liberty, or precinct."

Nothing could exceed the inefficiency of the constables and watchmen. Of the constables, Dalton (in the reign of James I.) observes that they "are often absent from their houses, being for the most part husbandmen, and so most of the day in the fields." The charge of Dogberry shows probably with no great caricature what sort of watchmen Shakespeare was familiar with. In the work already quoted, 2 Colquhoun observes of the watchmen of his time that the pay was so bad that "the managers have no alternative but to accept of such aged and often superannuated men living in their respective districts as may offer their services." . . . "What can be expected from such watchmen? Aged in general; often feeble; and almost on every occasion half starved from the limited allowance they receive, and without any claim upon the public or the least hope of reward held out even if they performed any meritorious service" . . . "and, above all, making so many parts of an immense system, without any general superintendence, disjointed from the nature of its organisation, it is only a matter of wonder that the protection afforded should be what it really is."

The defects of this state of things were slightly, but very slightly, mitigated by the institution of a number of small bodies of constables under the direction of particular magistrates. In the year 1796 there were eight such constables at Bow Street (known as Bow-Street runners), and six others at each of seven other police offices in London, making in all fifty constables who gave their whole time to their business. There were also sixty-seven mounted police, forming what was called the horse patrol, who patrolled the roads near London for the suppression of highwaymen. Probably there may have been arrangements more or less resembling these in other large towns. This system continued practically unaltered till the year 1829, although 1 various parliamentary inquiries into the subject took place. In 1829 was passed the first of a series of acts which put the administration of the law as to the apprehension of offenders upon quite a new footing.

The result is that a disciplined force in the nature of a standing army for the suppression of crime and the apprehension of offenders has been provided throughout every part of England by four successive steps, namely, (1) the establishment of the metropolitan police in 1829, (2) that of the borough police in 1836, (3) the partial establishment of the county police by the permissive act of 1839, and (4) its complete establishment by the compulsory act of 1856.

1*Preliminary Inquiry*

Before the establishment of justices of the peace, cases of public importance were inquired into before the Privy Council, as I have already observed; but there seems to have been no preliminary inquiry at all in regard to common offences, except in the single case of the coroner's inquest. The justice of the peace was at first little more than a constable on a large scale, whose power even to issue a warrant for the apprehension of suspected persons was acquired by practice, and was not derived from express parliamentary authority. In early times the formal accusation was often, perhaps usually, the first step in the procedure, and the prisoner was not arrested until after he had been indicted. This may still occur under the existing law, but such an occurrence is not usual. In almost every case in the present day a suspected person

appears before a justice. Witnesses are then examined, he is either discharged, bailed, or imprisoned till trial, and is then indicted and tried.

The earliest instance that occurs of any sort of preliminary inquiry into crimes with a view to subsequent proceedings is the case of the coroner's inquest. Coroners, according to 2 Mr. Stubbs, originated in the year 1194, but the first authority of importance about their duties is to be found in Bracton. 3 He gives an account of their duties so full as to imply that in his day their office was comparatively modern. The Statute de Officio Coronatoris (4 Edw. 1, st. 2, ad 1276) is almost a transcript of the passage in Bracton. It gives the coroner's duty very fully, and is to this day the foundation of the law on the subject. The following are its main provisions:—"A coroner of our Lord the King ought to inquire of these things if he be certified by the King's bailiffs or other honest men of the country; first he shall go to the places where any be slain, or suddenly dead, or wounded, or where houses are broken, or where treasure is said to be found, and shall forthwith command four of the next towns, or five, or six [*i. e.* the reeve and four men from each] to appear before him in such a place: when they are come thither the coroner upon the oath of them shall inquire in this manner, that is, to wit, if they know where the person was slain, whether it was in any house, field, bed, tavern, or company, and who were there. Likewise it is to be inquired who were culpable either of the act or of the force, and who were present, either men or women, and of what age soever they be, if they can speak or have any discretion, and how many soever be found culpable in any of the manners aforesaid, they shall be taken and delivered to the sheriff, and shall be committed to the gaol."

If any one is found guilty of the murder, the coroner is immediately to value his property 1 "as if it were to be immediately sold," and is to deliver it to the township which is to answer for it to the justices.

The statute contains important provisions as to appeals which I pass over for the present. It is silent as to the course to be taken where houses are broken, though the opening words of the statute refer to such cases. In practice the coroner's duties have been confined to cases of suspicious death and treasure trove.

The coroner's duties in respect of inquiries into the cause of suspicious deaths have hardly varied at all from the days of Edward I. to our own, except as regards the method of summoning jurors, and witnesses, and other details. The statute book contains a variety of provisions as to matters of secondary importance connected with inquests. The only ones which need here be mentioned are the statute of Philip and Mary (1 & 2 Phil. & Mary, c. 13, s. 5, 1554), which required a coroner to "put in writing the effect of the evidence given before him being material," and to bind over the witnesses to appear at the trial of the person accused. This act remained in force till 1826, when it was superseded by 7 Geo. 4, c. 64, s. 4, which provides that every coroner upon any inquisition before him taken whereby any one is indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind over the witnesses to give evidence at the trial, and certify and return the depositions and inquisition to the court before which the person indicted is to be tried. The inquisition of the coroner always was and still is

a formal accusation of any person found by it to have committed murder or manslaughter, or to have found and concealed treasure, and a person may be tried upon such an inquisition without any further accusation.

It is singular that, with the law as to coroners in full operation since 1276, no duties of the same sort should have been imposed on the justices of the peace appointed forty-eight years afterwards, in 1324.

Whatever may have been the reason, the fact is certain that no allusion is made to the holding of any sort of preliminary inquiry by justices in any statute passed before the statutes of Philip and Mary already casually referred to. It is probable, however, that from the very earliest times magistrates would make a more or less formal inquiry before they took steps towards the arrest or bail of a suspected person, and it is not at all improbable that the two statutes in question may have given legal sanction to a practice which had grown up without express statutory authority. The statutes were as follows. By the 1 & 2 Phil. & Mary, c. 13 (1554), it is enacted that, when any person arrested for manslaughter or felony, or suspicion of manslaughter or felony, being bailable by the law, is brought before any two justices, they are "to take the examination of the said prisoner and information of them that bring him of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony shall be put in writing before they make the bailment." The examination and bailment are to be certified to the court, and "all such as do declare anything material to prove the said murder" (murder is not mentioned in the earlier part of the act), "manslaughter, offences, or felonies, or to be accessory or accessories to the same as is aforesaid" (it is remarkable that the word "witnesses" is not used) "are to be bound over to appear to give evidence at the court of gaol delivery." This act was confined to the case of prisoners admitted to bail. It was followed in the next year (1555) by an act (2 & 3 Phil. & Mary, c. 10), which recites that it "does not extend to such prisoners as shall be brought before any justice of peace for manslaughter or felony, and by such justices shall be committed to ward for the suspicion of such manslaughter or felony and not bailed, in which case the examination of such prisoner and of such as shall bring him is as necessary or rather more than where such prisoner shall be let to bail." The act then goes on to reenact, with respect to cases in which the prisoners are committed, the provisions of the act of the preceding year as to prisoners bailed.[1]

These statutes continued to be in force till the year 1826, when they were repealed, and re-enacted, and extended to misdemeanour by 7 Geo. 4, c. 64, ss. 2 & 3, and this act was in its turn repealed and re-enacted in a more elaborate form, with some important variations, by 11 & 12 Vic. c. 42 (1848), which is known as Sir John Jervis's Act.

The important provisions of Sir John Jervis's Act upon the subject of the preliminary inquiry are these. [2] The witnesses are to be examined in the presence of the accused person, and he is to be at liberty to cross-examine them. The depositions are to be written down and signed by the magistrate and by the witnesses. After all the witnesses have been examined, the justice is to say to the accused, "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to

say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you at your trial." Whatever he says is then taken down and returned with the depositions. 1 The accused person is then to be asked whether he wishes to call any witnesses, and if he does, they must be examined and cross-examined, and their depositions must be taken in the same manner as those of the witnesses for the prosecution. 2 If the evidence is in the opinion of the justices not sufficient to put the accused person on his trial, they are to discharge him. If they think it "raises a strong or probable presumption of" his "guilt," they are to commit him for trial or admit him to bail. 3 The accused is entitled to copies of the depositions, and his right to be represented by counsel or by a solicitor is incidentally assumed in 4 one section of the act, and is, I believe, never disputed in practice.

A comparison of these provisions with those of the acts of Philip and Mary shows several changes of the utmost importance in one of the most important parts of criminal procedure.

Speaking generally, the difference between the procedure established in the sixteenth century and the procedure of the nineteenth is that under the first the magistrate acts the part of a public prosecutor, whereas under the second he occupies the position of a preliminary judge. This appears in every detail. Under the acts of Philip and Mary the accused person is to be examined. This meant that he was to be fully questioned as to all the circumstances connected with his supposed offence. Under the act of Victoria he can be asked no questions at all, though he is invited to make any statement he pleases, being cautioned that it will be taken down and may be given in evidence against him. Under the statutes of Philip and Mary the examination of the witnesses and the recording of their depositions was intended only for the information of the court. The prisoner had no right to be, and probably never was, present. Under the statute of Victoria the witnesses are to be examined in the prisoner's presence, and may be cross-examined by him, his counsel, or his attorney. Under the statute of Philip and Mary the depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them. Under the statute of Victoria he is entitled to a copy of them. In all these particulars the change is uniformly in the same direction. The object of the earlier statute is to expose and detect a man assumed to be guilty. In the later statute, the object is a full inquiry into his guilt or innocence.

One circumstance must here be mentioned, which makes a distinction of considerable importance between the preliminary criminal procedure of our own country and that of all the countries which used the civil law. I refer to the absence of the use of torture as a means of collecting evidence whilst the prisoner was in custody. It was never recognised as a part of the law of England, and its illegality was made the subject of much boasting by some of the earliest panegyrists of English institutions, and in particular Fortescue, Smith, and Coke. There is, however, proof that it was practised for the purpose of obtaining evidence under Henry VIII. and his three children, and also during the reigns of James I. and Charles I., and that not only in political cases but also in the case of common crimes. The proof of this is given in Jardine's *Reading on Torture,* in the appendix to which work there are printed fifty-five letters taken from the Council books, the first dated 5th November, 1551, and the last 21st May,

1640, authorising or otherwise relating to the use or the threat of torture in a variety of instances. In how many cases it may have been used without such authority, and when the practice began, no one can now even guess with any plausibility. Why torture was not employed in this as well as in other countries it is difficult to say. Probably the extremely summary character of our early methods of trial, and the excessive severity of the punishments inflicted, had more to do with the matter than the generalities of Magna Charta or any special humanity of feeling. People who, with no sort of hesitation, hanged a man who could not read, or who being able to read had married a widow, simply because twelve of his neighbours, reporting the village gossip, said he had stolen a dress worth two shillings, cannot be called scrupulously humane. If their conscience had declined to hang him till they had tortured him into a confession capable of being verified independently, they would perhaps have been a little more humane, though this certainly admits of a doubt.[1]

However this may be, it is still possible to give evidence of the manner in which the old system of preliminary investigations worked. In several of the trials reported under the Stuarts, the justice who had got up the case was the principal witness against the prisoner, and detailed at length the steps which he had taken to apprehend him. The following are instances:—

[2] In 1664 Colonel Turner was tried for a burglary, together with his wife and three of his sons. The principal witness was Sir Thomas Aleyn, an alderman of the city. He said: "Mr. Francis Tryon" (the person robbed) "put me on the business to examine it. I went and examined the two servants—the man and the maid. Upon their examination I found they had supped abroad at a dancing-school and had been at cards." . . . "The man confessed he had been abroad twenty or thirty times at Colonel Turner's house at supper about a year since. The maid denied they had been there at all; but it is true the man's saying he supped there (though it was false) was the first occasion of suspicion against Colonel Turner. When I had examined these two, I went to the examination of Turner, where he was all that day, where at night? He told me at several places and taverns, and in bed at nine of the clock, and was called out of his bed; but having myself some suspicion of him, I wished him to withdraw. I told Tryon that I believed, if he was not the thief, he knew where the things were." Aleyn afterwards charged Turner; "but he denied it, but not as a person of his spirit, which gave me some cause of further suspicion." He afterwards searched Turner's house unsuccessfully; but next day received information from one of the other aldermen which enabled him to track Turner into a shop in the Minories, where he found him in possession of money which he believed to be part of the stolen property. He pressed him to account for it, took him to Tryon, managed matters so as to induce him to admit to Tryon, upon Tryon's engaging not to prosecute, that he knew where the property was, and, after all sorts of manœuvres, got him to cause his wife to give up a number of Tryon's jewels, and finally committed him and her to Newgate. In short, he acted throughout the part of an exceedingly zealous and by no means scrupulous detective armed with the authority of a magistrate. [1] He detailed in court the whole of his proceedings, which were very expeditious. "Thursday," said one of the judges, "was the robbery, Friday he was examined, Saturday the money was brought, and that night the jewels were brought and he committed."

In the famous case of 2 Count Coningsmark and his alleged agents, who were tried for the murder of Mr. Thynne, a similar part was taken by Sir John Reresby, the committing magistrate. Just as he was going to bed, "Mr. Thynne's gentleman came to me to grant a hue and cry, and soon after the Duke of Monmouth's page to desire me to come to his master at Mr. Thynne's lodging, sending his coach to fetch me." Reresby immediately went to Mr. Thynne's and granted warrants to search for several suspected persons. At last a Swede was brought before him who confessed that he served a German captain who had had a quarrel with Thynne. Upon information obtained from the Swede, "having searched several houses till six o'clock in the morning, having been in chase almost the whole night, I personally took the captain at the house of a Swedish doctor in Leicester Fields, I going first into the room." Other suspected persons being afterwards arrested were brought to this house and 3 examined, and finally were committed for trial to the Old Bailey, after being examined on several occasions before the King in Council.

Other cases are mentioned in Reresby's memoirs in which he took a similar part. 1 For instance, under the date of 6th of July, 1683, after referring to the Rye House Plot, he says: "Six Scotchmen being stopped at Ferry Bridge, by directions from the Secretary, coming from London towards Scotland, and being but slightly examined by the justice of the peace, I caused them to confess much more to me, which I transmitted to the Secretary, as also the examination of another of that nation, who was sent to York Castle, and proved a very dangerous rogue."

2 In 1681, George Busby was tried at Derby assizes for being a Popish priest. The chief witness against him was Mr. Gilbert, a magistrate of the county, who gave a long account of the manner in which he went on several occasions to the house where he suspected Busby to be. On one occasion he took "a crimson damask vestment, wherein was packed a stole, a maniple of the same (as the Papists call them), an altar-stone, surplice, and a box of wafers, mass books, and divers other Popish things." All these he took to Derby assizes and showed them to the judge, who directed them to be burnt, but Mr. Gilbert "entreated his favour that I might send them again to the same place for two or three days to make the priest more confident." He went back accordingly and made a most elaborate search, having a singular series of conversations with people in the house, till at last he took the prisoner in a curiously contrived hiding-hole, near some chimneys, and carried him to Derby, "where after I had taken his examination, I made a mittimus and committed him to Derby gaol."

I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warning, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into court to be tried.

This is set in a strong light by the provisions of the celebrated act "for regulating of trials in cases of treason and misprision of treason" (7 & 8 Will. 3, c. 3), and those of 1 s. 14 of the Act of Union with Scotland (7 Anne, c. 21). The first of these acts

provides that every person accused of high-treason shall have a true copy of the whole indictment delivered to him five days at least before he is tried. The second extends the time for the delivery of the copy of the indictment to ten days before the trial, and enacts that at the same time that the copy of the indictment is delivered a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, professions, and place of abode of the said witnesses and jurors, be also given." This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the state trials held under the Stuarts, it did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of parliament that trials for political offences should not be grossly unfair, but they were comparatively indifferent as to the fate of people accused of sheep-stealing, or burglary, or murder.

It is probable, however, that the practice of the magistrates varied, and that where there was no particular reason, political or otherwise, for keeping a prisoner in the dark, he was allowed, during the interval between the commitment and trial, to see his friends and make such preparation for his trial as he could. In some remarks [2] by Sir John Hawles (Solicitor-General in the reign of William III.), on the trial of Colledge, the Protestant joiner, it is said that in murder and all other crimes, the prisoner is always permitted to advise with counsel before his trial, and that all persons are allowed in such cases to have free and private access to him, and the usage followed in the political trials of the seventeenth century is strongly reflected upon. This irregular and unsystematic good nature may have been sufficient in practice to prevent the infliction of gross injustice upon persons capable of making their complaints heard, but till the year 1849 prisoners certainly had no legal right to know beforehand what evidence was to be given against them. I will give a single illustration of this, and in giving it, I may observe that it is not so easy as it might be expected to be, to discover accounts of routine proceedings which are not recorded, and do not become the subjects of judicial decision, though they are more important than many others of which this cannot be said.

John Thurtell was tried on the [1] 6th and 7th Jan., 1824, and executed on the 9th, for the murder of William Weare, on the 24th Oct., 1823. In the *Times* newspaper, Oct. 31, 1823, there is a statement that the magistrates' investigation commenced at 10.30 p. m. "The prisoners were not brought into the room, it being thought best to keep them ignorant of the entire evidence against them, at least for a short time." Thurtell was then called in and asked many questions by Mr. Noel, the solicitor for the prosecution. Hunt (Thurtell's accomplice) was afterwards separately examined, which led to his making a full confession. The examinations taken before the magistrates were published in the newspapers, and [2] Mr. Justice J. A. Park made the following observations upon the subject in his charge to the grand jury:—

“These depositions he understood (for he repeated he knew nothing of the fact himself) had already appeared very copiously and even with notes and comments in the public press. Now it appeared to him that the first fault (and he had no doubt it was most unintended, and in noticing it he did not mean to wound the feelings of any individual)—it appeared to him that the first fault originated with the magistrates in allowing any persons to enter into their private apartments for the purpose of taking notes of their proceedings. He held there was a vast difference between the inquisitorial and the judicial power of the magistrates; where the magistrate was acting judicially his conduct was as open to the inspection and judgment of the public as that of himself and that of his learned brothers on the bench; to such publicity he had no objection, for he could wish everything he said as a judge to be heard and fairly canvassed by the public. 1 He knew he erred sometimes, because he was human, and nothing that was human could escape without error. But when a magistrate was acting inquisitorially, when he was taking an inquisition for blood, were these proceedings fit to be known and published to the world? He was bound to investigate and inquire—ought his inquiries and investigations to be conducted in a private or public manner? The statute law of the land prescribed the course to be pursued upon such an occasion for more than 200 years” (269 years). “There was a statute of Philip and Mary which stated that depositions before magistrates should be taken in writing in order that they might be transmitted to the judges who were to try the offence under the commission of oyer and terminer for the county. He appealed to the experience of every gentleman who heard him, and he knew what his own experience as judge had taught him, whether the constant course was not to transmit them to the judge, taking care that the accused should not have an opportunity of seeing them. The prosecutor or his solicitor might have access to them, but not the party accused. For what would be the consequence if the latter had access to them? Why, that he would know everything which was to be produced in evidence against him —an advantage which it was never intended should be extended towards him.”

The first alteration made in this state of things was effected in 1836 by the Prisoners’ Counsel Act (6 & 7 Will. 4, c. 114, s. 4), which provided that all persons under trial should at their trial have a right to inspect all depositions taken against them. In 1849, by 11 & 12 Vic. c. 42, s. 27, it was provided that the accused should be entitled to a copy of the depositions. This change was probably due to a growing sense of the unfairness of the law. Probably, too, the establishment of a regular police force by the steps already detailed may have put the magistrates in a new position in fact before the change was embodied in the statute law. As a regular force was established, first in the towns and then in the country by which charges of crime were investigated, however imperfectly, the magistrates would naturally assume a more and more judicial position. The inquiry before the magistrates is now essentially judicial. It may indeed admit of a doubt whether it is not too judicial, and whether it does not tend to become a separate trial. This tendency was certainly encouraged by the power given by 30 & 31 Vic. c. 35, to the prisoner to call witnesses before the magistrates, and to have them bound over to appear at the trial and to have their expenses allowed. The power was conceded because it was thought hard that a man should be prevented by poverty from producing witnesses. This may have been a good reason for the act, and it has had some collateral advantages, but it has made the law more elaborate than it was.

In the course of the last century a change has taken place in the position of magistrates parallel to and closely connected with the change in the position of constables.

The management of local public business of all kinds, and especially of that part of it which consists in the administration of justice, has happily been at all times, as it still continues to be, a matter of honourable ambition and interest to large numbers of persons well qualified for the purpose by education and social standing. No one, however, can be expected to devote the whole of his time to the duties of a magistrate unless he is paid for it, and in places where the population is very dense, there is so much business that it cannot be efficiently done except by persons who give their whole time to it. Moreover, as the law becomes more and more elaborate, and the standard of judicial proof rises, special knowledge is continually becoming more and more necessary for the proper discharge of the duties of a magistrate.

The force of these considerations has been recognised by slow degrees, and so strong are the attractions of the voluntary system, that up to this time the magistrates are unpaid in nearly all the counties, and in most of the cities and boroughs. But a different system has been introduced in the metropolitan district, and in some other parts of the country, by the following steps.

Throughout a great part of the eighteenth century the business of magistrates in that part of London which was not included in the City was carried on by magistrates who were paid almost entirely by fees. What the fees precisely were, and by what law their exaction was justified, I am not able to say, nor is it worth while to inquire. One or two curious memorials of the state of things which then existed will be worth mentioning by way of introduction to the later legislation on the subject.

Writing in 1754,[1] Henry Fielding says of his career as a magistrate: “By composing instead of inflaming the quarrels of porters and beggars (which I blush when I say has not been universally practised), and by refusing to take a shilling from a man who most undoubtedly would not have had another left, I reduced an income of about £500 a year of the dirtiest money upon earth to little more than £300, a considerable proportion of which remained with my clerk; and indeed, if the whole had done so, as it ought, he would be but ill paid for sitting almost sixteen hours in the twenty-four in the most unwholesome as well as nauseous air in the universe, and which hath in his case corrupted a good constitution without contaminating his morals.”

He observes in a footnote: “A predecessor of mine used to boast that he made £1,000 a year in his office, [1] but how he did this (if indeed he did it) is to me a secret. His clerk, now mine, told me I had more business than he had ever known there; I am sure I had as much as any man could do. The truth is, the fees are so very low when any are due, and so much is done for nothing, that, if a single justice of peace had business enough to employ twenty clerks, neither he nor they would get much by their labour. The public will not therefore think I betray a secret when I inform them that I received from the government a yearly pension out of the public service money.”

He afterwards says that he resigned the office to [2] his brother, who had always been his assistant. It was by a rare accident indeed that such a man as Fielding found

himself in such a position. Men of genius are exceptions everywhere, but a magistrate ought at least to be, as in these days he is, a gentleman and a man of honour. It was not so in the last century in London. 3 A characteristic account of the "trading justices" was given to the Committee of 1816, by Townsend, a well-known Bow Street runner, who at that time had been in the police thirty-four years or more, *i. e.* since 1782: "At that time before the Police Bill took place at all, it was a trading business; and there was Justice This and Justice That. Justice Welch in Litchfield Street was a great man in those days, and old Justice Hyde, and Justice Girdler, and Justice Blackborough, a trading justice at Clerkenwell Green, and an old ironmonger. The plan used to be to issue out warrants and take up all the poor devils in the street, and then there was the bailing of them, 2*s.* 4*d.,* which the magistrates had; and taking up 100 girls, that would make, at 2*s.* 4*d.,* £11 13*s.* 4*d.* They sent none to gaol, the bailing them was so much better."

These scandals led to the statute, 32 Geo. 3, c. 53, which authorised the establishment of seven public offices in Middlesex and one in Surrey, to each of which three justices were attached. The fees were to be paid to a receiver. No other Middlesex or Surrey justices were to be allowed, under heavy penalties, to take fees within the jurisdiction of the new magistrates. The justices were to be paid by a salary of £400 apiece.

This experiment proved highly successful.

The general result is that the business of holding the preliminary inquiry and committing or bailing the prisoner is, in the metropolitan district and in many large towns and populous districts, in the hands of trained lawyers, who act as preliminary judges; that in municipal boroughs it is in the hands of the mayor, an elected officer, and a number of other justices nominated by the Crown, but unpaid; that in the City of London it is vested by charter in the Mayor and Aldermen; in boroughs not under the Municipal Act in a variety of officers appointed under the provisions of charters and private acts; and that in the rest of the country it is in the hands of the local gentry, appointed by the Crown and exercising their office gratuitously.

Discharge,1Bail Or Committal

The next step to the preliminary inquiry held by the magistrates is the discharge, bail, or committal of the suspected person. Little need be said of the law as to the discharge or committal of the suspected person. It is obvious that, as soon as justices of the peace were erected into intermediate judges, charged to decide the question whether there was or was not ground for the detention of a suspected person, they must have acquired, on the one hand, the power of discharge, and, on the other, the power of committal. The whole object of the preliminary inquiry was to lead to the one or the other result, and the history of the preliminary inquiry is in fact the history of the steps which led to the determination of this question in a judicial manner. The law of bail has a separate independent history.

The right to be bailed in certain cases is as old as the law of England itself, and is explicitly recognised by our earliest writers. When the administration of justice was in its infancy, arrest meant imprisonment without preliminary inquiry till the sheriff held

his tourn at least, and, in more serious cases, till the arrival of the justices, which might be delayed for years, and it was therefore a matter of the utmost importance to be able to obtain a provisional release from custody. The right is recognised in curt and general terms by Glanville. 1 He says: "Cum quis itaque de morte regis vel de seditione exercitus infamatur aut certus apparet accusator aut non. Si nullus appareat certus accusator sed fama solummodo publica accusat; tunc ab initio salvo accusatus attachiabitur vel per plegios idoneos, vel per carceris inclusionem." If there is a determinate accuser—is qui accusatur ut prædiximus per plegios salvos et securos solet attachiari aut si plegios non habuerit in carcerem detrudi. In omnibus autem placitis de feloniâ solet accusatus per plegios dimitti præterquam in placito de homicidio ubi ad terrorem aliter statutum est." 2 Bracton refers to bail in many places, but the most general passage in his treatise *De Corona* which I have noticed 3 is to the effect that the sheriff ought to exercise a discretion in regard to bailing accused persons, having regard to the importance of the charge, the character of the person, and the gravity of the evidence against him.

These very ancient authorities are somewhat general in their language, but it is still possible to trace the history of the law relating to bail from the beginning of the reign of Edward I. to our own days.

The sheriff was the local representative of the Crown, and in particular he was at the head of all the executive part of the administration of criminal justice. In that capacity he, as I have already shown, arrested and imprisoned suspected persons, and, if he thought proper, admitted them to bail. The discretionary power of the sheriff was ill defined, and led to great abuses, which were dealt with by the Statute of Westminster the First (3 Edw. 1, c. 12, ad 1275). This statute was for 550 years the main foundation of the law of bail. It recites that sheriffs and others "have taken and kept in prison persons detected of felony, and incontinent have let out by replevin such as were not replevisable, and have kept in prison such as were replevisable because they would gain of the one party and grieve the other." It also recites, that before this time it was not determined which persons "were replevisable and which not, but only those that were taken for the death of man1 or by commandment of the king, or of his justices, or for the forest." It then proceeds to enact that certain prisoners shall not be replevisable either "by the common writ or without writ;" that others shall be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods."

The persons not to be bailed (apparently in addition to the four classes referred to in the recital) are (1) prisoners outlawed; (2) men who had abjured the realm (and so admitted their guilt); (3) approvers (who had confessed); (4) such as be taken with the manour; (5) those which have broken the king's prison; (6) thieves openly defamed and known, and such as are appealed (accused) by approvers; (7) such as are taken for felonious arson; (8) or for false money; (9) or for counterfeiting the king's seal; (10) or persons excommunicate taken at the request of the bishop; (11) or for manifest offences; (12) or for treason touching the king himself. On the other hand, the persons to be bailed are (1) persons indicted of larceny by inquests taken before sheriffs or bailiffs by their office, *i. e.* at sheriffs' tourns or courts leet; (2) or of light suspicion (I suppose wherever indicted); (3) or for petty larceny that amounteth not above the

value of 12*d.* if they were not guilty of some other larceny aforetime; (4) guilty of receipt of felons, or of commandment, or of force, or of aid in felony done (*i. e.* accessories before or after a felony); (5) guilty of some other trespass for which one ought not to lose life nor member, *i. e.* misdemeanours in general; (6) a man appealed by a prover after the death of the prover (if he be no common thief nor defamed). The statute does not say distinctly whether persons arrested on suspicion (for instance by hue and cry) were to be bailed or not. It applies to persons 1 "rettes" (which is translated "detected") of felony, as having been wrongfully let out by the sheriffs. Whether the word implied that the prisoner had been indicted, or whether it meant only in a general sense charged, or whether its use invested the sheriffs with a discretion, I cannot say.

The way in which the later statutes are framed seems to favour the supposition that the justices at all events could in the first instance admit to bail only persons indicted before them in their sessions. However this may have been, the Statute of Westminster determined what offences were bailable or not for five centuries and a-half.

Between 1275 and 1444, however, the sheriffs' powers had been to a great extent transferred to the justices of the peace in whom the power of admitting prisoners to bail was vested by a series of statutes.

2 These statutes assume that the question who is bailable and who not is settled by the statute of Edward I. though there are some inconsistencies between them, especially as to bail in cases of homicide, to which I need not refer. 3 Numerous statutes, relating to particular offences, were passed in the seventeenth and eighteenth centuries but no general provision on the subject was made till 1826, when the statute of 7 Geo. 4, c. 64, was passed, being one of the first attempts to consolidate the criminal law. It repealed all the statutes above referred to, so far as they relate to bail, and made other provisions on the subject which were in their turn superseded by those of 11 & 12 Vic. c. 42, s. 23, which are now in force.

Such is the history of the existing state of the law as to the bailing by justices of persons accused or suspected of crimes, but in order to make the history complete, it is necessary to mention shortly a branch of law which has become obsolete. In our own time there is practically no reason to fear that justices under a legal duty to admit a man to bail will refuse to do so. It was otherwise with the sheriffs of earlier times. Not only did the vagueness of the law itself leave a wide and ill-defined discretion in their hands, but their power was so great that even in plain cases they were often disposed to set it at defiance. Hence royal writs requiring them to do their duty were necessary; and of these there were several, the most important of which were the writ *de homine replegiando,* the writ *de manucaptione,* and the writ *de odio et atiâ.* These writs issued out of the chancery to the sheriff or coroner. If the first writ was not obeyed, a second writ, which was called an "alias," was issued, and if that was not obeyed, a third, called a "pluries." The final remedy was an attachment under which the sheriff or other officer was imprisoned for his disobedience. He might be fined for delaying till an "alias" and "pluries" issued. 1 The writ *de homine replegiando* was confined (at least after 3 Edw. 1) to cases in which a person was imprisoned before

trial for an offence bailable under the Statute of Bail (3 Edw. 1), though it also applied to cases in which a person was unlawfully detained by any one not having legal authority to detain him. In such cases the sheriff might return that the person detained had been "eloigned" (*elongatus,* carried to a distance where he could not be found), and upon such a return a writ might issue requiring the sheriff to take the captor "in withernam," that is, to imprison the captor till he produced the person so detained. The writ "de manucaptione" (of mainprise) was appropriated to cases in which a person had been taken on suspicion of felony and had tendered "manucaptors" or "mainpernors" who had been refused. The difference between bail and mainprise is long since obsolete. It is thus described by Hale: [1] "Bail and mainprise are used promiscuously oftentimes for the same thing, and indeed the words import much the same thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.* But yet in a proper and legal sense they differ. 1. Always mainprise is a recognizance in a sum certain, but bail is not always so. 2. He that is delivered per manucaptionem only is out of custody; but he that is bailed is in supposition of law still in custody, and the parties that take him to bail are in law his keepers, and may reseize him to bring him in." The difference between the use of the two writs is described in [2] Hale, but is to me very obscure.

The writ *de odio et*[3]*atiâ* was confined to cases of homicide, and has an odd history, as it was in itself a singularly clumsy procedure. When a person was imprisoned on a charge of homicide, says[4] Bracton, "Fieri solet inquisitio utrum hujusmodi imprisonati pro morte hominis culpabiles essent de morte illâ vel non, et utrum appellati essent odio vel atya." If the person imprisoned was found guilty, he was not to be admitted to bail. If, however, the inquest said, "quod per odium et atyam, et contineatur causa in inquisitione quo odio vel qua atya diligenter erit causa examinanda, cum sint plures, [5] &c., et ballivi qui non sine causæ cognitione in hujusmodi inquisitionibus prætendunt non causam ut causam, et si sufficiens fuerit causa per ballium dimittatur." This curious passage seems to imply that even in the infancy of our law questions arose as to malice similar to those which have given so much trouble in our own days. It obviously was not every sort of hatred or malice in the prosecutor which would entitle the prisoner to be bailed. The cause of it was to be considered. It is probable that the "causa" which was to be diligently examined was the evidence of the guilt of the accused man, and that "odium et atya" were mere legal figments by which the presence or absence of reasonable cause of suspicion was obscurely denoted. If a man hated another because he had been seen committing a murder, his hatred would be no reason why he should not prosecute the criminal. If the prosecutor was unable to assign any cause for the prosecution, it would not be unnatural to say that he must hate the person imprisoned. If there was evidence malice was immaterial. If there was no evidence malice was inferred. Hence, the sufficiency of the evidence, being the real point, was inquired into under pretence of inquiring into the malice. But, however this may have been, it is at all events clear that the effect of the writ was to cause a preliminary trial to take place in cases of homicide, the result of which determined whether the accused should be admitted to bail or imprisoned till he was finally tried. If he was found to have been accused by malice, he was admitted to bail on finding twelve sureties, [1] "qui manucapiant habendi eum ad primam assisam et coram justitiariis nostris ad respondendum de morte B."

The writ *de odio et atiâ* is referred to in 2 Magna Charta. Foster is of opinion (upon grounds which to me seem just) that it was abolished by 6 Edw. 1, c. 9 (the Statute of Gloucester), in 1278. Coke says in one place that it was abolished by the general words of 28 Edw. 3, c. 9, and revived by 42 Edw. 3, c. 1, in which I think he was mistaken; elsewhere he contradicts this opinion, saying that it was abolished by the Statute of Gloucester. At all events it has been obsolete for centuries.3

These writs, which issued to the sheriff and the coroner, can never have been of the first importance, and must have gone into disuse at an early period (4 though there are a few instances of them in comparatively modern times), as from the earliest times 1 the superior courts and the lord chancellor had the right of issuing the writ of habeas corpus, which answered in a simpler and more direct way all the purposes of the other writs.

The subject of the present chapter is the history of the methods of accusation and trial which have prevailed in England. These are private and public accusations, and trial by battle, by ordeal, by jury, and by the Star Chamber and similar courts of which I have 2 already spoken.

Accusation By A Private Accuser—Appeals

Accusation and trial are so closely connected that for practical purposes they are most conveniently considered together.

Since the Norman Conquest there have been 3 three modes of trial in criminal cases, namely, trial by ordeal, trial by battle, and trial by jury; and there have been also three modes of accusation, namely, appeal or accusation by a private person, indictment or accusation by a grand jury, and informations which are accusations either by the Attorney-General or by the Master of the Crown Office.

The history of these modes of accusation and trial may be conveniently related under one head.

The history of appeals or accusations by a private person and trial by battle go together, as trial by battle was an incident of appeals.

The fact that the private vengeance of the person wronged by a crime was the principal source to which men trusted for the administration of criminal justice in early times is one of the most characteristic circumstances connected with English criminal law, and has had much to do with the development of what may perhaps be regarded as its principal distinctive peculiarity, namely, the degree to which a criminal trial resembles a private litigation. In very early times this showed itself in the circumstance that the law of appeals formed the most, or nearly the most, important and prominent part of the criminal law. An elaborate account of the procedure connected with them fills a large part of the book of Bracton, *De Corona,* and also a considerable part of the first book of Britton, which relates mainly to the same subject. Each of these authors, but particularly Bracton, goes into the subject with great minuteness, Bracton in particular having a separate chapter upon each different

kind of appeal and mixing it up with definitions of the various offences as to which appeals might be brought, forms of writs to sheriffs, and much other matter which has now altogether lost its interest.

The following was the substance of the process according to which appeals might be made in cases of treason, homicide, breach of the peace and wounding (*de pace et plagis*), mayhem, breaches of the peace by false imprisonment, robbery, arson, and rape. The appeal was made before the coroner or before more coroners than one. The appellor was required to make a minute and strictly formal statement before the coroner as to the nature of the offence, 1 setting forth a great variety of particulars as to the time, place, and circumstances of the offence, in order that the appellee might be enabled to defend himself. This statement was enrolled by the coroner, and the appellor appears to have been held to it strictly in all subsequent stages of the proceedings. The next step was to secure the appearance of the appellee, the process for which was to publish the appeal at five successive county courts. If he did not appear at the fifth the consequence was outlawry. There were elaborate rules as to this, and as to the counter process of inlawry, by which the effect of outlawry was taken off, and the appellee was permitted to defend himself.

If the appellee appeared before the justices he might avail himself of any one of a great variety of pleas or exceptions, which are detailed at great length in Bracton. 1 He states the following as "ista generalis exceptio et prima":—"Si secta non fuerit bene facta, quia qui appellare voluerit et bene sequi, debet ille, cui injuriatum erit, statim quam cito poterit hutesium levare, et cum hutesio ire ad villas vicinas et propinquiores et ibi manifestare scelera et injurias perpetratas." There were, however, many other exceptions, one of which is introduced in the middle of the chapter without any special notice, but which must, if it really prevailed, have made appeals comparatively unimportant. 2 "Cadit appellum ubi appellans non loquitur de visu et auditu," but there is reason to think that if this was the law in Bracton's time it ceased to be so afterwards.

3 If the appellee did not plead, or not adequately, battle was waged between the parties, but the judges were bound, *ex officio,* to inquire (it is not clearly stated how) into the circumstances of the case, and not to allow the battle if the case was such that there were against the appellee 4 "presumptiones quæ probationem non admittunt in contrarium, ut si quis cum cultello sanguinolento captus fuerit super mortuum, vel a mortuo fugiendo, vel mortem cognoverit coram aliquibus qui recordum habeant, et hujusmodi tales." If the appellee was defeated before the stars appeared he was hanged. If he was victorious or defended himself till the stars appeared he was acquitted of the appeal, 5 but inasmuch as the appeal was considered to raise a presumption of his guilt he was to be tried by the country as if he had been indicted.

There are some variations from this in 6 Britton's *Accountof Appeals,* which was written about 1291, in the time of Edward I., and no doubt the practice must have varied, but it would not be worth while to go minutely into the subject. 1 In Hawkins's *Pleas of the Crown* is to be found an elaborate account of the law as it stood when all but practically obsolete. I may however observe that the plea of want

of fresh suit was taken away by the Statute of Gloucester (6 Edw. I., c. 9) in 1278, which allowed the appellor to sue within a year and a day.

The principal points in the history of appeals are as follows:—Appeals in cases of treason were properly (it seems) brought in Parliament. I have already given an account of them and of the manner in which they came to be abolished by statute, 1 Hen. 4, c. 14. That statute applies only to appeals of treason within the realm. Appeals for treasons done out of the realm were not affected by it, but were to be brought before the constable and marshal. 2 Such an appeal actually was brought by Lord Rea against David Ramsey in the year 1631, and combat was ordered upon it, but the king revoked his letters patent to the constable and marshal, and the matter came to an end.

Appeals in cases which were not capital, and in particular appeals for blows, for wounds, and false imprisonment, merged in actions of tort for damages for those causes. Appeals of mayhem lingered a little longer, but became obsolete.

Appeals of robbery and larceny lasted longer, because at Common Law the restitution of property feloniously taken could be awarded only when the thief or robber was convicted on an appeal, but this was altered by 21 Hen. 8, c. 11, which gave a writ of restitution to the true owner upon the conviction of the felon on an indictment.

Appeals of arson seem to have been discontinued at a very early time.

Of appeals of rape it is only necessary to say that they seem to have differed less than other appeals from indictments, and that the offence at which some early statutes on the subject were levelled seems to have included what we should describe as abduction with intent to marry as well as what we describe as rape.

Hence the only appeals which can be said to have had any definite history and to have formed a substantial part of the criminal procedure of the country were appeals of murder. It seems that appeals continued to be the common and established way of prosecuting murder till the end of the fifteenth century. Indeed, they were viewed with so much and, according to our notions, such strange and unmerited favour that in 1482 (22 Edw. 4) they were made the subject of an act of judicial legislation of an almost unexampled kind. 1 FitzHerbert has this note on the subject: “Note that all the justices of each bench say that it is their common opinion that, if a man is indicted of the death of a man, the person indicted shall not be arraigned within the year for the same felony at the king’s suit, and they advise all legal persons (touts hœs de ley) to execute this point as a law without variance, so that the suit of the party may be saved.” This resolution, in which the judges, openly and in the plainest words, assumed legislative power, was apparently acted upon to the great injury of the public, and it was found necessary six years afterwards to repeal it by statute. This appears from the recitals and provisions of 3 Hen. 7, c. 1, to which I have already referred in connection with the Court of Star Chamber. This act recites that “murders and slayings of the king’s subjects do daily increase, that the persons in towns where such murders fall to be done will not attach the murderer” as by law they ought, and that “it is used that within the year and a day after any death or murder had or done the felony should not be determined at the king’s suit for saving of the party’s suit”

(the appeal), "wherein the party is oftentimes slow, and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder. And also he that will sue any appeal must sue in proper person, which suit is long and costly that it maketh the party appellant weary to sue." As a remedy it is provided that indictments for murder shall be tried at once, and that an acquittal on an indictment shall be no bar to an appeal.

The effect of this provision seems to have been that the indictment, which did not involve trial by battle, was usually tried first, and its result was practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the parties concerned. This state of things continued till the year 1819, though the resort to an appeal became less and less common as time went on. 1 There are, however, some specimens of appeals of murder reported in the *State Trials,*2 and an attempt to abolish them by statute was successfully resisted in the years 1768 and 1774. The last appeal of murder ever brought was the case of 3 Ashford *v.* Thornton. Thornton, being strongly suspected of having murdered Mary Ashford, was tried for that offence and acquitted at Warwick Assizes, and an appeal was brought by her brother. On the 2nd November, 1818, the appellant read his count (the equivalent of an indictment) in the Court of King's Bench, charging Thornton with his sister's murder. Thornton then pleaded, "Not guilty, and I am ready to defend the same with my body;" "and thereupon taking his glove off he threw it upon the floor of the court." The appellant then counter-pleaded that Thornton ought not to be permitted to wage battle, because the circumstances (which are set out in detail in the counter-plea) were such as to show that he was guilty. The appellee replied, setting out circumstances which he regarded as establishing an alibi in his favour. To this there was a demurrer. Upon this issue was joined, and an argument took place, in which 4 all the authorities on the subject are reviewed. The Court decided that the result of the authorities was that the appellee had a right to wage his body, unless circumstances practically inconsistent with his innocence appeared, and that such did not appear from the matter put upon the pleadings to be the case. The result was that no further judgment was given, the appellant not being prepared to do battle. The proceedings ended by Thornton's arraignment on the appeal, to which he pleaded *autrefois acquit.*

This proceeding led to the statute 59 Geo. 3, c. 46, by which all appeals in criminal cases were wholly abolished.

It is probable that the commonest and most important form of appeal was that of appeal by an approver. The nature of this proceeding was as follows:—1 If a person accused of any crime, but especially of robbery, chose to plead guilty and to offer to give up his accomplices he was handed over to the coroner, before whom he confessed his guilt and accused a certain number of other persons, and the king might "grant him life and limb if he would deliver the country from a certain number of malefactors either by his body" (*i. e.* by killing them upon battle waged) "or by the country" (*i. e.* convicting them before a jury), "or by flight." If he failed to fulfil the conditions imposed on him he was hanged on his own confession. If the person accused was a man of good character, the conditions of the proceedings were made less favourable to the approver than they otherwise would have been.

If the approver fulfilled the stipulated condition and disposed of the prescribed number of accomplices he had to abjure the realm 2 "in regno remanere non poterit etiam si velit plegios invenire."

Accusations By Public Report—Ordeals—Trial By Jury

I have already described the manner in which public accusations were made before the Conquest. I now come to the procedure subsequent to the Conquest.

Glanville mentions the subject very slightly. 1 In his short chapter on criminal proceedings he describes the procedure adopted in the case of each particular crime separately, but he seems in all cases to recognize the distinction between an accusation by a definite accuser and an accusation by public report alone.

The silence of Glanville upon this subject is, however, of the less importance, because we have still 2 the text of the Assize of Clarendon (1164) and that of the Assize of Northampton (1176), which constitute the legislation of Henry II. upon this subject. The Assize of Northampton was a republication of the Assize of Clarendon, with some alterations and additions intended to make the system established by it more rigorous. Its provisions are as follows:—"If any one is accused before the justices of our Lord the King of murder or theft or robbery, or of harbouring persons committing those crimes, or of forgery or of arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and if he fails let him lose one foot. And at Northampton it was added for greater strictness of justice" (*pro rigore justitiæ*) "that he shall lose his right hand at the same time with his foot, and abjure the realm, and exile himself from the realm within forty days. And if he is acquitted by the ordeal let him find pledges and remain in the kingdom unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King. This assize is to apply from the time of the Assize of Clarendon to the present time, and from the present time as long as our Lord the King pleases in cases of murder and treason and arson, and in all the aforesaid matters, except small thefts and robberies done in the time of war, as of horses and oxen, and less matters."

The system thus established is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction subject to the chance of a favourable termination of the ordeal by water. If the ordeal fails, the accused person 1 loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation therefore was equivalent to banishment at least.

We have still some evidence as to the kind of cases in which the ordeal was inflicted. It is to be found in the *Rotuli Curiæ Regis* for the reigns of Richard I. and John, said by Sir F. Palgrave to be the oldest judicial records in existence. The following

illustrations (amongst others) are published by Sir F. Palgrave in his [2]*Proofs and Illustrations.*

"*Roll of the Iter of Stafford in 5 John.*—One Elena is suspected by the jurors because she was at the place where Reinalda de Henchenhe was killed, and because she was killed by her help and consent. She denies it. Let her purge herself by the judgment of fire; but as she is ill, let her be respited till she gets well."

"Andrew of Bureweston is suspected by the jurors of the death of one Hervicus because he fled for his death, therefore let him purge himself by the judgment of water."

"*Roll of the Iter of Wiltshire, 10 Rich. 1.*—The jurors say that Radulphus Parmentarius was found dead with his neck broken, and they suspect one Cristiana, who was formerly the wife of Ernaldus de Knabbewell, of his death, because Radulphus sued Cristiana in the ecclesiastical court for breach of a promise of marriage she had made to him, and after the death of her husband Ernaldus, Reginald, a clerk, frequented her and took her away from Radulphus, and Reginald and Cristiana hated Radulphus for suing her, and on account of that hatred the jurors suspect her and the clerk of his death. And the country says it suspects her. Therefore it is considered that the clerk and Cristiana appear on Friday, and that Cristiana purge herself by fire."

It is impossible to say how long the system of ordeals lasted. In the *Mirror* there is a list of 155 abuses in the law of which the author complains. The 127th is—"It is an abuse that proofs and purgations be not by the miracle of God where other proof faileth." [1] The *Mirror* was written in the reign of Edward I., so that it appears probable that ordeals fell into disuse in the course of the thirteenth century, [2] probably in consequence of the decrees of the Lateran Council of 1216.

The system of accusation which led up to, and to use a modern legal expression "sounded," in ordeal, was the origin of the grand jury of later times, and of our own days. In my chapter on the History of the Criminal Courts. [3] I have given Bracton's description of the justices' eyre, as it existed in the time of Henry III., and have shown that the accusation of suspected persons was only one of its multifarious duties, which were of such magnitude and variety that they may properly be said at that time to have consisted of a general superintendence over all the local details of the executive government. By degrees the old system of convening something like a county parliament, in which every township was represented by its reeve and four men, fell into disuse, and the sheriffs fell into the habit of summoning only a sufficient number of *probi et legales homines* to form a grand jury and as many petty juries as might be needed for the trial of the civil and criminal cases to be disposed of. The law upon the subject of the number and qualifications of the men to be put upon the panels formerly was, and to some extent still is, singularly vague. In practice at the assizes the grand jury for counties is always composed of the county magistrates, whose names are called over by the officer of the court until twenty-three at most have appeared. The magistrates, however, have no special legal right or duty in the matter. Any "good and lawful men" of the county may serve, no special qualification being required, though there are some disqualifications.[1] There is no historical interest in

the enactments which have been made upon this subject. The grand jury to the present day accuses every person who is put on his trial before any court of criminal jurisdiction which tries prisoners by a jury.

In the earlier chapters I have given the history of each of the steps in the prosecution of criminals from the first moment when a person is suspected down to the final conclusion of the proceedings. I have, however, intentionally omitted all but the most cursory notice of the actual trial by which the guilt or innocence of the suspected person is determined. In attempting to relate its history I shall adopt a somewhat different method from that which I have hitherto followed. Instead of treating separately the history of the opening speech of the counsel for the Crown, the prisoner's defence, the examination of the witnesses, and the judge's summing up, I shall give an account of characteristic trials or groups of trials from the reign of Queen Mary, when the earliest trials of which we have detailed reports took place, till the reign of George III., when the system now in force was established in all its main features.

I.—

1554-1637

The first group of trials which I shall consider are those which took place between 1554 and 1637, the first being the trial of Sir Nicholas Throckmorton, and the last being the proceedings in the Star Chamber which led to its abolition. 1 The report of the trial of Throckmorton is the earliest which is full enough to throw much real light on the procedure which then prevailed. All the trials which took place during this period seem to have followed much the same course, and to have been conducted in the same manner.

The cases of which reports remain were, for the most part, of great political importance, and were accordingly, during the early stages of the procedure, under the charge not of the justices of the peace, but of the Privy Council, and especially of the judges who were members of it, and the law officers of the Crown. The suspected person, having been arrested, was kept in confinement more or less close according to circumstances, and was examined in some cases before the Privy Council, in some cases by the judges, and in some instances by torture. The evidence of other persons, and more especially the evidence of every one who was suspected of being an accomplice, was taken in the same manner. When the case was considered ripe for trial the prisoner was arraigned and the jury sworn, after which the trial began by the speeches of the counsel for the Crown. There were usually several counsel, who, in intricate cases, divided the different parts of the case between them. The prisoner, in nearly every instance, asked, as a favour, that he might not be overpowered by the eloquence of counsel denouncing him in a set speech, but, in consideration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was, that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question

to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was that, during the period in question, the examination of the prisoner, which is at present scrupulously, and I think even pedantically, avoided, was the very essence of the trial, and his answers regulated the production of the evidence; the whole trial, in fact, was a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning. The judges occasionally took part in the discussion; but, in the main, the debate was between the parties. As the argument proceeded the counsel would frequently allege matters which the prisoner denied and called upon them to prove. The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i. e.* the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions. When the matter had been fully inquired into by this searching discussion, the presiding judge "repeated" or summed up to the jury the matters alleged against the prisoner, and the answers given by him; and the jury gave their verdict.

I will give an account of a few of the most remarkable trials as specimens.

Sir N. Throckmorton was tried for high treason in 1554, [1] the charge against him being that he compassed and imagined the Queen's death, and levied war against her, and adhered to her enemies; the alleged fact on which the charge was founded being a conspiracy with Wyat before his rising.

The trial took place on the 17th April, 1554. [2] The Court sat probably from 8 a. m. till 2, or, at any rate, some time before 3 p. m., as at their rising they adjourned till 3, and the jury gave their verdict at 5. The trial would seem accordingly to have lasted altogether for about six hours. It consisted almost entirely of a verbal duel between Throckmorton and the counsel for the Crown, namely, Serjeant Stanford, who, I suppose, may have been the author of Stanford's *Pleas of the Crown,* and Griffin, the Attorney-General. [1] Stanford took by far the most conspicuous part in the proceedings. He began by asking Throckmorton if he had not sent Winter to Wyat in Kent to confer about taking the Tower of London and about Wyat's rising? Throckmorton said he had told Winter that Wyat wanted to speak to him; but that he said nothing on the matters stated, and challenged Stanford to prove what he alleged. Stanford read Winter's "confession," and offered to call Winter to swear to it. Throckmorton said that, for the sake of argument, he would admit the "confession" to be true, and pointed out that certain parts of it were highly favourable to him, and that no part of it showed anything criminal on his part. Some matters he explained in answers to questions from the judges and the Attorney-General.

Stanford then read the confession of Cuthbert Vaughan, which, if true, proved that Throckmorton had given Vaughan much information as to the designs of Wyat's confederates. The Attorney-General offered to produce Vaughan to swear to his confession. To which Throckmorton replied, "He that hath said and lied will not, being in this case" (*i. e.,* under sentence of death), "stick to swear and lie." Vaughan,

however, was called, swore to the truth of his confession, and, in answer to a question from Throckmorton, said he was only a common acquaintance, and that Wyat had given him a letter of introduction to Throckmorton. Upon this Throckmorton said, “If you have done with Vaughan, my lord, I pray you give me leave to answer.” The Chief Justice replied, “Speak, and be short.” Throckmorton thereupon insisted on the improbability of his placing so much confidence in a common acquaintance, and appealed to Sir R. Southwell (one of the Commissioners by whom he was tried, and before whom, as a Privy Councillor, Vaughan had been examined) to confirm him in saying that Vaughan had varied in his evidence, and in particular that he had vouched a witness who had not been examined and a document which had never been produced. He also insisted that Vaughan ought not to be believed, because his only hope of escape from his own sentence of death was to accuse some one else. The judges hereupon asked if he meant to say that Vaughan’s deposition was totally false. Thereupon Throckmorton admitted that much of it was true; but he denied the specially damaging parts of it, and explained a variety of matters which were specifically pointed out to him. Throckmorton’s own “confession” was then read by Stanford. It admitted in substance that he had discussed with several persons the scheme of the marriage between Queen Mary and Philip II., of which he and they strongly disapproved; but it went no further. A deposition of the Duke of Suffolk was next read, on which Throckmorton remarked that it stated only what the Duke said he had heard from his brother, Lord Thomas Grey, who “neither hath said, can say, nor will say anything against me.” Certain statements, very remotely connected with the subject, made by one Arnold, were then referred to. They mentioned a man named FitzWilliams. Throckmorton, seeing FitzWilliams in court, desired that he might be sworn as a witness. FitzWilliams offered himself to be sworn, but, upon the Attorney-General’s application, the Court refused to hear him, and ordered him out, one of the judges saying, “Peradventure you would not be so ready in a good cause.” Finally it was said that Wyat had “grievously accused” the prisoner, to which Throckmorton replied, “Whatsoever Wyat hath said of me in hope of his life, he unsaid it at his death.” One of the judges owned this, but added that Wyat said that all he had written and confessed to the Council was true. Throckmorton replied, “Master Wyat said not so. That was Master Doctor’s addition.” On this another Commissioner observed that Throckmorton had good intelligence. He answered, “God provided that revelation for me this day, since I came hither; for I have been in close prison these fifty-eight days, where I heard nothing but what the birds told me which did fly over my head,”—an assertion which was probably false. After this Throckmorton objected, that his case was not brought within 25 Edw. 3, as no overt act of compassing the Queen’s death was proved against him; but at the most, procurement by words only of levying war. The judges put various difficulties in his way, refusing to have the statutes read, and, 1 in at least one instance, misconstruing their language grossly when Throckmorton quoted them. They held however, certainly in accordance with all later authorities, that in treason there are no accessories, all being principals. Nothing can exceed the energy, ingenuity, presence of mind, and vigour of memory which Throckmorton showed, or is reported to have shown, throughout every part of the case, and especially in the legal argument. The Attorney-General is reported to have appealed to the Court for protection. “I pray you, my lords that be the Queen’s Commissioners, suffer not the prisoner to use the Queen’s learned counsel thus. I was never

interrupted thus in my life, nor I never knew any thus suffered to talk as this prisoner is suffered. Some of us will come no more to the bar, an we be thus handled."

The Chief Justice summed up, "and," says the reporter (who, no doubt, was very favourable to Throckmorton), "either for want of good memory or good will, the prisoner's answers were in part not recited, whereupon the prisoner craved indifferency, and did help the judge's old memory with his own recital." After the summing up, Throckmorton made to the jury a short, earnest, pathetic address, full of texts. He begged the Court to order that no one, and in particular none "of the Queen's learned counsel be suffered to repair to them." Whereupon two serjeants were sworn to attend them for that purpose. After a deliberation of two hours the jury acquitted him. They were committed to prison for their verdict, and eight of them (four having submitted and apologised) were brought before the Star Chamber in October (six months and more after the trial), and discharged on the payment by way of fine of £220 apiece, and three, who were not worth so much, of £60 apiece. "This rigour was fatal to Sir John Throckmorton, who was found guilty upon the same evidence on which his brother had been acquitted."

The next trial to which I will refer is that of [1] the Duke of Norfolk in 1571. He was tried for high treason by imagining the death and deposition of Queen Elizabeth; the overt act being an endeavour to marry Mary, Queen of Scots, knowing that she claimed title to the Crown as against Queen Elizabeth. He was also charged with being concerned in various other treasonable enterprises, which are set out at great length in the indictment. The case was tried before the Court of the Lord High Steward, consisting of twenty-six Lords Triers. The proceedings, though not so animated as those in Throckmorton's case, followed much the same course. Serjeant Barham conducted the greater part of the prosecution. After opening the case, he urged the Duke to confess that he knew that Mary claimed the crown of England. He admitted that he knew it, "but with circumstance," that is, subject to explanation. Barham contested the value of the explanation, and many depositions were read, on the bearing of which the Duke on the one side, and Barham on the other, argued, questioned each other, and exchanged explanations at great length. Here is a single specimen:—

"*Serjeant:* Now for the matter of taking the Tower. *Duke:* I deny it. *Serjeant:* Was it not mentioned unto you in the way when you came from Titchfield, by one that came to you and moved you a device between you and another for taking the Tower? *Duke:* I have confessed that such a motion was made to me, but I never assented to it. *Serjeant:* You concealed it; and to what end should you have taken the Tower but to have held it against the Queen by force?" &c.

After Barham had finished the part of the case which he was to manage, other charges were enforced in the same way by the Attorney-General, and others again by the Solicitor-General. After which "Mr. Wilbraham, the Attorney of the Wards," made a speech ending with a burst of patriotic eloquence as to how under circumstances the English would have beaten certain Walloons. On this the reporter observes, "This point Mr. Attorney spoke with such a grace, such cheerfulness of heart and voice, as if he had been ready to be one at the doing of it, like a hearty true Englishman, a good

Christian, a good subject, a man enough for his religion, prince, and country." After this Wilbraham, like his leaders, had an argument at length with the prisoner, who was thus expected to deal successively with no less than four eminent counsel.

Some of the Duke's observations throw much light on the position of a prisoner in those days. At one point he said, "There is too much for me to answer without book; for my memory is not so good to run through everything, as they do that have their books and notes lying before them. Therefore, I pray you, if I forget to answer to anything, remind me of it." The Duke, like Throckmorton, argued with much reason that no overt act of compassing the Queen's death had been proved against him, and quoted some authorities, and in particular Bracton. The Attorney-General was indignant at his audacity. "You complained of your close keeping that you had no books to provide for your answer: it seemeth you have had books and counsel; you allege books, statutes, and Bracton. I am sure the study of such books is not your profession." The Duke humbly said, "I have been in trouble these two years; think you that in all this time I have not had cause to look for myself?" The Duke was convicted and executed.

Many other trials in Queen Elizabeth's time were conducted in the same way. I may mention those of 1 Campion and other Jesuits in 1581, those of 2 Abington and others in 1586, that of 3 Lord Arundel in 1589, and a very remarkable one of 4 Udale, for felony in writing the libel called Martin Marprelate in 1590. In Udale's case there was really no evidence, or hardly anything which could by courtesy be called evidence, except the fact that when examined before the Privy Council he would not deny having written the book; and that when the judge who tried him offered to direct an acquittal if he would only say he did not write it, he refused to do so.

Under James I. the character of the procedure remained unchanged, as may be seen by reference to the cases of 1 Raleigh in 1603, the trials for the 2 Gunpowder Plot in 1606, and those of 3 Overbury's murderers in 1615. The trials of 4 Lord Somerset and 5 Sir Jervase Elwes are perhaps the best illustrations of the old procedure. Each affords a striking instance of the importance which then attached to the examination of the prisoner. 6 The argument between Lord Somerset and the different counsel and members of the court is exceedingly curious and minute, but its effect cannot be given shortly. Elwes, who was Lieutenant of the Tower, and had delivered the Countess of Somerset's poisons to Overbury, defended himself on the ground that he did not know what they were, though he admitted that he knew that at one time one of the subordinate agents had thoughts of committing the crime. 7 He defended himself with so much energy and skill that he might perhaps have escaped had not Coke, the presiding judge, cross-examined him as to some expressions in his letters which he was unable to explain, 8 and (which is even more at variance with our modern views) produced against him, after his defence had been made, a "confession" by one Franklin, who had made the confession privately and not even upon oath before Coke himself, at five o'clock that morning, before the court sat. The "confession," if true, no doubt proved Elwes's guilt beyond all doubt, but put upon him as it was at the very last moment, when he had no opportunity to inquire about it, or even to cross-examine Franklin without inquiry, it is not surprising that "he knew not what to answer." If Elwes's dying speech is rightly reported, he confessed his guilt at the gallows, and,

without making any complaint on the subject, ascribed its discovery to Coke. 9 "I displeased God, being transported with over-much pride of my pen; which obsequious quill of mine procured my just overthrow upon the knitting of my Lord Chief Justice's speech at my arraignment, by reason of two or three passages at the bottom of my letter subscribed with my own hand, which I utterly had forgotten, because I felt not my sin."

Of all the trials which I have mentioned, however, that of Raleigh is by far the most remarkable. He was accused of treason by conspiring with Lord Cobham to make Arabella Stuart Queen of England through the agency of the Archduke of Austria and his ambassador. The whole evidence against Raleigh was a "confession" or examination of Cobham before the Privy Council, and a letter which he wrote afterwards. Both in the confession and in the letter, Cobham charged Raleigh with this plot by obscure allusions and implications, and with no details. Some few trifling bits of hearsay were proved, I suppose by way of corroboration. For instance,1 Dyer, a pilot, swore that he accidentally met some one in Lisbon, who said that Cobham and Raleigh would cut King James's throat before he could be crowned. The extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court of justice, except perhaps in those in which Jefferies presided.2 The trial is extremely curious, but its great interest in a legal point of view lies in the discussion which occupied most of it on Raleigh's right to have Cobham called as a witness. He knew that Cobham had retracted his confession, and he had actually received from him a letter saying, "I protest upon my salvation I never practised with Spain by your procurement. God so comfort me in this my affliction as you are a good subject, for anything I know." For these reasons, and also because as he said he felt sure that Cobham would not venture to state openly and on oath what he had confessed before the Council, Raleigh earnestly pressed for his production. He put his demand partly on two statutes of Edward VI. (1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 11). The first act provides that no one is to be indicted, arraigned, or convicted of treason unless he be accused by two sufficient and lawful witnesses. The second act is to the same effect, but uses the words "lawful accusers," which 1 Coke himself afterwards interpreted as meaning witnesses, "for other accusers have we none in the common law." It also provides that the accusers shall, at the time of the arraignment, be brought in person before the accused. Of these statutes Coke declares that they were grounded on the common law, which "herein is grounded upon the law of God, expressed both in the Old and New Testament 'in ore duorum vel trium testium,' &c." 2 In Raleigh's trial, Coke insinuated that these statutes were no longer in force, and 3 Chief Justice Popham expressly said that they were repealed, adding, "It sufficeth now if there be proofs made either under hand or by testimony of witnesses, or by oaths." As for having Cobham produced in court, Lord Salisbury (Robert Cecil) said that the commissioners ought to know from the judges whether Raleigh had a right to demand his production, or whether it was matter of favour? Upon this the following remarkable statements were made:—

4 "*Lord Chief Justice:* This thing cannot be granted, for then a number of treasons should flourish: the answer may be drawn by practice whilst he is in person. *Justice Gawdy:* The statute you speak of concerning two witnesses in case of treason is found

to be inconvenient; therefore by another law it was taken away. *Raleigh:* The common trial of England is by jury and witnesses. *Lord Chief Justice:* No, by examination: if three conspire a treason and they all confess it, there is never a witness, yet they are condemned. *Justice Warburton:* I marvel, Sir Walter, that you, being of such experience and wit, should stand on this point: for so many horse-stealers may escape, if they may not be condemned without witnesses. If one should rush into the king's privy chamber whilst he is alone and kill the king (which God forbid), and this man be met coming with his sword drawn all bloody, shall not he be condemned to death? My Lord Cobham hath perhaps been laboured in that, and to save you, his old friend, it may be that he will deny all that he hath said?"

The result was that Cobham was not produced, and that Raleigh was convicted and executed on the 29th October, 1618, just fifteen years after his trial.

I now pass from the proceedings before the Courts of Common Law to those which took place before the Star Chamber.

I have already given some account of the history and of the jurisdiction of that court. I will now notice some of the cases which led to its abolition. Its function as a criminal court was to try cases of misdemeanour which were not, or were supposed not to be, sufficiently recognised or punished at the common law. Its procedure was founded upon an information, generally by the Attorney-General, who drew up a charge like a Bill in Chancery against the defendant. The defendant put in his answer also in the form of an Answer in Chancery. He might be examined upon interrogatories, and was liable to be required to take what was called the *ex officio* oath. This was an oath in use in the Ecclesiastical Courts, by which the person who took it swore to make true answer to all such questions as should be demanded of him. The evidence of witnesses was given upon affidavit. When the case was ripe for hearing it came on for argument much in the way in which cases are argued in the Chancery Division of the High Court. The parties appeared by counsel; the information, answer, and depositions were read and commented upon; and finally each member of the court pronounced his opinion and gave his judgment separately—a point worth noticing because it stands in marked contrast to the practice of the modern Judicial Committee of the Privy Council, which in a certain sense represents the Star Chamber.

The Star Chamber proceedings reported in the *State Trials* leave a singular impression on my mind. As far as the mere management in court of the different cases went, it cannot be denied that they are for the most part calm and dignified, though the strange taste and violent passions of the time give them occasionally a grotesque appearance; but the severity of the "censures" or sentences is in these days astonishing. A few instances may be mentioned. In 1615 [1] Sir John Hollis and Sir John Wentworth were prosecuted "for traducing the public justice." Weston had been hanged for the murder of Sir Thomas Overbury, to whom he had administered poison. Wentworth and Hollis went to Weston's execution, where Wentworth asked Weston whether he really did poison Overbury, and pressed him to answer, "saying he desired to know, that he might pray with him." Hollis "was not so much of a questioner," but, "like a kind of confessor, wished him to discharge his conscience and satisfy the world." Hollis moreover, when the jury gave their verdict, said, "If he were on the jury, he would

doubt what to do." It is difficult to see how this could be regarded as in any sense criminal conduct; but it seems to have been thought that Wentworth's question and Hollis's remarks remotely implied that Weston's guilt might perhaps be not absolutely certain, notwithstanding his conviction. Lord Bacon (then Attorney-General) developed this view of the subject at length, and with characteristic grace, calmness, and power. The defendants excused themselves in a polite manner; Sir John Hollis observing that "Mr. Attorney had so well applied his charge against him that, though he carried the seal of a good conscience with him, he would almost make him believe he was guilty." As for what he had said to Weston, he was there "carried with a general desire which he had to be at the execution as he had done in many like cases before." It was a common thing on such occasions to question the person about to be executed, and he had only followed his usual practice. Coke pronounced sentence. He referred to Abimelech, to cases of poisoning in the Year-books, as to which he remarked that "from Edward III. to 22 Henry VII. (which was a great lump of time) no mention is made of poisoning any man." As to going to executions, he said that "ever since he was a scholar and had read those verses of 1 Ovid, *Trist.* iii. 5, 'Ut lupus et vulpes instant morientibus et quæcumque minor nobilitate fera est,' he did never like it, and he did marvel much at the use of Sir John," to whom he applied, "with a little alteration," Virgil's line, "Et quæ tanta fuit Tyburn tibi causa videndi." Finally by way of "censure" Sir John Hollis was fined £1,000 and Sir John Wentworth 1,000 marks, and each was imprisoned a year in the Tower.

2 In 1632 Mr. Sherfield was prosecuted before the Star Chamber for breaking a glass window in St. Edmond's Church in Salisbury. He admitted that he had done so, but justified his conduct on the ground that the window "was not a true representation of the Creation; for that it contained divers forms of little old men in blue and red coats, and naked in the head, feet, and hands, for the picture of God the Father, and the seventh day he therein hath represented the like image of God sitting down taking his rest, whereas the defendant conceiveth this to be false." The window contained many other inaccuracies. Eve, for instance, was represented as being taken whole out of Adam's side, whereas in fact a rib was taken and made into Eve. Besides, as to the days, "he placed them preposterously, the fourth before the third, and that to be done on the fifth, which was done on the sixth day." For these reasons the defendant made eleven holes in the window with his pikestaff, and, said one of the witnesses, "the staff broke and he fell down into the seat and lay there a quarter of an hour groaning." For this, after a long and decorous discussion, Sherfield was fined £500.

3 Mr. Richard Chambers, a merchant of London, who had a dispute with some under officers at the Custom House, was summoned before the Privy Council at Hampton Court, where he said to the Council, "that the merchants are in no part of the world so screwed and wrung as in England; that in Turkey they have more encouragement." For this little bit of grumbling, directed solely against under officers, he was fined £2,000, and required to make a written submission or apology, which he refused to do. For his refusal he was imprisoned for six years.

These proceedings were sufficiently severe, but those which made the Court utterly intolerable and brought about its abolition were the sentences upon libellers, and the proceedings connected with them. The best known of these may be shortly noticed.

1 In 1632 William Prynne was informed against for his book called *Histrio Mastix*. Prynne's answer was, amongst other things, that his book had been licensed, and one of the counsel, Mr. Holbourn, apologised, not without good cause, for his style. 2 "For the manner of his writing he is heartily sorry, that his style is so bitter, and his imputations so unlimited and general." The book certainly was a bitter and outrageous performance, and it is probable that a moderate sentence upon the author would, at the time, have been approved. His trial was, like the other Star Chamber proceedings, perfectly decent and quiet, but the sentence can be described only as monstrous. He was sentenced to be disbarred and deprived of his university degrees; to stand twice in the pillory, and to have one ear cut off each time; to be fined £5,000; and to be perpetually imprisoned, without books, pen, ink, or paper. One of the Court, 3 Lord Dorset, was as brutal in his judgment as Prynne in his book. "I should be loth he should escape with his ears, for he may get a periwig which he now so much inveighs against, and so hide them, or force his conscience to make use of his unlovely love-locks on both sides; therefore I would have him branded in the forehead, slit in the nose, and his ears cropt too."

Five years after this, in 1637, Prynne, Bastwick, and Burton, were tried for libel, and were all sentenced to the same punishment as Prynne had received in 1632, Prynne being branded on the cheeks instead of losing his ears.

The procedure in this case appears to me to have been as harsh as the sentence was severe, though I do not think it has been so much noticed. In cases of treason and felony no counsel were allowed to prisoners in the sixteenth and seventeenth centuries, indeed in cases of felony they were not allowed to address the jury for the prisoner till 1837. The rule was otherwise in misdemeanours, and by the practice of the Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information. Prynne's answer was of such a character that one of the counsel assigned to him refused to sign it at all, and the other did not sign it till after the proper time. Bastwick could get no one to sign his answer. Burton's answer was signed by counsel, but was set aside as impertinent. Upon the whole, the case was taken to be admitted by all the three, and judgment was passed on them accordingly. There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence. It ought, however, in fairness to be admitted that the course taken made no practical difference to the defendants, as they neither could, nor did they wish to deny that they were the authors of the books imputed to them, and the books spoke for themselves. They were asked at the final hearing whether they pleaded guilty or not guilty, although the Court took the matter of the information as admitted. I suppose this was to give them an opportunity of disavowing the publication, if they were so minded, but this is only a conjecture.

The last Star Chamber case to which I will refer is noticeable, amongst other reasons, because it illustrates the intense unpopularity of one of the principal points in the

procedure, both of the Star Chamber and of the Ecclesiastical Courts, from which the Star Chamber probably borrowed it. This was what was known as the *ex officio* oath, already mentioned. In the Common Law Courts [1] this oath is still in constant use without objection, in interlocutory proceedings, but in the old Ecclesiastical Courts and in the Star Chamber it was understood to be, and was, used as an oath to speak the truth on the matters objected against the defendant—an oath, in short, to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim "*nemo tenetur prodere seipsum*" was agreeable to the law of God, and part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad laws, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which they have afforded protection has come to be commonly admitted.

Be this as it may, the extreme unpopularity of the *ex officio* oath is set in a clear light by the case of John Lilburn. Lilburn wrote an account of the proceedings against him which is probably substantially accurate and is extremely lively and circumstantial. [2] He was committed to the Gatehouse "for sending of factious and seditious libels out of Holland into England." He was afterwards ordered by the Privy Council to be examined before the Attorney-General, Sir John Banks. He was accordingly taken to the Attorney-General's chambers, [3] "and was referred to be examined by Mr. Cockshey his chief clerk; and at our first meeting together he did kindly entreat me, and made me sit down by him, put on my hat, and began with me after this manner. Mr. Lilburn, what is your Christian name?" A number of questions followed, gradually leading up to the matter complained of. Lilburn answered a good many of them, but at last refused to go further, saying, "I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of." He was afterwards asked by the Attorney-General to sign his examination, but refused to do so, though he offered to write an answer of his own to what might be alleged against him. [1] Some days after he was taken to the Star Chamber office that he might enter his appearance. He replied that he had been served with no subpœna, and that no bill had been drawn against him. "One of the clerks said I must first be examined and then Sir John" (the Attorney-General) "would make the bill." Lilburn thought the object of the examination was to get materials for a bill, and accordingly when the head of the office tendered him the oath "that you shall make true answer to all things that are asked you," he refused to do so, saying, first, "I am but a young man and do not well know what belongs to the nature of an oath." Afterwards he said he was not satisfied of the lawfulness of that oath, and after much dispute absolutely refused to take it. After about a fortnight's delay he was brought before the Star Chamber, where the oath was again tendered to him and he again refused it on the ground that it was an oath of inquiry for the lawfulness of which he had no warrant. [2] Lilburn had a fellow prisoner, "old Mr. Wharton," said in one part of the case to have been eighty-five years of age. When asked to take the oath Wharton refused, and began to tell them of the bishops' cruelty towards him, and that

they had "had him in five several prisons within these two years for refusing the oath." On the following day they were brought up again. Lilburn declared, on his word and at length, that the charges against him were entirely false, and that the books objected to were imported by another person with whom he had no connection. 3 "Then," said the Lord Keeper, "thou art a mad fellow, seeing things are thus that thou wilt not take the oath and answer truly." Lilburn repeated that it was an oath of inquiry and that he found no warrant in the word of God for an oath of inquiry. "When I named the word of God the Court began to laugh as though they had had nothing to do with it." Failing with Lilburn, the Court asked Wharton whether he would take the oath, whereupon getting leave to speak, "he began to thunder it out against the bishops, and told them they required three oaths of the king's subjects, namely, the oath of church-wardenship, and the oath of canonical obedience, and the oath *ex officio,* which, said he, are all against the law of the land, and by which they deceive and perjure thousands of the king's subjects in a year." "But the Lords, wondering to hear the old man talk after this manner, commanded him to hold his peace, and to answer them whether he would take the oath or no. To which he replied, and desired them to let him talk a little, and he would tell them by and by. At which all the Court burst out laughing; but they would not let him go on, but commanded silence (which if they would have let him proceed, he would have so peppered the bishops as they never were in their lives in an open Court of judicature)." As both absolutely refused to take the oath they were each sentenced to stand in the pillory, and to pay a fine of £500, and Lilburn to be whipped from the Fleet to the pillory, which stood between Westminster Hall Gate and the Star Chamber. Lilburn was whipped accordingly, receiving, it was said, upwards of 500 lashes, and was made to stand in the pillory for two hours after his whipping. In May, 1641, the House of Commons resolved "that the sentence of the Star Chamber given against John Lilburn is illegal, and against the liberty of the subject: and also bloody, cruel, barbarous, and tyrannical."

It is difficult to say how far the cases reported in the *State Trials* can be regarded as fair specimens of the common course of the administration of criminal justice, as it is not unnatural to suppose that in cases in which the Government were directly interested prisoners might be treated more harshly than in common cases. The only report of a trial for a common offence given in the *State Trials* before the year 1640, is that of an appeal of murder tried at the King's Bench bar, in the 4th Charles I. (1628). The report is published in 14 *St. Tr.* 1342, from the papers of Serjeant Maynard. The evidence given seems to have been, with one strange exception, similar to the evidence which would be given in the present day on a trial for murder. It was proved that one Jane Norkott was found lying dead in her bed in a composed manner, the bed clothes not disturbed, and her child in bed. Her throat was cut and her neck broken. There was no blood on the bed, but much at two distinct and distant places on the floor, and a bloody knife was found sticking in the floor, the point towards the bed and the haft from the bed. These facts clearly proved that the case was one of murder, and not (as was supposed at first) of suicide. Mary Norkott, the mother of the deceased, Agnes Okeman, her sister, and Okeman, her brother-in-law, deposed at the inquest that they slept in an outer room through which her room was entered, and that no stranger came in in the night. Upon this singularly weak evidence they were suspected of murder, though a coroner's jury at first returned a verdict of *felo de se.*

After thirty days the body was disinterred and a second inquest held. Probably (though that is not stated) they found a verdict of murder against the defendants, who were tried at Hertford assizes and acquitted. The judge, being dissatisfied with the verdict, recommended that the infant child should be made plaintiff in an appeal of murder against its father, grandmother, aunt, and uncle, and the appeal was tried accordingly. On the trial it was sworn that when the body was disinterred at the second inquest "the four defendants were required, each of them, to touch the dead body. Okeman's wife fell upon her knees and prayed God to show tokens of her innocency. The appellant" (*sic,* but as the appellant was a baby this seems strange; probably it should be "appellees") "did touch the dead body, whereupon the brow of the dead, which before was of a livid and carrion colour, began to have a dew or gentle sweat arise on it, which increased by degrees till the sweat ran down in drops on the face, the brow turned to a lively and fresh colour, and the deceased opened one of her eyes and shut it again; and this opening the eye was done three several times; she likewise thrust out the ring or marriage finger three times and pulled it in again, and the finger dropped blood on the grass." These occurrences, which I believe (some allowance being made for exaggeration and inaccurate observation) are not unnatural effects of decomposition, seem to have excited the greatest astonishment in Court, but Serjeant Maynard does not say how the judge dealt with them in his charge or what was the result of the proceedings. If they are regarded as miraculous, they have the defect of being wholly uncertain in their meaning, for it is impossible to say whether they attested the innocence of Elizabeth Okeman or her guilt, or that of any, and if so of which, of the other persons concerned.

In the absence of reports of particular trials I may refer to a striking description of trials in general by Sir Thomas Smith, Secretary of State to Queen Elizabeth, which occurs in his [1]*Commonwealth of England,* written during the author's embassy to France, with special reference to the difference between the institutions of France and England, and the Common and the Civil Law.

The following is his description of a trial at the Assizes: Having described the preliminary proceedings and the fixing of the circuits he describes the Courts themselves. "In the town house or in some open common place there is a tribunal or place of judgment made aloft. Upon the highest bench there sit the judges which be sent down in commission in the midst. Next them on each side the justices of the peace according to their degree. On a lower bench before them the rest of the justices of the peace and some other gentlemen or their clerks. Before these judges and justices there is a table set beneath, at which sitteth the *custos rotulorum,* or keeper of the writs, the escheator, the under sheriff, and such clerks as do write. At the end of that table there is a bar made with a space for the inquests, and twelve men to come in when they are called, behind that space another bar, and there stand the prisoners which be brought thither by the gaoler all chained together." The introductory proceedings, including the various proclamations and the taking of the pleas, the challenges and swearing of the jury, are next fully described. They are identically the same as those which now obtain, the very words of the proclamations having remained almost unchanged. The prisoner having pleaded not guilty, and the jury having been sworn, the crier "saith aloud, If any can give evidence or can say anything against the prisoner, let him come now, for he standeth upon his deliverance.

If no man come in, then the judge asketh who sent him to prison, who is commonly one of the justices of the peace. He, if he be there, delivereth up the examination which he took of him" (under the Acts of Philip and Mary), "and underneath the names of those whom he hath bound to give evidence: although the malefactor hath confessed the crime to the justice of the peace, and that it appear by his hand and confirmation, the twelve men will acquit the prisoner, but they which should give evidence pay their recognizances. Howbeit this doth seldom chance except it be in small matters and where the justice of the peace who sent the prisoner to the gaol is away." This curious passage gives a different impression from the reports of cases in the *State Trials.* The juries in the cases I have referred to showed little inclination to acquit prisoners who had confessed or had been accused by the confessions of others; but Sir Thomas Smith's account clearly implies that, if the witnesses did not appear, the examination of the prisoner was read, and he probably may (though this is not stated) have been further examined upon it. In such cases as Smith refers to, in the present day the judge would direct an acquittal.

To resume Smith's account, "If they which be bound to give evidence come in, first is read the examination which the justice of the peace doth give in" (it is likely that the prisoner would be questioned upon it, but this is not mentioned), "then is heard (if he be there) the man robbed, what he can say, being first sworn to say the truth, and after the constable, and as many as were at the apprehension of the malefactors, and so many as can say anything being sworn one after another to say truth. These be set in such a place as they may see the judges and the justices, the inquest and the prisoner, and hear them and be heard of them all. The judge, after they be sworn, asketh first the party robbed if he know the prisoner, and biddeth him look upon him: he saith Yea. The prisoner sometimes saith Nay. The party pursuyvant giveth good ensignes, *verbi gratiâ,* I know thee well enough; thou robbedst me in such a place, thou beatedst me, thou tookest my horse from me, and my purse; thou hadst then such a coat, and such a man in thy company. The thief will say No, and so they stand a while in altercation. Then he" (I suppose the prosecutor) "telleth all that he can say: after him likewise all those who were at the apprehension of the prisoner, or who can give any indices or tokens, which we call in our language evidence against the malefactor. When the judge hath heard them say enough, he asketh if they can say any more. If they say No, then he turneth his speech to the inquest. Goodmen (saith he), ye of the inquest, ye have heard what these men say against the prisoner. You have also heard what the prisoner can say for himself. Have an eye to your oath and to your duty, and do that which God shall put in your minds to the discharge of your consciences, and mark well what is said. Thus sometimes with one inquest is passed to the number of two or three prisoners. For, if they should be charged with more, the inquest will say, My lord, we pray you charge us with no more; it is enough for our memory. Many times they are charged with but one or two." The jury then retire to consider their verdicts, and are confined "with neither bread, drink, meat, nor fire. If they be in doubt of anything that is said, or would hear again some of them that gave evidence, to interrogate them more at full, or if any that can give evidence come late, it is permitted that any that is sworn to say the truth may be interrogated of them to inform their consciences." Finally the verdict is returned; the prisoner, if found guilty, and his offence is clergyable, prays his clergy. If he can read he gets it. If not, or if his offence is not clergyable, the judge passes sentence: "Law is thou shalt return to the place

from whence thou camest; from thence thou shalt go to the place of execution. There thou shalt hang till thou be dead. Then he saith to the sheriff, Sheriff, do execution."

Several observations arise on this striking passage. Smith makes no mention of counsel; he says nothing explicitly of the prisoner's defence, and he seems to attach little or no importance to the judge's summing up. On the other hand, the whole account assumes that the common course was to call witnesses face to face, though [1] expressions occur which imply that depositions might be used instead; on what conditions is not stated. From the account given of the reading of the prisoner's examination as a first step, and of the "altercation" between him and the prosecutor, I should infer that the prisoner's defence was made, not in a set speech as at present, but by fragments in the way of argument and "altercation" with the prosecutor and the other witnesses. This would agree with and illustrate the reports in the *State Trials* already referred to. Upon this view the only difference between the trials which are fully reported and the routine described by Smith would be that in the more important cases the examination of the prisoner would be conducted by counsel, whereas in less important cases it would usually consist of a debate between the prisoner and the prosecutor and the other witnesses, the judge of course interfering as he saw fit.

Upon the whole it may be said that the criminal trials of the century preceding the civil war differed from those of our own day in the following important particulars:—

(1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defence. He was examined, and his examination was taken down.

(2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced on his trial. He had no counsel either before or at the trial.

(3) At the trial there were no rules of evidence, as we understand the expression. The witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced.

(4) The confessions of accomplices were not only admitted against each other, but were regarded as specially cogent evidence.

(5) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance. In later times they were not examined on oath, if they were called.

This last rule appears to us so extraordinary, that it is necessary to explain how it came about.

[1] Barrington, in his *Observations on the Statutes,* says, "The denying a felon to make his defence by advocate, and the not permitting his witnesses to be examined upon oath till the late statute, seem to have been borrowed from the Roman law, which is indeed the more severe upon the criminal as he is not permitted to produce any witnesses in his favour; and Montesquieu gives this as a reason why perjury is a

capital offence in France, though not in England." 2 Barrington quotes from the journals of the House of Commons, Thursday, June 4, 1607, a paper "delivered to and read by Mr. Speaker, declaring the manner of proceeding in Scotland for point of testimony upon trials in criminal cases, for satisfaction of some doubts.

"In criminal causes by the civil law there is no jury called upon life and death, and therefore the judges admit witnesses in favour of the pursuer, but none in favour of the defender, because in all cases (either criminal or civil) no man can be admitted to prove the contrary of his own accusation, for it is his part who relevantly alleges the same to prove it. As, if A accused B for breaking his stable and stealing his horse such an hour of the night, the pursuer may be well admitted to prove what he hath alleged; but the defendant can never be admitted to prove that he was alibi at that time, for that would be contrary to the libel, and therefore most unformal. In Scotland we are not governed by the civil law, but *ordanes* (ordinaries probably), and juries are to pass upon life and death much the same as here, which jury, as it comes from the neighbourhood where the fact was committed, are presumed to know much of their own knowledge, and therefore they are not bound to examine any witnesses except they choose to do it on the part of the pursuer; but this is not lawful to be done in favour of the defendant. It is of truth the judge may either privately beforehand examine *ex officio* such witnesses as the party pursuer will offer to him; and then, when the jury is publicly called, he will cause these depositions to be read, and likewise examine any witnesses which the pursuer shall then desire, but never in favour of the defender."

I have quoted these passages at length, not only on account of their curiosity, but because they seem to me to throw much light on the spirit of the old criminal procedure. The true reason for the rule as to restricting the defence is obvious. It increased the power of the prosecution, and saved trouble to those who conducted it. It was in complete harmony with the other points in which the trials of the sixteenth century formed a contrast to those of our own day. In the present day the rule that a man is presumed to be innocent till he is proved to be guilty is carried out in all its consequences. The plea of not guilty puts everything in issue, and the prosecutor has to prove everything that he alleges from the very beginning. If it be asked why an accused person is presumed to be innocent, I think the true answer is, not that the presumption is probably true, but that society in the present day is so much stronger than the individual, and is capable of inflicting so very much more harm on the individual than the individual as a rule can inflict upon society, that it can afford to be generous. It is, however, a question of degree, varying according to time and place, how far this generosity can or ought to be carried. Particular cases may well be imagined in which guilt, instead of innocence, would be presumed. The mere fact that a man is present amongst mutineers or rebels would often be sufficient, even in our own days, to cost him his life if he could not prove that he was innocent.

In judging of the trials of the period in question we must remember that there was no standing army, and no organised police on which the Government could rely; that the maintenance of the public peace depended mainly on the life of the sovereign for the time being, and that the question between one ruler and another was a question on which the most momentous issues, religious, political, and social, depended. In such a

state of things it was not unnatural to act on a different view as to the presumptions to be made as to guilt and innocence from that which guides our own proceedings.

Suspected people, after all, are generally more or less guilty, and though it may be generous, for the reason already given, to act upon the opposite presumption, I do not see why a Government not strong enough to be generous should shut their eyes to real probabilities in favour of a fiction. This principle must be admitted, and the procedure of the period in question must be judged in the light of it, before it can be fairly criticised. I think such criticism would not be wholly unfavourable to it. The trials were short and sharp; they were directed to the very point at issue, and, whatever disadvantages the prisoner lay under, he was allowed to say whatever he pleased; his attention was pointedly called to every part of the case against him, and if he had a real answer to make he had the opportunity of bringing it out effectively and in detail. It was but seldom that he was abused or insulted.

The general impression left on my mind by reading the trials is that, harsh as they appear to us in many ways, the real point at issue was usually presented to the jury not unfairly. In Raleigh's case, for instance, the substantial question was, Do you, the jury, believe that Raleigh was guilty because Cobham said so at one time, although it is admitted that he afterwards retracted what he said? In our days such evidence would not be allowed to go before a jury, and, if it were, no jury would act upon it; [1] but it is quite a different question whether, in fact, Cobham did let out the truth in what he said against Raleigh.

It is very questionable to me whether Throckmorton was not privy to Wyat's rising, and there can be no reasonable doubt that the Duke of Norfolk intrigued with Queen Mary in a manner which meant no good to Elizabeth, whether his conduct amounted technically to high treason or not. In a word, admit that the criminal law is to be regarded as the weapon by which a Government not very firmly established is to defend its existence, admit also that a person generally suspected of being disaffected probably is disaffected, and that, even if he has not done the particular matters imputed to him, he has probably done something else of the same sort, finally remember that the political contests of the sixteenth and seventeenth centuries turned upon the bitterest and the most deep-seated differences which exist amongst men, and that they appealed to the strongest of human passions, and the inference will be that the trials to which I have referred were conducted on intelligible principles, and that, the principles being conceded, their application was not unfair, though the punishments inflicted were no doubt extremely severe.

These trials should be compared not to the English trials of later times, but to those which still take place under the Continental system. It will appear hereafter that the criminal procedure of modern France cannot be said to contrast advantageously with that of the Tudors and early Stuarts, so far as concerns the interests of the accused, and the degree in which the presumption of his innocence is acted upon in practice.

Of course our modern English criminal procedure is greatly superior to that of our ancestors, but there is a common tendency to depreciate past times instead of trying to understand them. The consideration and humanity of our modern criminal courts for

accused persons, are due in a great degree to the fact that the whole framework of society, and especially the Government in its various aspects—legislative, executive, and judicial, is now immeasurably stronger than it ever was before, and that it is accordingly possible to adjust the respective interests of the community and of individuals with an elaborate care which was formerly impracticable.

The part of the early criminal procedure which seems to me to have borne most hardly on the accused was the secrecy of the preliminary investigation, and the fact that practically the accused person was prevented from preparing for his defence and from calling witnesses. I am by no means sure that the practice of examining the prisoner pointedly and minutely at his trial was not an advantage to him if he was innocent; and I doubt whether the absence of all rules of evidence, and the habit of reading depositions instead of having the witnesses produced in court, made so much difference as our modern notions would lead us to believe. The one great essential condition of a fair trial is that the accused person should know what is alleged against him, and have a full opportunity of answering either by his own explanations or by calling witnesses, and for this it is necessary that he should have a proper time between the trial and the preparation of the evidence for the prosecution. The management of the trial itself is really a matter of less importance. It will appear, as we go on, that the trial was improved first, and the preliminary procedure afterwards, and it will also appear that the improvement of the trial did little good whilst the preliminary procedure remained unaltered.

II.—

1640-1660

The trials which took place between the meeting of the Long Parliament and the Restoration illustrate that part of our history which, for obvious reasons, has aroused the strongest party feelings. The only matter on which I have to observe is the effect which it produced on the administration of criminal justice. With some obvious qualifications, this was almost wholly good. The qualifications are those which are inseparable from the administration of justice in a revolutionary period. The judicial proceedings of such a period cannot, in the nature of things, be regular, because no system of government can make provision for its own alteration by main force. A forcible revolution implies a new departure, and new institutions based upon the will of the successful party, and necessitates acts which involve a greater or less departure from legality. This was no doubt the case to a considerable extent in the English Civil Wars. In some of the impeachments which formed the turning-points in the struggle between the King and the Parliament, and particularly in the attainder of Strafford and the execution of Laud, the law was, to say the least, violently strained. The trial and execution of Charles I. was a proceeding which cannot be criticised at all upon strictly legal grounds. The establishment of the High Court of Justice which tried not only Charles I., but many of his adherents, without a jury, and sentenced them to death, was in itself a greater departure from the ordinary practice of English criminal justice than the Star Chamber. It supplies the only case (so far as I know) in English history in which judges sitting without a jury (other than the members of courts-martial) have

been entrusted with the power of life and death. Nevertheless, after making every allowance on these points, it must be remarked that, from the year 1640 downwards, the whole spirit and temper of the criminal courts, even in their most irregular and revolutionary proceedings, appears to have been radically changed from what it had been in the preceding century to what it is in our own days. In every case, so far as I am aware, the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions. In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned, the prisoners usually refused to answer. The prisoner was also allowed, not only to cross-examine the witnesses against him if he thought fit, but also to call witnesses of his own. Whether or not they were examined upon oath I am unable to say.

These great changes in the procedure took place apparently spontaneously, and without any legislative enactment. This, no doubt, favours the view that the course taken in the political trials of the preceding century either really was or else was regarded as being illegal. If they were, the word illegal must have been construed in a sense closely approaching to unjust or immoral.

The proceedings against King Charles I. form a remarkable illustration of the contrast which exists between the administration of justice before and after the Long Parliament and the Civil War. He was, as is known to every one, condemned principally for refusing to plead to the charges made against him by the High Court of Justice, and this was nearly the only step in the whole of his career in which he was not only well advised, but perfectly firm and dignified in his conduct. If he had pleaded he would, of course, have been convicted. The Court, however, did not put their sentence solely on that ground. They took evidence to satisfy their consciences, and there are few stranger documents than [1] the depositions of the witnesses who would have been called against him if he had pleaded, and whom the Court thought it necessary to hear. They prove his presence at the different battles, and the fact that people were killed there, just as witnesses in the present day would prove the facts about any common case of theft or robbery. For instance: “Samuel Morgan, of Wellington, in the county of Salop, felt-maker, sworn and examined, deposeth, that he, this deponent, upon a Monday morning in Keynton field, saw the King upon the top of Edge Hill, in the head of the army; . . . and he saw many men killed on both sides, at the same time and place.” “Gyles Gryce . . . saw the King in front of the army in Naseby Field, having back and breast on.” Also, he “saw a great many men killed on both sides at Leicester, and many houses plundered.”

The punctilious and almost pedantic formality of providing such witnesses for the purpose of proving such facts is characteristic, and shows how deeply men’s minds had been impressed with the importance of proceeding upon proper and formal evidence in criminal cases.

III.—

1660-1678

The reigns of Charles II. and James II. form perhaps the most critical part of the history of England, as the whole course of our subsequent history has been determined by the result of the struggles which then took place. At every critical point in those struggles a leading part was played by the courts of criminal justice, before which the contending parties alternately appeared, charged by their adversaries with high treason, generally on perjured evidence, and before judges who were sometimes cowardly and sometimes corrupt partisans.

The history of the most important of these proceedings has been so often related that I should not feel justified, even if my space allowed me, in attempting to go into their circumstances minutely; but there is still room for some observations upon them from the merely legal point of view. I do not think that the injustice and cruelty of the most notorious of the trials—the trials for the Popish Plot, or those which took place before Jeffreys—have been in any degree exaggerated. The principal actors in them have incurred a preeminent infamy, in mitigation of which I have nothing to say, but I am not sure that their special peculiarity has been sufficiently noticed. It may be shortly characterised by saying that the greater part of the injustice done in the reigns of Charles II. and James II. was effected by perjured witnesses, and by the rigid enforcement of a system of preliminary procedure which made the detection and exposure of perjury so difficult as to be practically impossible. There was no doubt a certain amount of high-handed injustice, and the disgusting brutality of Jeffreys naturally left behind it an ineffaceable impression; but, when all this has been fully admitted, I think it ought in fairness to be added that in the main the procedure followed in the last half of the seventeenth century differed but little from that which still prevails amongst us; that many of the trials which took place—especially those which were not for political offences—were perfectly fair; and that even in the case of the political trials the injustice done was due to political excitement, to individual wickedness, and to the harsh working of a system which, though certainly defective in admitting of the possibility of being harshly and unjustly worked, was sound in many respects.

A study of the *State Trials* leads the reader to wonder that any judge should ever have thought it worth while to be openly cruel or unjust to prisoners. His position enabled him, as a rule, to secure whatever verdict he liked, without taking a single irregular step, or speaking a single harsh word. The popular notion about the safeguards provided by trial by jury, if only “the good old laws of England” were observed, were, I think, as fallacious as the popular conception of those imaginary good old laws. No system of procedure ever devised will protect a man against a corrupt judge and false witnesses, any more than the best system of police will protect him against assassination. The safeguards which the experience of centuries has provided in our own days are, I think, sufficient to afford considerable protection to a man who has sense, spirit, and, above all, plenty of money; but I do not think it possible to prevent a good deal of injustice where these conditions fail. In the seventeenth century, rich

and powerful men were as ill off as the most ignorant labourer or workman in our own day; indeed, they were much worse off, for the reasons already suggested.

The importance of these remarks will be illustrated by the trials during the next period to which I have to refer.

IV.—

1678-1688

The ten years immediately preceding the Revolution are, perhaps, the most important in the judicial history of England. In them occurred the trials for the Popish Plot, the Meal Tub Plot, and the Rye House Plot, the trials connected with the Duke of Monmouth's rebellion, and the trials which led to the Revolution itself, of which the trial of the Seven Bishops was by far the most important.

One great leading cause of the result of these trials is, I think, to be found in the defects of the system of criminal procedure which was then in full vigour, and which, even to this day, is in force, theoretically though not practically, to a greater extent than is generally supposed to be the case. The prisoner was looked upon from first to last in a totally different light from that in which we regard an accused person. In these days, when a man is to be tried, the jury are told that it is their first duty to regard him as being innocent till he is proved to be guilty, and that the proof of his guilt must be given step by step by the prosecution, till no reasonable doubt can remain upon the subject. This sentiment is both modern and, in my opinion, out of harmony with the original law of the country. No one can be brought to trial till a grand jury has upon oath pronounced him guilty, as the form of every indictment shows. "The jurors for our Lady the Queen, upon their oaths, present that A, wilfully, feloniously, and of his malice aforethought, did kill and murder B." Why should a man be presumed to be innocent when at least twelve men have positively sworn to his guilt? In former days, as I have already shown, the presentment of a grand jury went a long way towards a conviction, and a man who came before a petty jury under that prejudice was by no means in the same position as a man against whose innocence nothing at all was known. In nearly every one of the trials for the Popish Plot, and, indeed, in all the trials of that time, the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King, whose safety is far more important to the public than the life of such a questionable person as the prisoner. A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.

The following were the essential points in the proceedings which established this view. First, the prisoner as soon as he was committed for trial might be, and generally was, kept in close confinement till the day of his trial. He had no means of knowing what evidence had been given against him. He was not allowed as a matter of right, but only as an occasional, exceptional favour, to have either counsel or solicitors to

advise him as to his defence, or to see his witnesses and put their evidence in order. When he came into court he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him. Any one who has ever acted as an advocate knows what it is to be called upon to defend a man at a moment's notice. Under such circumstances, a modern barrister has usually at least a copy of the depositions. To defend a prisoner efficiently is a task which makes considerable demands on the readiness, presence of mind, and facility of comprehension of a man trained to possess and use those faculties. That an uneducated man, whose life is at stake, and who has no warning of what is to be said against him, should do himself justice on such an occasion is a moral impossibility. But this was what was required of every person tried for high treason in the seventeenth century. None of the prisoners tried for the Popish Plot, except Lord Stafford and Sir George Wakeman, defended themselves even moderately well. Langhorn, who was a barrister, lost his head so completely that he did not cross-examine Oates as to the arrangement of his chambers, which was said to be such that Oates could not possibly have heard and seen what he said he heard and saw there—a circumstance on which Scroggs afterwards relied as a justification of his conduct in disbelieving Oates. When an experienced lawyer defended himself so feebly, it is not surprising that inexperienced persons should have been utterly helpless.

That the prisoner's witnesses were not permitted to be sworn was even in those days considered as a hardship, and the jury were told in all or most of the trials to guard against attaching too much weight to it. The advantage which that state of the law gave to fraudulent defences, which might be set up without any risk of a prosecution for perjury, seems to have been stupidly overlooked. It was also a common topic of complaint that prisoners had no copy of the indictment against them, or of the panel of jurors; but I think the importance of these matters was overrated. A copy of the indictment would only have enabled prisoners to make little quibbles, which the judges would have overruled, and would have been right in overruling; and a copy of the panel is of no real use to a prisoner. If the sheriff wishes to pack a jury, he must be very clumsy if he does not provide a sufficient number of partial jurors, free from any legal objection, to allow for thirty-five peremptory challenges. If, on the other hand, he is fair, one juryman is practically as good as another. The real grievance was keeping the prisoner in the dark as to the evidence against him. Theoretically this grievance still exists, though practically it has long since been removed. As the law still stands, a bill might be sent before a grand jury without notice to the person accused. The bill being found, the person accused might be arrested merely on proof of his identity; he would not be taken before a magistrate, and until he was put in the dock to take his trial he would have no legal right to know who were the witnesses against him, or what they had said, or even to have a copy of the indictment.

These defects in the system of trial in the seventeenth century, I own, strike me as being almost less important than the utter absence which the trials show of any conception of the true nature of judicial evidence on the part of the judges, the counsel, and the prisoners. The subject is even now imperfectly understood, but at that time the study of the subject had not begun.

I have now completed what I had to say on the administration of criminal justice under the Stuarts after the Restoration. The most general observation which it suggests to me is, that it brought to light and illustrated in the case of eminent persons defects both in the law itself and in the methods of procedure which must have produced a great amount of obscure injustice and misery. There must have been plenty of Oateses and Bedloes at the assizes and quarter sessions who have never been heard of, and no doubt scores or hundreds of obscure people suffered for common burglaries and robberies of which they were quite as innocent as Stafford was of the high treason for which he was convicted. There certainly was, however, a considerable improvement in the methods of trial during the seventeenth century. Prisoners were not tortured (as they were in every other part of Europe); witnesses were produced face to face, whom the prisoner could cross-examine. The rules of evidence were beginning to be, to some extent, though to a small extent, recognised and understood, and by the end of the century the evils of judicial corruption and subserviency, and the horrors of a party warfare carried on by reciprocal prosecutions for treason alternately instituted against each other, with fatal effect, by the chiefs of contending parties, had made so deep an impression on the public imagination, that a change of sentiment took place which from that time effectually prevented the scandals of the seventeenth century from being repeated. I have dwelt at length upon the second half of the seventeenth century because it was from its troubles and scandals that a better system arose, which has been by degrees improved into the one which is now administered amongst us.

V.—

1688-1760

The administration of criminal justice, after the Revolution, passed into quite a new phase. I should doubt whether much difference was made in the common course of justice, at the assizes and sessions, till very recent times; but from the Revolution to our own day political parties have been recognised parts of the body politic, and political differences have been treated as matters on which contending parties can differ without carrying their disputes to the deadly extremity of prosecutions for treason. There have been plenty of political trials since the Revolution, but from a variety of causes they have been conducted in most cases fairly, in some instances more or less unfairly, but never scandalously. The legislative result of the scandals of the seventeenth century upon criminal procedure was slight. The most important was the enactment that the judges should hold office, not at the pleasure of the Crown, but during good behaviour. This deeply affected the whole administration of justice. The changes in procedure were less important; and applied entirely to trials for high treason. As to them it was enacted, [1] in 1695, that persons indicted for high treason or misprision of treason should have a copy of the indictment five (afterwards extended to ten) days before trial, and be allowed to have counsel and witnesses upon oath; and that the treason should be proved by two witnesses, either both to one overt act, or each to one of two overt acts of the same kind of treason. [1] In 1708 the prisoner was also allowed to have a list of the witnesses and of the jury ten days before his trial. [2] In 1702 it was enacted that in cases of treason and felony the prisoner's witnesses

should be sworn, as well as the witnesses for the Crown. These were the only legislative changes which the scandals of the trials in the days of the later Stuarts produced; and nothing can set in a clearer light the slightness of the manner in which the public attention was then, or indeed till a far later time, directed to the defects of the criminal law.

Many of the trials which took place in the reigns of William III., Anne, George I., and George II. are deeply interesting on various accounts, and especially on account of the strong light which they throw, not only on the history, but still more on the manners of the time; but in a legal point of view they call for little remark. As time passes, the differences between our own days and those of the seventeenth century gradually pass away. From the first there is a complete absence of fierceness and brutality. At first there are [3] a few instances in which prisoners are questioned. For a considerable time the witnesses are allowed to tell their own story at length in their own way, and the restriction as to not swearing the prisoner's witnesses is kept up till the passing of the statute already referred to. I am not sure that the most striking feature in the political trials of the first part of the eighteenth century is not to be found in the fact that the reforms about giving prisoners indicted for treason a copy of the indictment, lists of jurors and witnesses, and the right to be defended by counsel, made in practice so very little difference. The truth is, that after the Revolution few, if any, prisoners were tried for high treason except people clearly proved to have committed what was held to be treason; and I do not think that counsel had learnt the art of defending prisoners zealously or impressively.

From the middle of the eighteenth century to our own time there has been but little change in the character of criminal trials, and it is unnecessary to give further illustrations of them. The most remarkable change introduced into the practice of the courts was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. A practice sprung up, the growth of which cannot now be traced, by which counsel were allowed to do everything for prisoners accused of felony except addressing the jury for them. In the remarkable case of [1] William Barnard, tried in 1758, for sending a threatening letter to the Duke of Marlborough, his counsel seem to have cross-examined all the witnesses fully, in such a way, too, at times, as to be nearly equivalent to speaking for the prisoner, *e. g.:* "*Q.* It has been said he went away with a smile. Pray, my Lord Duke, might not that smile express the consciousness of his innocence as well as anything else? *A.* I shall leave that to the Great Judge."

On the other hand, at the trial of [2] Lord Ferrers two years afterwards, the prisoner was obliged to cross-examine the witnesses without the aid of counsel and, what seems even harder, to examine for himself witnesses called to prove the defence of insanity which he set up.

Since the middle of the eighteenth century proceedings of the highest importance, and involving momentous changes in the substantive criminal law, have been effected partly by legislation, partly, though to a much smaller extent, by judicial decisions. Of these I shall speak in my chapters on the different branches of the substantive law; but I do not think that the actual administration of justice, or the course of trials has

altered much since the beginning of the reign of George III. Its general character has no doubt been affected to a considerable extent by the changes made in the law itself, by the course of thought on legal and political, religious and moral subjects, and by many other influences, but it can hardly be said to have had any history of its own, and apart from its connection with the current events of the time. The only change which has made any great difference between the trials of our own days and those of 120 years ago was made by [1] the Act which allowed prisoners accused of felony to make their full defence by counsel; and this, after all, has only put trials for felonies, such as robbery or burglary, on the same footing as trials for perjury, cheating, and other misdemeanours. Indeed, if we have regard to the powers of cross-examination which were conceded to counsel in the course of the eighteenth century, the change was less important than it may at first sight seem to have been.

The result of the history of the administration of criminal justice in England which I have thus sketched—for it is a slight though not, I hope, an incorrect sketch—may be thus shortly summarized:—

Criminal justice was originally a rude substitute for, or limitation upon, private war, the question of guilt or innocence, so far as it was entertained at all, being decided by the power of the suspected person to produce compurgators or by his good fortune in facing an ordeal. The introduction of trial by combat, though a little less irrational, was in principle a relapse towards private war, but it was gradually restricted and practically superseded many centuries before it was formally abolished.

Trial by jury originated in the adaptation to the purpose of the administration of justice of the process commonly in use in the eleventh and twelfth centuries for obtaining information as to matters of fact, namely, collecting an inquest or body of persons supposed to be acquainted with the subject and taking their sworn statement about it. The members of the inquest were originally witnesses, and, even if they derived their knowledge from other witnesses, they, and not their informants, were responsible for the truth of their verdict. By slow degrees they acquired the character of judges of fact informed by witnesses. This process lasted from the first origin of juries in the twelfth or thirteenth centuries down to the sixteenth century, when we have the first fairly trustworthy records of actual trials.

Side by side with trial by jury during this period, a system was developing itself in the Star Chamber, and similar courts, of a trial by written pleadings, bills, answers, interrogatories, and affidavits, like those which were afterwards in use in the Court of Chancery in civil cases. It exercised a strong influence over trial by jury, and its effect can be traced in all the criminal proceedings which took place under the Tudors, James I. and Charles I. The administration of criminal justice at this time was also affected to a considerable extent by the civil law trial by witnesses, though, on the one hand, it never thoroughly adopted torture, which was practically an essential part of that system, nor did it, on the other, admit, except in the one case of treason, the necessity for two witnesses, which rendered torture necessary in countries where it prevailed.

The Civil Wars broke down this system, and gave to trial by jury an undisputed supremacy, which has now lasted for more than two centuries, in the administration of criminal justice; but the experience of the reigns of Charles II. and James II. showed, first, that juries might be quite as unjust and tyrannical as the Star Chamber; next, that they were equally likely to be unjust on any side in politics; and, lastly, that the true theory of judicial evidence was at that time not understood, and that, so far as it was understood, it had little influence upon verdicts.

Lastly, after the Revolution, a decisive victory having been won by one of the great parties of the State, the administration of criminal justice was set upon a firm and dignified basis, and so became decorous and humane; and as it was mainly left in the hands of private persons, between whom the judges were really and substantially indifferent, the questions which were involved came to be fully and fairly investigated, each party to the contest doing the best he could to establish his own view of the case in which he was interested. The rapid growth of physical science, and indeed of every branch of knowledge, which has been one great characteristic of the history of the last two centuries, naturally influenced the administration of justice as well as other things, and the final result of the long process which I have been trying to describe seems to be that in criminal trials questions of fact are investigated as nearly in the same spirit as other matters of fact as the differences inherent in the nature of the processes will admit. It would be interesting to trace the steps by which this came about, but such an inquiry belongs rather to the history of the rules of evidence than to the history of the administration of criminal justice. The last-mentioned history ends at the point at which the present forms are fully established, and at which the process carried on under them begins to develop itself, in accordance with the general intellectual movement of the age.

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35.

THE STORY OF THE *HABEAS CORPUS*[1]

By Edward Jenks[2]

IT may sound a little surprising to assert, at the present day, that there is no readily accessible book, nor, indeed, so far as the writer is aware, any book, which gives, in a succinct and intelligible form, an account of the origin of this famous bulwark of our liberties. And yet there have been times in our history, and may be again, when 'those famous words *Habeas Corpus*' have been on the lips of every one who takes an interest in public affairs. Most of us know that the famous Habeas Corpus Act of 1679 created no new remedy, but merely strengthened and perfected an engine which had been used with effect in the great struggle between Crown and Parliament in the earlier years of the century. The older statutes, the Petition of Right and the 16 Car. I. c. 10, which mark the stages of that Titanic struggle, also refer to the writ of *Habeas Corpus* as a thing well known. As we follow back the story, we find the same assumption everywhere. The writ is accepted as a primordial fact. A few vague flourishes about ancient liberties are supposed to account for its existence. It would almost seem as though it were indiscreet to inquire too closely into the origin of this sacred instrument. And the writer believes that there was once a time at which such inquiry would indeed have been indiscreet—that those who then knew most and felt most strongly about the writ of *Habeas Corpus* had the best of reasons for discouraging antiquarian research. It is not likely that Coke and Selden and Prynne were really ignorant on the subject. But they often speak as though they were.[1]

In truth there is not a little about the *Habeas Corpus* which requires explanation. In the first place it seems odd (or it would seem odd in any system of law but our own) that the king's writ, this 'high prerogative writ,' as Blackstone calls it,[2] should have been the great engine for defeating the king's own orders. In the second place, it is somewhat disconcerting to find that this high prerogative document is not an Original writ at all, but a mere interlocutory mandate, or judicial precept, which occurs in the course of other proceedings. Thirdly, and this perhaps is the most embarrassing discovery, the more one studies the ancient writs of *Habeas Corpus* (for there were many varieties of the article) the more clear grows the conviction, that, whatever may have been its ultimate use, the writ *Habeas Corpus* was originally intended not to get people out of prison, *but to put them in it.* These are facts which should surely arouse a just curiosity. Amongst other thoughts which they suggest, they seem to raise this not unimportant historical question—Were the champions of popular liberties, in those stormy days of the early seventeenth century, quite so conservative as they professed to be? When they were loudly asserting that they did but vindicate the existing order, were they in very truth effecting a revolution?

Now the great matter of the liberty of the subject did not rest on mere tradition in the days of Coke. Whatever may be the true meaning of that famous passage in Glanvil,[3]

which Coke so triumphantly quoted,[4] whatever the precise value of that still better known and vaguely rhetorical clause of the Great Charter,[1] neither of these vague authorities could stand before the precise and elaborate provisions of the great Statute of Westminster I,[2] which, in its fifteenth chapter, had disposed exhaustively of the subject of bail. That chapter was in full force when Coke prepared his Second Institute. He wrote an elaborate criticism upon it. The chapter is too long to quote in full; but amongst those persons who are in the plainest language declared not to be 'replevisable,' are 'those which were taken . . . by commandment of the king or of his Justices.' Coke employs the whole force of his argument to show that the words 'by commandment of the king' do not mean what they obviously do mean, even descending so low as to assert, that 'the commandment of the king' means the order of the King's Bench, while 'of his Justices' means the Common Pleas.[3] But the whole of Coke's commentary on the statute is an audacious piece of political controversy, thinly disguised under cover of legal exegesis. It is kindest to remember, that the Second Institute was not published until some time after its author's death.

Plainly, then, the asserters of public liberties found a lion in the path. They could not use any of the ordinary remedies against unlawful imprisonment. This will be clear if we look for a moment at these remedies.

1. The writ *de Homine Replegiando.* This was the most obvious proceeding. It lay equally against the sheriff, i. e. the royal agent, and the private person.[4] If the latter did not give up his prisoner, but sought to escape obedience by *eloigning* his captive—i. e. hiding him in a distant county—he could himself be summarily imprisoned by a *Capias in withernam.*[5] Both sheriff and private person were liable to attachment if they disobeyed the writ. But when we read the writ, in any of those books of precedents which so rapidly appeared after the introduction of printing,[1] we see in a moment why it was that the heroes of the seventeenth-century struggle could not venture to rely on it. Assuredly no Chancellor of James or Charles would have hesitated to affix the broad seal to the document. For it bade the sheriff replevy the prisoner nisi captus fuerit per speciale preceptum nostrum.

2. The writ *de Manucaptione.* This was a writ framed, apparently, on the latter part of the fifteenth chapter of Westminster I. According to its form, as given in the orthodox books,[2] it was only available for persons indicted of larceny before sheriffs by inquest of office; and as, by a statute of the year 1354,[3] sheriffs were forbidden to take indictments, the writ seems to have fallen into disuse. In any case, it expressly referred to the Statute of Westminster I, and could, therefore, hardly have been used by any one claiming to be set at liberty in defiance of the provisions of that statute. Moreover, a statute of the year 1331[4] had reissued the statutory restrictions on mainprize. The difference between bail and mainprize is explained by Coke,[5] but does not seem to be material for our purpose.

3. The writ *de Odio et Atia.* This writ, which is fully described by Bracton,[6] only lay in favour of a man imprisoned on an *Appeal* of homicide, i. e. at the suit of a private person. It directed the sheriff to hold an inquest whether the accused was accused on good grounds, or of 'hatred and malice.' It is said to have been the writ alluded to in the twenty-sixth chapter of the Great Charter, and it probably represents a very

ancient right of a party challenged to battle.[1] In its form of an inquest, it was, no doubt, a powerful agent in the gradual evolution of the criminal jury. Coke, who had his own reasons for magnifying the writ (which had probably fallen out of use long before his time), invents a statute of 28 Edw. III to abolish it, and then revives it by implication in the 42 Edw. III. c. 1.[2] The real truth of the matter is, in all probability, that, with the dying out of Appeals of homicide, the writ ceased to be applicable, and fell into oblivion.[3] In spite of the vague wording of the Statute of Westminster II,[4] it can hardly be believed that it could have issued in favour of a prisoner at the king's suit. In any case it would not, even if successful, have resulted in a *Habeas Corpus,* but in a writ *de ponendo in ballium,* of which the form is given by Bracton.[5]

Thus we have seen, that the three most obvious remedies for wrongful imprisonment were practically closed to the victims of Charles I. But their champions were mighty in the law, and knew all the mazes of the jungle. If they could not lead their prisoners out by the highway, they would drag them through secret windings to a place of safety.

We know that the instrument which they chose for their purpose was the writ of *Habeas Corpus.* But when we look for the writ of *Habeas Corpus* in the contemporary records, we are at first puzzled by the choice offered to us. To say nothing of the *Habeas Corpus* (or, rather, *Habeas Corpora*) directed to the sheriff, bidding him bring up the four knights for the Grand Assize,[1] or the jurors in an ordinary inquest,[2] we find that, under the more familiar name of *Capias,* the writ of *Habeas Corpus* plays a normal part in almost every personal action.[3] The first step after the service of the writ is the summons, and the second is the *Capias ad respondendum,* which bade the sheriff *have the body* of the defendant on a given day before the Court. As the sheriff might have some difficulty in executing this order, he was warned a second and a third time before being attached for disobedience. These warnings went by the names of *alias* and *pluries* respectively; and these names will awaken certain memories. If the *Capias ad respondendum* proved ineffectual to secure the defendant's appearance, the plaintiff might resort, at first only in trespass *contra pacem,* but afterwards in almost all other actions,[4] to the elaborate process of outlawry. And when the necessary forms had been gone through, and the sheriff had returned *quinto exactus,* the plaintiff could then get a *Capias utlagatum,* which would direct the sheriff to seize the outlaw, and have him before the Justices at Westminster on a given date, *ad faciendum et recipiendum quod Curia nostra de eo consideraverit.*[5] If, when the sheriff had got the defendant in prison, he failed to produce him at the proper time, alleging that the prisoner could not be moved for danger to his health, he might be reminded of his duty by a subsequent writ of *Habeas Corpus super Languidus retorn*'.[6] If the accused was in custody on an Appeal of homicide, the sheriff might be directed to *have his body* before the Justices on a certain day, that they might proceed with the Appeal.[1] A similar writ lay to apprehend a man who had been indicted of felony, but had eluded arrest under outlawry.[2] Finally, if judgment were given against the defendant, the sheriff might be ordered by the writ of *Ca. Sa.* to *have the body* of the defendant before Our Justices, *ad satisfaciendum* the claim of the plaintiff.[3]

These writs have been mentioned, not because it is contended that any one of them is in itself the famous weapon of political warfare, but that we may be warned to look for the origin of that weapon, not in vague assertions of the liberty of the subject, but in what seems to be, at first sight, a wholly unlikely quarter, viz. that practice of arrest on mesne process, which was so long one of the great scandals of our legal procedure. As Pollock and Maitland have pointed out,4 the *Habeas Corpus,* in its form of a *Capias,* or arrest on mesne process, was making its way into English law before the close of the thirteenth century. And although, in the dearth of law books which followed the work of Bracton and his epitomists, exact proof is not forthcoming, we may regard it as fairly certain, that the writs we have enumerated were fully established as ordinary legal process before the end of the fourteenth century. The *Capias ad respondendum,* the *Capias utlagatum,* and the *Capias ad satisfaciendum* are practically as old as the common law itself.

But, if we look at the Statutes and Year Books of the fifteenth century, we shall, I think, gain the impression that another and very important form of the *Habeas Corpus* is making its way into legal procedure. This is the *Habeas Corpus cum Causa* (or, more briefly, *Corpus cum causa*), which bids the sheriff, or other custodian, '*have the body* of A in our prison under your custody as it is said' before Our Justices at Westminster on a certain day, 'together with the day and cause of his caption and detention, to do and receive what Our Court shall consider of him on this part.' It is a little significant that this writ is, apparently, with the striking exception to be hereafter referred to, not to be found in the early printed books of forms. The next example I have met with is in Coke's Entries, published in 1614.1 But it is quite clear, that the writ of *Corpus cum causa* was known, in one form or another, at least two hundred years before that date. What were the occasions on which it was used?

In the present state of the authorities, any statement about the law of the fifteenth century must be made with extreme caution. But as the result of a fairly earnest attack on Statutes and Year Books, I venture to put it, that the *Corpus cum causa* was used, for a long time, as a mere adjunct to two important writs Original, the writ of *Certiorari* and the writ of *Privilege.* A word on each of these.

1. *Certiorari.* This was, as is well known, a prerogative writ, by which the King's Bench removed the proceedings from an inferior tribunal to its own *forum.* It appears that, as the law stands at the present day,2 the writ always issues as of right at the request of the Crown, but, at the request of the defendant or prisoner, only on cause shown. It seems, however, that, at the very beginning of the fifteenth century, the writ was employed as a means of chicane by both prosecutors and defendants. A statute of the year 14143 is directed against the practice by condemned prisoners of procuring the writ, and getting released on bail; and it is probable that the same practice is alluded to by another statute passed twenty years later.4 Much about the same time, the writ was used as a means of evading liabilities on Statute Staple. When arrested on the summary process provided by the Statutes of the Staple, debtors obtained a *Corpus cum causa* from Chancery, on the pretence of having a legitimate defence; and then, having procured bail, proceeded to issue a *Sci. Fa.* to test the validity of the recognizance.1 The *Certiorari* was also used by prosecutors as a means of oppression, with the object of snatching outlawries without giving the accused time to appear.2

Somewhat later, the same writ, with its accompanying *Habeas Corpus,* was used by defendants to delay proceedings in local courts, an abuse which was checked by two statutes of Elizabeth and James I.3 The principle of the *Certiorari* is indeed very old in our law; for it is, in essence, little more than a development of the ancient *Pone.*4 And it is worth noting, that, in the very earliest known Register of Writs, it is expressly said, that a *Pone* will only be granted to the tenant,*aliqua ratione precisa vel de majori gratia.*5

Although cases of *Certiorari* do not become frequent in the Year Books until the latter half of the reign of Henry VI, we may probably take it, that from the beginning of the fifteenth century the remedy was recognized, and that it was enforced by a *Corpus cum causa.* The connection between the two writs comes up in a curious quarter, viz. Cowell's Interpreter, where the *Habeas Corpus* is treated merely as an incident in *Certiorari.*6 Cowell is certainly not above suspicion in the matter; but neither, for the matter of that, is Coke. Each must be taken for what he is worth. But the value of the *Certiorari* for Coke's purpose was certainly discounted by the drawbacks:—(1) that it could only be applied for when proceedings had already been commenced in an inferior tribunal, (2) that the writ could not be claimed as of right by a prisoner or defendant.

2. *Privilege.* From very early times exemption, absolute or qualified, from legal process, was freely claimed by divers classes of persons. The most conspicuous example is, of course, that of the clergy; but other people were not slow to follow their example. As early as the reign of Henry IV1 a clerk of the Chancery who was sued in the Common Bench obtained a *Supersedeas* on the ground that he could only be sued in the tribunal of which he was an official. The Common Law Courts claimed similar privileges on behalf of their officials;2 and the privilege of members of Parliament rested on similar grounds.

Towards the middle of the fifteenth century, we notice a vigorous development of the theory of *Privilege.* Where a man is sued in a superior court, and, on coming to appear, is arrested on a process in an inferior tribunal, he is entitled to a *Corpus cum causa,* directed to the officers who have arrested him; and they will be ordered to produce him before the higher court.3

Needless to say, this chance of escape from liability was soon abused; and we find the Courts busily engaged, during the greater part of Henry VI's reign, in deciding when *Privilege* might be allowed, and when not. Thus, it was early decided,4 that the application would only be granted where the applicant had been arrested *veniendo morando vel redeundo,* on the business of his case. What the superior tribunal would do with the applicant when he came before it is not quite clear; sometimes he was only allowed to appoint an attorney, sometimes, apparently, he was bailed. But it was always agreed that a *Supersedeas,*5 and, *à fortiori,* a *Corpus cum causa,*6 did not lie for a person imprisoned at the suit of the king, even where the king's interest in the suit was purely formal, e. g. in an action of trespass *contra pacem.* In another case,7 where the proceedings in the superior tribunal were obviously feigned, the Court refused the *Corpus cum causa,* on the ground that the applicant could not have been coming to attend to his duties in the superior court *invacation.* A further rule laid

down was, that if the proceedings in the superior court were commenced after the imprisonment, there was no case for the *Habeas Corpus.*1 In later cases the Court dealt sharply with persons who sought to abuse the process.2 If the memory of this class of cases had not entirely died out, we should hardly have found judges in the eighteenth century alleging that the *Habeas Corpus* did not apply in civil suits; nor should we have required a special statute to get over the difficulty.

3 The position at the end of the fifteenth century seems then to be tolerably clear. The remedy of *Corpus cum causa* is available to an imprisoned applicant; but only on one of two grounds. He must show either (1) that there is a proceeding in which the King's Bench or the Chancery would be justified in issuing the prerogative writ of *Certiorari* or its equivalent, or (2) that he, the applicant, enjoys a special privilege which entitles him to exemption from proceedings in all but a particular tribunal.

In the sixteenth century, however, the *Corpus cum causa* expands beyond these limits. We note a disposition to use it to test the validity of an imprisonment.4

In one of the very earliest of the printed Form Books5 there appears a writ addressed to the Constable of the Tower, directing him, under penalty of £100, to *have the body* of a certain John Elyngton *together with the day and cause of his caption and detention,* before our Justices at Westminster, to answer to a plea brought against him for the sum of forty shillings by one Wilfred Armidel, *et ad faciendum ulterius et recipiendum quod curia nostra,* &c. The prisoner had been arrested in the suit at the Common Bench, and let out on bail. Then he had been arrested by the Constable of the Tower, who had refused to produce him on the first demand. Unhappily, there seems to be little clue to the date of the writ. It must, of course, have been before 1510, the date of Pynson's book; but beyond that fact there is nothing to guide us.1 The language of the writ, however, the flourishes about the sworn duty of the king to render justice to all his subjects, and the suspiciously small amount of the claim in the Common Bench,2 point irresistibly to the conclusion, that we are here on the track of a struggle between the law courts and the executive, in which recourse is being had to the lately established theory of privilege for suitors, in order to test the validity of a State imprisonment. If so, the writ is a landmark in our story. A Year Book case of 1497,3 in which a lady obtained a *Corpus cum causa* to test the validity of a recaption of herself (after an escape) by a gaoler of a franchise, is also interesting, for it raises a question of which much was heard in later days. The gaoler sought to evade the point at issue by omitting the cause of detainer in his return. It was held that, where the arrest was made *ex officio curiae,* it was not necessary to specify the cause; otherwise where the arrest was at the suit of the party. Two writs in Rastell's Register4 (both, alas, undated) are directed to securing the appearance of a defendant who has been arrested by the malice of the plaintiff, but the words *cum causa* are not found.

In the year 1588, two cases of a distinctly political character were decided on *Habeas Corpus.* In the first (*Search'sCase*)1 the applicant had been arrested by the Steward of the Marshalsey, for himself causing the arrest (presumably by due course of law) of one Mabbe, who had obtained Letters of Protection from the Queen. The Court of Common Pleas discharged Search from custody, and, on his subsequent re-arrest, issued an attachment against Mabbe and his friends.

Howell's Case is still more striking. There the Steward of the Marshalsey returned to a *Habeas Corpus* that the prisoner was committed *per mandatum Francisci Walsingham militis Principalis Secretarii et unius de privato concilio Dominae Reginae.* The return was held to be insufficient, for not stating the cause; and then the Steward amended his return, alleging a committal 'by the opinion and order of the whole Privy Council.' With some reluctance the Court seems to have admitted that such a return was good; but it insisted that the prisoner should always be produced, so that 'if it shall seem good to the Court, the prisoner shall have his privilege.'2

These cases led directly to the famous pronouncement known as *The Resolution in Anderson.* This dictum, one of the very few extra-judicial pronouncements of the English Bench, seems to be entirely unworthy of the contumely which has been heaped upon it. Read carefully, in the light of history, it appears to be a very exact and careful statement of the law, coloured neither by subserviency nor by arrogance. Put in its briefest form, it lays down two propositions:—

A. That persons committed 'by Her Majesty's commandment from her person, or by order from the Council Board, or if any one or two of her Council commit one *for high treason,*'—such persons are not *bailable;* but,

B. 'Nevertheless the Judges may award the Queen's writs to bring the bodies of such persons before them' (and then remand them) 'which cannot conveniently be done, unless notice of the cause in generality, or else specially, be given to the keeper or gaoler that shall have the custody of such a prisoner'3 (*anno* 1592).

So far from being an unworthy concession to Court influence, this Resolution marks a distinct advance in the development of the *Habeas Corpus.* It sweeps away the historical accidents of the writ—the accompaniments of *Certiorari* and *Privilege*—and definitely establishes the *Habeas Corpus* as a substantive remedy, which exists as of right for all prisoners. With regard to the vexed question of the 'cause shown,' the judges and barons who unanimously signed the Resolution knew perfectly well that for this further demand there was no legal authority, if the imprisonment was by order of the Crown. But in the most decided, though at the same time courteous, manner, they intimate that the Crown would do well to give way upon the minor point.

From this time the *Habeas Corpus* starts upon a new career of activity. At the very beginning of the seventeenth century it succeeded in procuring the release of Sir Thomas Shirley from the Fleet, whither he had been committed on an arrest for debt.1 In 1608 the Common Pleas, by its agency, rescued Sir Anthony Rooper from the clutches of the Court of High Commission.2 In 1610 the great case of the validity of the customs of London (*Wagoner's Case*3) was decided on a *Habeas Corpus.* In 1615, in the case of Peter Furb, the Court of Common Pleas asserted its ancient privilege of protecting its suitors by the same writ.4

We are now, perhaps, in a position to understand the merits of the famous *Five Knights' Case* of 1627.5 Sir Thomas Darnel and four others were committed to the Fleet by a warrant, signed by two members of the Privy Council, which alleged for

cause only *per speciale mandatum regis.* Darnel applied to the King's Bench for a *Habeas Corpus,* which was immediately issued. The warden of the Fleet made some little delay in returning the writ; but, on the receipt of an *alias,* put in a return which merely alleged the warrant as above described. The same course was taken with the other four prisoners. The Court of King's Bench, after hearing lengthy arguments for the prisoners, remanded the latter to prison. It is difficult to see how, as the law then stood, the Court could have done otherwise. The writ of *Habeas Corpus* had been readily granted; but the return showed a cause for which the prisoners were not 'replevisable.' When the decision of the King's Bench was under discussion in Parliament, in a conference between the two Houses, Coke met the difficulty by a bold argument. Admitting, as he was obliged to do, the plain meaning of the Statute of Westminster I, he urged that it applied only to proceedings by way of replevin in the Sheriff's Court, 'a petty and base Court, and not of record, where the sheriff is not the judge, but the jurors, that is John a Noke and John a Stiles, William Roe and John Doe, and such worthies as these.'1 But Coke must have known perfectly well, that the powers of his former colleagues of the King's Bench, in the matter of bail, belonged to them only as justices of the peace, and not as justices of the bench. The business of the justices of the bench is, not to bail prisoners, but to try them.

Now the powers of justices of the peace to grant bail rested, unfortunately for Coke, upon express statute, and very limited they were. They seem to have been first given by a statute of 1483,2 which allowed justices of the peace to bail persons committed 'on suspicion' or 'on light suspicion, of felony.' Stringent precautions in the exercise of this power were imposed by a slightly later Act,3 while the great criminal statute of the year 15444 expressly reënacted the provisions of the Statute of Westminster I with regard to persons not replevisable, and ordered strict observance of them by all justices of the peace.

In the end Parliament did the only thing possible under the circumstances, by introducing a bill to alter the law. In the year 1628 this bill, now known as the Petition of Right, received the grudging assent of the king; and an obscure sentence in it gave the victory to the Parliament, by abolishing the power of the Crown to imprison without cause shown.1

The acceptance of the Petition of Right was almost immediately followed by the *Six Members' Case*2 in 1629. As in the case of the Five Knights, the writ was granted without demur;3 but, contrary to the precedent of 1627, the prisoners were not produced at the bar of the King's Bench, the different gaolers merely returning that the prisoners were committed by order of twelve of the Privy Council upon a warrant signed by the king himself.4 The cause of committal alleged in the latter document was, 'notable contempts by him committed against Ourself and Our government, and for stirring up sedition against Us.' It was strenuously argued, that this was no sufficient cause of committal within the terms of the Petition of Right;5 and Heath, the Attorney-General, had to resort to the meanest of quibbles, as well as the most dangerous constitutional doctrines, to get over the objection. Nevertheless, as is well known, the Court refused to enlarge the prisoners, though their committal was a clear breach of Parliamentary privilege, unless they would find sureties, not only for their

reappearance, but for their good behaviour.6 This they naturally declined to do, as such a step would have been a virtual admission of guilt.7

The *Six Members' Case* was followed by eleven of the blackest years in the history of English law, during which the growing indignation of the popular party found, owing to the suspension of Parliament, no adequate means of expressing itself. Whether the Courts during this period refused applications for *Habeas Corpus,* it is difficult to discover without an exhaustive search. But that they did so is highly probable, for one of the earliest acts of the Long Parliament, which met in November, 1640, was to appoint a Committee on the Courts of Justice,1 and, a few days later, to refer to it the question of *Habeas Corpus.*2 The result of the Committee's action is very clearly shown in the sixth section of the famous Act for the Abolition of the Star Chamber,3 which received the royal assent in July, 1641; but it may be doubted whether the wording of the section, which was evidently the subject of much discussion, was altogether wise. At first the proposal seems to have been, to declare the *Habeas Corpus* claimable as of right by every prisoner, a course which, one would have thought, would have prevented many future disputes. But, after engrossment of the bill, the desire to refer to the hated tribunal by name seems to have got the better of the discretion of the House, and a rider was sewn on to the parchment4 which, in effect, limited the scope of the provision to commitment by a conciliar Court, or by the king's personal warrant, or that of the Privy Council. Unhappily also, the Act did not touch upon the question of vacation, though it expressly attributed equal functions to the King's Bench and the Common Pleas. As is well known, this omission gave an opening to a serious miscarriage of justice in *Jenks' Case,* a proceeding in which the forms of law were perhaps more shamelessly abused by the judicial bench than in any of the more famous trials in the days of Charles I.

5 This has not been a very lucid story, but it has been no easy task to pierce the mists with which the barbarous condition of the evidence and the deliberate mis-statements of party controversy have covered the subject. The final word on the history of the *Habeas Corpus* will not be said, until the Year Books have been reëdited, and the long series of judicial rolls (or at least a good selection from them) carefully printed. Meanwhile, however, this paper claims to have suggested the answers to at least four questions which, for the last two hundred years, have puzzled the student who has grappled with the *Habeas Corpus.* As thus:

1. *Q.* Why was there any doubt whether the writ issued 'as of right'?

A. Because the *Certiorari* never issued as of right on the demand of the defendant, and the *Privilege* only issued in certain special cases (xviii. L. Q. Rev. pp. 69, 70).

2. *Q.* Why was there any doubt as to the proper tribunal?

A. Because the *Certiorari* only issued by order of the King's Bench, while the *Privilege* (writ or bill) sometimes issued out of the Chancery and sometimes out of the Common Pleas (ibid. p. 71).

3. *Q.* Why could the writ only be claimed in term time?

A. Because no one could take proceedings during vacation in a superior Court, and to take proceedings was, *ex hypothesi,* the object of the *Corpus cum causa* (ibid. p. 71).

4. *Q*. Why could the gaoler demand an *alias* and a *pluries?*

A. Because, the original *Capias* being an order to *arrest* a person, the sheriff, to whom it was addressed, might reasonably have some difficulty in catching his man (ibid. pp. 67, 68).

All of which questions were finally set at rest by the Habeas Corpus Act of 1679.[1]

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36.

THE HISTORY OF THE REGISTER OF ORIGINAL WRITS[1]

By Frederic William Maitland[2]

DE Natura Brevium, Of the Nature of Writs,—such is the title of more than one well-known text-book of our mediæval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs, must be his theme. The scheme of "original writs" is the very skeleton of the Corpus Juris. So thought our forefathers, and in the universe of our law-books, perhaps in the universe of all books, a unique place may be claimed for the *Registrum Brevium,*—the register of writs current in the English Chancery. It is a book that grew for three centuries and more. We must say that it grew; no other word will describe the process whereby the little book became a big book. In its final form, when it gets into print, it is an organic book; three centuries before, it was an organic book. During these three centuries its size increased twenty-fold, thirty-fold, perhaps fifty-fold; but the new matter has not been just mechanically added to the old, it has been assimilated by the old; old and new became one.

It was first printed in Henry VIII.'s reign by William Rastell. Rastell's volume contained both the Register of Original Writs and the Register of Judicial Writs. The former is dated in 1531; at the end of the latter we find accurate tidings—"Thus endyth thys booke callyd the Register of the wryttes oryggynall and judiciall, pryntyd at London by William Rastell, and finished the xxviii day of September in the yere of our lorde 1531 and in the xxiii yere of the rayne of our soverayn lord kyng Henry the eyght." Whether this book was ever issued just as Rastell printed it I do not know; what I have seen is Rastell's book published with a title-page and tables of contents by R. Tottel, in 1553. In 1595 a new edition was published by Jane Yetsweist, and in 1687 another, which calls itself the fourth, was printed by the assigns of Richard and Edward Atkins, together with an Appendix of other writs in use in the Chancery and Theloall's Digest. In 1595 the publisher made a change in the first writ, substituting "Elizabetha Regina" for "Henricus Octavus Rex;" the publisher of 1687 was not at pains to change Elizabeth into James II. In other respects, so far as I can see from a cursory examination of Rastell's book (which I am not fortunate enough to possess), no changes were made; the editions of 1595 and 1687 are reproductions of the volume printed in 1531, and the correspondence between them is almost exactly, though not quite exactly, a correspondence of page for page.

Coke speaks of the Register as "the ancientist book of the law."[1] In no sense can we make this saying true. But to ask for its date would be like asking for the date of one of our great cathedrals. In age after age, bishop after bishop has left his mark upon the church; in age after age, chancellor after chancellor has left his mark upon the register. There is work of the twelfth century in it; there is work of the fifteenth

century, perhaps of the sixteenth, in it. But even this comparison fails to put before us the full ineptitude of the question, What is the date of this book? No bishop, no architect, however ambitious, could transpose the various parts of the church when once they were built; he could not make the crypt into a triforium; but there was nothing to prevent a reforming chancellor from rearranging the existing writs on a new plan; from taking "Trespass" from the end of the book and thrusting it into the middle. No; to ask for the date of the Register is like asking for the date of English law.

When we take up the book for the first time we may, indeed, be inclined to say that it has no arrangement whatever, or that the principle of arrangement is the principle of pure caprice. But a little examination will convince us that there is more to be said. Every now and again we shall come across clear traces of methodic order, and probably in the end we shall be brought to some classification of the forces which have played upon the book. The following classification may be suggested: (1) Juristic logic; (2) practical convenience; (3) chronology; (4) mechanical chance. Let me explain what I mean. We might expect that the arrangement of such a work would be dictated by formal jurisprudence; we might expect that the main outlines would be those elementary contrasts of which every system of law must take notice,—real, personal—petitory, possessory—contract, tort. Again, knowing something of the English writs, we might expect to find those which begin with "Præcipe" falling into a class by themselves; or, again, to find that those which direct a summons are kept apart from those which direct an attachment; or, again, to find that writs of "Justicies," *i. e.,* writs directing the sheriff to do justice in the county court, are separated from writs destined to bring the defendant into the king's own courts. Well, in part we may be disappointed; but not altogether: formal jurisprudence has had something to do with the final result, though not so much as might be expected. The printed book begins, and every MS. that I have seen, whether it comes from Henry II.'s day or Henry VI.'s, begins with the writ of right. Now, there is logic in this; for whatever actions are "personal," whatever acts are "possessory,"—and different ages hold different opinions about this matter,—there can be no doubt that the action begun by writ of right is "real" and "petitory" or "droiturel." Our Register then begins with the purest type of a real and droiturel action. And the logic of jurisprudence has left other marks, especially near the end of the book, where we find Novel Disseisin, Mort d'Ancestor, Cosinage and Writs of Entry, following each other, in what we shall probably call their "natural order." Still, such logic will not, by any means, explain the whole book. It would be quite safe to defy the student of "general jurisprudence" to find Trespass, or Covenant, or *Quare Impedit,* by the light of first principles.

Then, again, practical convenience has had its influence. The first twenty-nine folios of the printed Register are taken up by the Writ of Right, and other writs which have generally collected around that writ. Then a new section of the book begins (f. 30-71); it is devoted to writs which the modern jurist would describe as being of the most divers natures; but they all have this in common, that in some way or another they deal with ecclesiastical affairs and the clerical organization. The link between this group and that which it immediately succeeds is (f. 29 b) the Writ of Right of Advowson. It is a Writ of Right; but having once come across the advowson it is convenient to dispose of this matter once and for all, to introduce the Assize of

Darrein Presentment, which is thus torn away from the other possessory assizes, the *Quare Impedit,* the *Quare Incumbravit,* the *Juris Utrum,* and so forth. This brings us into contact, if not conflict, with the church courts; so let us treat of Prohibitions to Court Christian, whether these relate to advowsons, land, or chattels, and while we are about it we may as well introduce the *De excommunicato capiendo,* and so forth; then we shall have done with ecclesiastical affairs. Here, to use the terms that I have ventured to suggest, we see "practical convenience" getting the better of "juristic logic;" or, to put it in other words, matter triumphing over form. But form's turn comes again. We have done with the church; what topic should we turn to next? The answer is, "Waste." But why waste, of all topics in the world? Because, until the making of a certain statute, duly noticed in our Register, the action of waste was an action on a royal prohibition against waste.[1] "Prohibition" is the link which joins "waste" to "ecclesiastical affairs."

Yet another principle has been at work. A section in the middle of the book is devoted to *Brevia de Statuto,* writs that are founded on comparatively modern statutes. What keeps this group of writs together is neither "form" nor "matter," but chronology; they are recent writs, for which neither logic nor convenience has found a more appropriate place. In short, we have here an appendix. But it is an appendix in the middle of the book. We can hardly explain its appearance there without glancing at the MSS.; but even without going so far we can still make a guess. When these statutory writs have been disposed of, we almost immediately (f. 196 b) come upon what seems a well-marked chasm. Suddenly the Novel Disseisin is introduced, and then for a long while logic reigns, and we work our way through the possessory actions. If we find, as we may find, a MS. which has several blank leaves before the Novel Disseisin, which honors the Novel Disseisin with an unusual display of the illuminator's art, we have made some way towards a solution of the problem. At one time the book was in mechanically separate sections, and the end of one of these sections was a convenient place for a statutory appendix.

After all, however, it is improbable that we shall ever be able to explain in every case why a particular writ is found where it is found, and not elsewhere. The *vis inertiæ* must be taken into account. Writs collected in the Chancery; now and again an enterprising Chancellor or Master might overhaul the Register, have it recopied, and in some small degree rearranged; but the spirit of a great official establishment, with plenty of routine work, is the spirit of leaving alone; the clerks knew where to find the writs; that was enough.

The MS. materials for the history of the Register are abundant. The Cambridge University library possesses at least nineteen Registers, some complete, some fragmentary; the number at the British Museum is very large. Over the nineteen Cambridge Registers I have cast my eyes. They are of the most various dates. In speaking about their dates it is necessary to draw some distinctions. In the first place, of course, it is necessary to distinguish between the date of the MS. and the date of the Register that it contains, for sometimes it is plain that a comparatively modern hand has copied an ancient Register. In the second place, as already said, it is useless to ask the date of a Register, or of a particular Register, if thereby we mean to inquire for the date when the several writs contained in it were first issued, or first became current;

the various writs were invented in different reigns, in different centuries. The sense that we must give to our inquiry is this: at some time or another the official Register of the Chancery was represented by the MS. now before us; what was that time? It will be seen, however, that the question in this form implies an assumption which we may not be entitled to make,—the assumption that our MS. fairly represents what at some particular moment of time was the official Chancery Register. I have as yet seen no MS. which on its face purported to be an official MS., or a MS. which belonged to the Chancellor or any of his subordinates. In very many cases the copy of the Register is bound up in a collection of statutes and treatises, the property of some lawyer or of some religious house. Often an abbey or priory had one big volume of English law, and in such volumes it is common to find a *Registrum Brevium.* Such volumes were lent by lawyer to lawyer, by abbey to abbey, for the purpose of being copied, and it is clear that a copyist did not always conceive himself bound to reproduce with mechanical fidelity the work that lay upon his desk. Thus, many clerks are quite content that the names of imaginary plaintiffs and defendants should be represented by A and B, while another will make "John Beneyt" a party to every action, and suppose that all litigation relates to tenements at Knaresborough. We have not to deal with the dull uniformity of printed books; no two MSS. are exactly alike; every copyist puts something of himself into his work, even if it be only his own stupidity. Thus, settling dates is a difficult task. Sometimes, for example, a MS. which gives the Register in what, taken as a whole, seems a comparatively ancient form, will just at a few places betray a knowledge of comparatively modern statutes. Gradually, however, by comparing many MSS., we may be able to form some notion of the order in which, and the times at which, the various writs became recognized members of the *Corpus Brevium.*

It will be convenient to mention here that one of the most obvious tests of the age of a Register is to be found in the wording of those writs which expressly mention a term of limitation. There are three such writs; namely, the Novel Disseisin, the Mort d'Ancestor, and the *De nativo habendo.* Now, at the beginning of Henry III.'s reign (1216), the limiting period for the Novel Disseisin seems to have been the last return of King John from Ireland, but in 1229, or thereabouts, there was a change, and Henry's first coronation at Westminster became the appointed date;[1] the Mort d'Ancestor was limited to the time which had elapsed since Richard's coronation. The Statute of Merton (1236), or rather, as I think, an ordinance of 5th Feb., 1237, fixed Henry's voyage into Brittany as the period for the Novel Disseisin, and John's last return from Ireland as the period for the Mort d'Ancestor and *De Nativo.*[2] Statute of Westminster the First (1275, cap. 39) named for the Novel Disseisin Henry's first voyage into Gascony, for the Mort d'Ancestor and for the *De Nativo* Henry's coronation.[3] As no further change was made until Henry VIII.'s day, this test is applicable only to the very earliest Registers. For Registers of the fourteenth century, however, we can use a somewhat similar criterion: when they mention Henry III., as they call him "pater noster," or "avus," or "proavus noster." But, good though such tests may be, they are by no means infallible. A man copying an already ancient Register might well be tempted to tamper with phrases that were obviously obsolete; and, again, we shall have cause to doubt whether even in the Chancery itself a new statute of limitations always set the clerks on promptly overhauling their ancient books and making the necessary corrections; great is the force of official laziness.

Still, these writs which mention periods of limitation are the parts of the Register which first attract the critic's eye.

But there is yet another difficulty. Are we justified in assuming that there always, or ever, was in the Chancery some one document which bore the stamp of authority, and which was *the* Register for the time being? I doubt it. The absolutely accurate officialism to which we are accustomed in our own day is, to a large extent, the product of the printing-press. The cursitors and masters of the mediæval Chancery had no printed books of precedents. It is highly probable that each of them had his MS. book; that these books were transmitted from master to master, from cursitor to cursitor, and that they differed much from each other in details.[1] To have prevented them from differing would have been a laborious and a needless task. This thought will be brought home to us by several passages in the printed book. In the first place, it is full of notes and queries: the writer expresses his doubts as to the best way of formulating this or that writ; he tells us what some think, what others think, what some do, and what others do; occasionally he speaks to us in the first person, says "credo" and "je croye," and even points out that this Register differs from other Registers.[2] It is in this way that we may explain the somewhat capricious selection of writs that the printed book presents. It naturally includes all the common forms that are in daily use; but it includes, also, many forms of a highly specialized kind,—forms which set forth the facts of cases which have happened once, but are by no means likely to happen again. The Chancery undoubtedly had some power in itself to devise such "writs upon the special case;" not unfrequently it was ordered to make a writ suited to the very peculiar circumstances of a case which had been brought before the Council, or before the Parliament, just because none of the common writs would meet it.[1] Of such "*brevia formata*" we get a selection, but only a selection. Some are preserved because they will be useful as precedents, others, as it seems to me, because they are curiosities, and not likely to form precedents.[2] In many quarters we see more signs of private enterprise than of official redaction. A considerable number of specially worded writs bear the name of Parning,—a number out of all proportion to the brief two years during which that famous common lawyer held the great seal. He had the good fortune, we may suppose, to have some industrious clerk for an admirer; his predecessors and successors were less lucky.[3] I greatly doubt, then, whether we have in strictness a right to speak about *the* Register of a given period, as though there was some one document exclusively or preëminently entitled to that name; rather we should think of *the* Register as a type to which diverse registers belonging to diverse masters and clerks more or less accurately conformed. About common matters these manuscripts agreed; about rareties and curiosities there was difference, and room for difference. There was no great need for a perfectly stereotyped uniformity; the fact that a writ was penned, and that it passed the seal, was not a fact that altered rights or secured the plaintiff a remedy; it still had to run the gauntlet in court, and might ultimately be quashed as unprecedented and unlawful. It is clear, indeed, that the granting of specially worded writs was regarded as an important matter, which required grave counsel and consideration; the masters were consulted as a body; sometimes it would seem as though the opinion of the justices was taken before the writ issued.[1] A chancellor, a master, even a cursitor, cannot have liked to see his writs quashed; and, though writs were quashed very freely, as the Year Books witness, still, if I mistake not, it will be found that in most cases the fault lay rather with the

plaintiff or his advisors than with the Chancery; he had got an inappropriate writ, but not one that was in any respect contrary to law. Any notion that the Chancery was a Romanizing institution, that the learning of the masters was the learning of civilians, is rudely repelled by the Register. Whatever academic training in Roman and canon law the masters may have had, they were English lawyers, daily engaged in watching the development of English law in the English courts, in reading the Year Books, and in "writing up" decisions in the margins of their Registers. Still, to return to my point, the granting of a newly worded writ was no judicial act; to grant one which could not be maintained was no act of justice; it might be a very proper experiment.

The Register of which I am speaking is the Register of Original Writs. The printed book contains also a Register of Judicial Writs. The difference between Original Writs and Judicial Writs is generally known. Roughly speaking, we may put it thus: An original writ is a writ whereby litigation is commenced; its type is a common writ of trespass or debt, whereby the sheriff is directed to compel the defendant to appear in court and answer the plaintiff; on the other hand, a judicial writ is a writ issued during the course of an action, either before or after judgment; thus, the re-summons of one already summoned, a *venire facias* for jurors, a *fieri facias,* an *elegit,*—these may be taken as types of judicial writs. But, in strictness, we are hardly entitled to bring into our definitions any particularization of the character of the writs. The technical distinction seems to have been a simpler one: the original writ issues out of the Chancery, the judicial issues out of a Court of Law; we can say no more. It sometimes happens that the same writ can be obtained in the Chancery or in the Common Pleas; in term time one gets it from the court, in vacation one goes to the Chancery; such a writ will, therefore, have its place in both Registers, the Original and the Judicial.[1] And very many of the documents which find a place in the former cannot be described as writs originating litigation; they relate to litigation that has been already begun. A tenant in an action begun by writ of right puts himself on the grand assize while yet the action is in the court baron or county court; the writ summoning the electors of the grand assize will issue out of the Chancery, and we must look for it in the Register of Original Writs. The same Register contains numerous writs evoking litigation from the local courts,—writs of *pone, certiorari, recordari facias,* and so forth. But, further, the fully developed *Registrum Brevium Originalium* contains great masses of documents which neither originate nor evoke litigation,—pardons, protections, safe-conducts, licenses to elect bishops and abbots, orders for the election of coroners and verderers, letters whereby the king presents a clerk, fiscal writs addressed to the Barons of the Exchequer, writs to escheators, and so forth, in rich abundance; even letters to foreign princes, begging them to do justice to Englishmen, find a place in the collection.[1] Many of these formulas, it may be, were never known as *brevia originalia,* and some were not *brevia* at all; still, it would be very difficult to say where the original writs left off, for a great deal of what we might call fiscal and administrative work was done under quasijudicial forms, and by the use of quasi-judicial machinery. The Exchequer, according to our ideas, was half law court and half financial bureau. The collection of the revenue, the management of the king's demesnes and feudal rights, were carried on by means of writs, inquests, verdicts, very similar to those which determined the rights of litigants. And happy it may be for us that no stricter separation was made between ordinary law and administrative law. Our present point, however, must be merely that all this great

mass of miscellaneous matter is collected into the Register of Original Writs, and thus gets mixed up with the formulas of ordinary litigation. The later the MS. of the Register the larger is the proportion which the administrative documents bear to the writs which originate or evoke litigation, and, as we shall see hereafter, the general scheme of the book had become fixed at a time when it was still chiefly made up of writs subserving the process of litigation between subject and subject.

These things premised, it may be allowed me to make a few remarks about the early history of the Register.

It is highly probable that so soon as our kings began to interfere habitually with the ordinary course of justice in the communal and feudal courts, and by means of writs to draw matters into their own court, the clerks of the chancery began to collect precedents of such writs, and it well may be that some of the formulas that they used were already of high antiquity.2 But the careful reader of Mr. Bigelow's "Placita" will, as I think, be led to doubt whether before the reign of Henry II. there was anything that could fairly be called a *Registrum Brevium,* and the student of Madox's Exchequer will be inclined to hold that there were no writs that could be obtained "as of course" (*de cursu*) by application to subordinate officials. Nothing was to be had for nothing; the price of writs was not fixed, and every writ was, in the terms of a later age, "a writ upon the special case." Before the end of Henry's reign there had been a great change, though the practice of selling royal aid (theoretically it was rather "aid" than "justice" that was sold) was by no means at an end. Already when Glanvill wrote there were many writs drawn up "in common form;" so drawn up, that is, as to cover whole classes of disputes. Let us follow him in his treatment of them. Not impossibly he took them up in the order in which they occurred in an already extant Chancery Register, and, as we shall see hereafter, the arrangement of the Register in much later times conforms, as regards some of its main outlines, to the arrangement of Glanvill's treatise.

In his first book he begins (cap. 6) with the *Præcipe quod reddat* for land, which he treats as the normal commencement of a petitory action. In the second book we have (cap. 8, 9) the writs of peace granted when a tenant has put himself on the grand assize; then (cap. 11) the writ summoning the electors of the grand assize, and (cap. 15) the writ summoning the recognitors. The third book, on warranty, does not give us any "original" writ. In the fourth book (cap. 2) occurs the Writ of Right of Advowson, the Writ (cap. 8) *Quo advocato se tenet in ecclesia;* a Prohibition (cap. 13) to ecclesiastical judges against meddling with a cause touching an advowson, and (cap. 14) a summons on breach of such a Prohibition. The fifth book, on serfage, gives us (cap. 2) the *De libertate probanda.* The sixth book turns to dower, and contains (cap. 5) the Writ of Right of Dower, a writ of *Pone* (cap. 7) for removing the case from the county court, the Writ (cap. 15) of Dower *unde nihil habet,* and the Writ (cap. 18) of Admeasurement of Dower. The seventh book, on inheritance or succession, has (cap. 7) the Writ *Quodstare facias rationalem divisam,* and (cap. 14) the writ to the Bishop, directing an inquiry into bastardy. In the eighth book comes (cap. 4) the Writ *de fine tenendo,* and several writs (cap. 6, 7, 10), *Quod recordari facias,* "evocatory writs," we may call them. In the ninth we have (cap. 5) the Writ *De homagio capiendo,* the Writ of Customs and Services (cap. 9), a writ against a tenant who has encroached

upon his lord (cap. 12), and the Writ *De rationabilibus divisis* (cap. 14). The tenth book gives us the Writ of Debt (cap. 2), the Writ *De plegio acquietando* (cap. 4), a writ for a mortgage creditor calling on the debtor to pay (cap. 7), a writ calling on the mortgagee to render up the land (cap. 9), a writ calling in the warrantor of a chattel (cap. 16). From the eleventh book we gather only a writ announcing the appointment of an attorney. In the twelfth book we come to the Writs of Right, strictly so called (*brevia de recto tenendo*), and a number of writs empowering the sheriff to do justice; namely, the *Ne injuste vexes* (cap. 10), the *De nativo habendo* (cap. 11), a Writ of Replevin (cap. 12, 15), a Writ of Admeasurement of Pasture (cap. 13), a *Quod permittat* for easements (cap. 14), a Writ *De rationabilibus divisis* (cap. 16), a Writ *Quod facias tenere divisam* (cap. 17), a Writ of *Justicies* for the return of chattels unlawfully taken by a disseisor, and a few other miscellaneous writs, including a Prohibition to Court Christian against meddling with lay fee. In the thirteenth book come the possessory assizes. The fifteenth gives a hasty sketch of criminal business.

Glanvill's scheme of the law, or rather his scheme of royal justice, might, as it seems to me, be displayed by some such string of catchwords as the following: "Right" (*i. e.,* proprietary right in land), "Church," "Liberty," "Dower," "Inheritance" or "Succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now, some of the main lines of this "*legalis ordo,*" if I may use that term, keep constantly reappearing in the later history of the Register. At all events, two poles are fixed,—the *terminus a quo,* the *terminus ad quem;* we are to begin with "Right;" to end with "Possession." The reappearance of this scheme in the Register of later days is the more remarkable, because Bracton did not adopt it; as is well known, he begins with "Possession," and ends with "Right." We may make a further remark, which will be of use to us hereafter. Glanvill's twelfth book is most miscellaneous, and at one point resolves itself into a string of writs, which are given without note or comment. The idea which keeps the book together is that of justice done, not by the King's court, but by lords and sheriffs, in pursuance of royal writs. Such a tie is likely to be broken in course of time. Thus, the "Writ of Right Patent," the writ commanding a lord to entertain a proprietary action, is likely to find its proper place by the side of the *Præcipe quod reddat,* especially when Magna Charta has sanctioned the rule that a *Præcipe* is only to be issued when the tenant holds immediately of the king.[1] And so, again, the writs commanding the sheriff to do justice, writs of "*Justicies,*" or "*Justifices,*" will hardly be kept together by this bond; but in course of time, as the king's own court extends, its sphere will fall into various subordinate places; thus, for example, "Debt by Justicies in the county court" will become an appendix or a preface to "Debt in the Bench."

The arrangement of Glanvill's book is, however, sufficiently well known, and therefore, without further reflection upon it, I will pass on to describe the earliest *Registrum Brevium* that I have seen. Happily it is one to which we can affix a precise date, namely, the 10th of November, 1227. It is found in a MS. at the British Museum (Cotton, folios D, 11, f. 143 b),—a book that once belonged to the monks of St. Augustine's, Canterbury. It forms a schedule annexed to a writ of Henry III., bearing the date just given, and directed to the people of Ireland. That writ recites that the king desires that justice be done in Ireland according to the custom of his realm of

England, and states that for this purpose he is sending a formulary of the writs of course (*formam brevium decursu*), and wills that they be used in the cases to which they are applicable. The writ was issued at Canterbury, and to this fact we probably owe its lucky preservation in a Canterbury book. The Register that it gives is about forty years younger than Glanvill's treatise, and affords the means of measuring the growth of law during an important period,—the period of the Great Charter. I will briefly describe its contents.

It begins with three Writs of Right (1, 2, 3), and we learn that these writs can only be had "*sine dono;*" that is, without payment, when the land demanded is but half a knight's fee or less, or the service due from it does not exceed 100 shillings, or, being a burgage tenement, the rent or the value of the buildings does not exceed 40 shillings a year. Then follows (4) the *Præcipe in capite.* Then (5) the *Novel Disseisin,* the period of limitation being stated as "*post ultimam transfretacionem nostram de Hibernia in Angliam;*"1 and as an appendix to this we have (6) the Novel Disseisin of Common, and (7) the Assize of Nuisance, with variations. Next comes (8) the Mort d'Ancestor; the period of limitation is said to be *postquam coronacionem H. patri nostris.*2 Then come (9) the assize of Darrien Presentment, (10) Prohibition to the bishop against admitting a parson, (11) Writ ordering a bishop to disencumber the church when he has admitted a parson contrary to such Prohibition, (12) Mandamus to a bishop to admit a presentee, (13) Writ of Right of Advowson, (14) Prohibition to ecclesiastical judges, (15) Writ against ecclesiastical judges who have disobeyed the Prohibition. This ecclesiastical group being finished, we find next (16) the Writ of Peace for a tenant who has put himself on the grand assize, and (17) a writ for the election of the grand assize. And here we have an interesting note: "*Et notandum quod in hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent non audito illo verbo quod in aliis recognitionibus dicitur scilicet a se nescienter.*" Unless I am traducing the copyist, something must have gone wrong with these last words. They were French, but he took them for Latin. In the grand assize the recognitor must swear, in an unqualified way, that he will tell the truth; while in all other recognitions he may add "a so. scient;" that is, "according to his knowledge." A small group of writs relating to dower (18, 19, 20) come next. Then follows (21) the *Juris Utrum,* which, it is remarked, lies either for the clerk or for the layman.1 Next (22) comes the Attaint which can be brought against recognitors of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, but not against the recognitors of the Grand Assize. Then (23) we have an action on a fine, "*Præcipe A. quod teneat finem,*" and (24) the action of *Warrantia Cartæ.* Writs of Entry are represented by but two specimens: the first is (25) Entry *ad terminum qui præteriit,* the second (26) is *Cui in vita.* Then we find (27) *quod capiat homagium,* (28) writs for sending knights to view an essoinee, and (29) to hear a sick man appoint an attorney. On these follow (30) the *De nativo habendo,* (31) the *De libertate probanda* (32) the *De rationabilibus divisis,* and (33) the *De superoneracione pasturæ.* We pass to criminal matters, and get (34) the writ to attach an appellee to answer for robbery, rape, or arson, with a note that in case of homicide the appellee is to be attached, not by gage and pledge, but by his body; as a sequel to this comes (35) the *De homine replegiando.* We return to civil matters, and find (36) the Writ of Services and Customs, and (37) the *Ne injuste vexes.* Then comes (38) Debt and Detinue. The only writ that falls under this head is a *Justicies,* and not, like Glanvill's Writ of Debt, a *Præcipe;* and there is this

further difference, that the remarkable words, "*et unde queritur quod ipse ei injuste deforciat,*" which occur in Glanvill's writ, and make it look so very like a Writ of Right, have disappeared. The supposed debt in the Irish Register is one of 20 shillings, and we have this important note: "In the same fashion a writ is made for a charter, '*quam ei commisit,*' or for a horse or for chattels to the value of 40 shillings, '*sine dono*' [*i. e.,* without any payment to the king], for if the debt or price exceeds 40 shillings the words must be added: '*accepta ab eo* [the plaintiff] *securitate de tercia parte de primis denariis ad opus Regis.*' " In Ireland, at all events, the king will only become a collector of debts for the modest commission of 33? per cent.

To this succeeds (39) a Prohibition to ecclesiastical judges against dealing with lay fee, and (40) a writ to compel them to answer for breach of such a prohibition. Next occurs (41) a writ directing the sheriff not to suffer an infant to be impleaded, and (42) a *Recordari facias* applicable to a case in which a tenant has vouched an infant. Then we have (43) a *Justicies de plegio acquietando* for a debt of forty shillings or less; "*non habebit ultra xl. sol. sine dono.*" Then comes (44) a writ forbidding the sheriff to distrain R., or permit him to be distrained, to render ten marks to N., for which he is neither principal debtor, nor pledge; but "this writ does not run in privileged cities, or where the debtor is the king's debtor." Another writ (45) forbids the sheriff to distrain R. for money promised to the king "for right or record," *i. e.,* for money promised in consideration of the king's aid in litigation, if, without his own default, he has not got what he stipulated for. Another writ (46) forbids the sheriff to distrain a surety when the principal debtor can pay; but this writ is not to be issued when the debt is one that is due to the king. Then (47) comes a writ of Mesne by way of *Justicies,* and (48) the *De excommunicato capiendo.* Upon this follows (49) covenant "*si quis conventionem fecerit albi quam in curia domini Regis cum vicino suo qui eam infringere voluerit de aliqua terra vel tenemento ad terminum si exitus illius tenementi non excesserint per annum xl. solidos;*" the writ is a *Justicies* "*quod teneat conventionem.*" We have then (50) a Writ of Dower, and (51) a Writ of Waste against a dowager. Miscellaneous writs follow: (52) a *Venire facias* for an assize; (53) a *Pone ad peticionem petentis;* (54) a summons for a warrantor; (55) a writ to inquire of the bishop touching the marriage of a woman claiming dower; (56) a writ directing a view of the land demanded.

So ends the Irish Register, an important document. It brings out very forcibly the king's position as a vendor of justice, or rather, as we have said, of "aid." We must, as it seems to me, believe, until the contrary be shown, that we have here a fairly correct representation of the writs that were current in England in 1227; the writs that were "of course" and to be had at fixed prices; but some may have been omitted as inapplicable to Ireland.

Before making further comments, let us turn to an English *Registrum,* which, so far as I can judge, must be of very nearly the same date as this Irish *Registrum.* It is found in a Cambridge MS. (Ti. vi. 13), and may, I think, be safely ascribed to the early years of Henry III.'s long reign; for I can see no trace in it of the Statute of Merton. The book contains a copy of Glanvill's treatise, which is followed by a *Registrum,* and of this we will note the contents. I add references to Glanvill's treatise, and to the Irish

Register; the latter of these I will designate by the symbol “Hib.” while the Cambridge MS., now under consideration, I shall hereafter refer to as CA.

1. Writ of right addressed “Roberto de Nevill;” with several variations. (Glanv. xii, 2; Hib. 1.)

2. Writ of right *“de rationabili parte.”* (Glanv. xii, 5.)

3. *Praecipe in capite.* (Glanv. i, 6; Hib. 4.)

4. *Pone;* this will only be granted to a tenant *“aliqua ratione precisa vel de majori gratia.”* (Hib. 53.)

5. Writs of peace when tenant has put himself on grand assize. (Glanv. ii, 8, 9; Hib. 16.)

6. Writ summoning electors of grand assize, *“et nota quod in hac assisa non ponuntur nisi milites et precise jurare debent.”* (Glanv. ii, 11; Hib. 17.)

7. *De recordo et judicio habendo.*

8. *Procedendo* in writ of right.

9. Respite of writ of right so long as tenant is *“in servicio nostro in Pictavia vel in Wallia cum equis et armis per preceptumnostrum.”* Respites (Hib. 41) where a tenant or vouchee is an infant.

10. *Warrantia cartae.* (Hib. 24.)

11. Entry *“ad terminum que preteriit.”* (Cf. Glanv. x, 9; Hib. 25.)

12. Entry *“cui in vita.”* (Hib. 26.)

13. *De homagio capiendo.* (Glanv. ix, 5; Hib. 27.)

14. Novel disseisin;[1] limitation *“post ultimum reditum domini J. patris nostri de Hybernia in Angliam.”* (Glanv. xiii, 33; Hib. 5.)

15. Novel disseisin of pasture; same limitation. (Glanv. xiii, 37; Hib. 6.)

16. Mort d’Ancestor;[2] limitation *“post primam coronacionem R. Regis avunculi nostri.”* (Glanv. xiii, 3, 4; Hib. 8.)

17. *De nativo habendo;*[2] same limitation. (Glanv. xii, 2; Hib. 30.)

18. *De libertate probanda.* (Glanv. v, 2; Hib. 31.)

19. *De rationabilibus divisis.* (Glanv. ix, 14; Hib. 32.)

20. *De superoneratione pasturae.* (Hib. 33.)

21. Replevin. (Glanv. xii, 12, 15.)

22. *De pace regis infracta;* writ to attach appellee by gage and pledge in case of robbery or rape. (Hib. 34.)

23. *De morte hominis;* writ to attach appellee by his body. (Hib. 34.)

24. *De homine replegiando.* (Hib. 35.)

25. Services and customs; a *"justicies."* (Glanv. ix, 9; Hib. 36.)

26. *Ne injuste vexes.* (Glanv. xii, 10; Hib. 27.)

27. Debt; a *"justicies;" "reddat B. x. sol. quos ei debet ut dicit,* vel *cartam quam ei commisit custodiendam."* (Glanv. x, 2; cf. xii, 18; Hib. 38.)

28. Prohibition to ecclesiastical judges against entertaining a suit touching a lay fee. (Glanv. xii, 21; Hib. 39.)

29. Similar prohibition to the litigant. (Glanv. xii, 22.)

30. Prohibition in case of debt or chattels, *"nisi sint de testamenti vel matrimonio."*

31. Attachment for breach of prohibition. (Hib. 40.)

32. *De plegiis acquietandis.* (Glanv. x, 4; Hib. 43.) Also (32*a*) a writ forbidding the sheriff to distrain the surety while the principal debtor can pay. (Hib. 46.)

33. Mesne. (Hib. 47.)

34. Aid to knight lord's son or marry his daughter.

35. *De excommunicato capiendo.* (Hib. 48.)

36. Covenant; *justicies;"de x. acres terre."* (Hib. 49.)

37. Writ announcing appointment of attorney.

38. Writ to send knights to hear sick man appoint attorney. (Hib. 29.)

39. Writ sending knights to view essoinee. (Hib. 28.)

40. Darrein presentment. (Glanv. xiii, 19; Hib. 9.)

41. Prohibition in case touching advowson. (Glanv. iv, 13; Hib. 14.)

42. Writ of right of advowson. (Glanv. iv, 2; Hib. 13.)

43. Writ to bishop for admission of presentee. (Hib. 12.)

44. *Quare incumbravit.* (Hib. 11.)

45. Attachment for breach of prohibition. (Glanv. iv, 14; Hib. 11.)

46. Dower *"unde nihil habet."* (Glanv. vi, 15; Hib. 18.)

47. Dower *"de assensu patris."* (Hib. 19.)

48. Dower in London.

49. *Juris utrum.* (Glanv. xiii, 24; Hib. 20.)

50. Attaint; the assize was taken *"apud Norrvicum coram H. de Bargo, justiciario nostro."*[1] (Hib. 22.)

51. *De fine tenendo;* the fine made *"tempore domini J. patris nostri."* (Glanv. viii, 6; Hib. 23.)

52. *Quare impedit.*

53. Writ of right of ward in socage.

54. Writ of right of ward in chivalry.

55. Assize of nuisance; vicontiel or "little" writ of nuisance; limitation *"post ultimum reditum domini J. Regis patris nostri de Hybernia in Angliam."* (Cf. Glanv. xiii, 35, 36; Hib. 7.)

56. *Ne vexes abbatem contra libertates.*

57. *Quod permittat* for estovers; a *justicies.*

58. *Quod faciat sectam ad hundridum vel molen dinum.*

Comment on these two Registers I must for a while postpone; I hope to be allowed to return to the subject on some future occasion.

When we compare these two Registers together, the first remark that occurs to us is, that in substance they are very similar, while in arrangement they are dissimilar. From this we may draw the inference that the official Register in the Chancery had not yet crystallized; or, to put the matter in another way, that very possibly different officers in the Chancery had copies which differed from each other. Indeed, the official Register of the time may not have taken the shape of a book, but may have consisted of a number of small strips of parchment filed together and easily transposed. There is a certain agreement between them even in arrangement. Both have "Right" in the forefront, and occasionally give us the same writs in the same order. One instance of such correspondence is worthy of note, for it will become of interest to us hereafter.

The following seems to be, for some reason or another, an established sequence: *De nativo habendo, De libertate probanda, De rationabilibus divisis, De superoneratione pasturæ,* Replevin, *De pace regis infracta* (writs for the arrest or attachment of appellees), *De homine replegiando,* Services and Customs. Traces of this sequence will be found even when the Register, having increased in bulk fifty times over, gets printed in the Tudor days. The writs are arranging themselves in groups: a Writ of Right cluster, an Ecclesiastical cluster, a Liberty and Replevin cluster. But many questions are very open. Shall the Writs of Entry precede or follow the Assizes? Shall they be deemed proprietary or possessory?

Taking our two Registers together, we can form an idea of the writs which were "of course" in the early years of Henry III.; and these we may contrast with the writs which Glanvill gives us from the last years of Henry II. On the whole, we can record a distinct advance of royal justice; but there have been checks and retrogressions. The Writ of Right, properly so called, the *Breve de recto tenendo,* which commands the feudal lord to do justice, has taken the place of the simple *Precipe quod reddat* as the normal commencement of a proprietary action for land. This is a victory of feudalism consecrated by the Great Charter. Again, in Glanvill's day the jurisdiction over testamentary causes had not yet finally lapsed into the hands of the church; twice (vii., 7, xii., 17) he gives us a writ (*quod stare facias rationabilem divisam*) whereby the sheriff is directed to uphold the will of a testator. This writ we miss in the Registers; the state has had to retreat before the church. We are so apt to believe that in the history of the law all has been for the best, that it is well for us to notice this unfortunate defeat,—for unfortunate it assuredly was, and to this day we suffer the evil consequences which followed from the abandonment by the king's courts of all claim to interfere with the distribution of a dead man's chattels. On the other hand, we see that the triumph of feudalism is more apparent than real; it has barred the high road, but royal justice is making a flank march. Glanvill (x., 9) has a writ which lies for a mortgagor against a mortgagee; or, rather, we ought to say for a gagor against a gagee, when the term for which the land was gaged has expired. The alteration of a few words in this will turn it into a writ of entry *ad terminum qui præteriit.*[1] Such a writ of entry is given by our two Registers, and they also give the writ *cui in vita* applicable for the recovery of land alienated by a married woman. Curiously enough they do not give the writ of entry *sur disseisin;* though we happen to know that already in 1205 this writ, lying for a disseisee against the heir of the disseisor, had been made a writ of course.[2] This is by no means the only sign that the copies of the Register which got into circulation did not always contain the newest improvements. Still, here we see that a foundation has been laid for that intricate structure of writs of entry which will soon be reared. It is very doubtful whether Glanvill knew the procedure by way of attaint for reversing the false verdict of a petty assize; but we find this securely established in our Registers.

Another noteworthy advance is to be seen in the actions which we may call contractual. The *Warrantia Cartæ* is in use, and so is the Writ of Covenant. We may doubt whether there is as yet any writ as of course which will enforce a covenant not touching land. The typical covenant of the time is what we should call a lease; but Glanvill (x., 8) told us that the king's court was not in the habit of enforcing "*privatas conventiones*" agreements, that is, not made in its presence and unaccompanied by

delivery of possession. Debt and Detinue are still provided for chiefly by writs of *Justicies,* directing trial in the county court. "Debt in the Bench" seems, as yet, no writ of course, and the Irish Register shows us that, at least across St. George's Channel, one had to pay heavily even for a *Justicies.* The excuse for such exaction, of course, was that no writ was necessary for the recovery of a debt in a local court; royal interference was a luxury. Lastly, we will notice that, as yet, we hear nothing of Account and nothing of Trespass.

The next Register that I shall put in is found in a Cambridge MS. I shall hereafter refer to it as CB. (kk., v. 33). Like the last, it is bound up with a Glanvill, and this, I may remark, is in favor of its antiquity. Edwardian Registers are generally accompanied, not by Glanvill, but by Hengham, or Fet Assavoir or Statutes. On the whole, we may, as I believe, safely attribute this specimen to the middle part of Henry III.'s reign, to the period between the Statute of Merton (1236) and the Statute of Marlborough (1267), and I am inclined to think it older than the Provisions of Westminster (1259). In the following notes of its contents I will give references to the "Pre-Mertonian" Register CA., which I described on a former occasion:—

"Incipiunt Brevia de Causa Regali."

1. Writ of right with many variations. (CA. 1.)

2. Writ of right *de rationabili parte.* (CA. 2.)

3. *Ne injuste vexes.* (CA. 26.)

4. *Praecipe in capite.* (CA. 3.)

5. Little writ of right *secundum consuetudinem manerii.*

6. Writs of peace when tenant has put himself on grand assize. (CA. 5.)

7. Writ summoning electors of grand assize, with variations. (CA. 6.)

8. [1] Writ of peace when tenant of gavelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.

9. *Pone* in an action begun by a writ of right. (CA. 4.)

10. [2]*Mort d'ancestor,* with limitation *"post primam coronacionem Ricardi avunculi nostri."* (CA. 16.)

11. *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.

12. *Nuper obiit.*

13. [1] Novel Disseisin, with limitations *"post ultimum reditum J. Regis patris nostri de Hibernia in Angliam."* (CA. 14.) Novel Disseisin of pasture. (CA. 15.)

14. 2 Assizes of Nuisance: some being vicontiel, with limitation *“post primam transfretacionem nostram in Britanniam.”* (CA. 55.)

15. Surcharge of pasture. (CA. 20.)

16. *Quo jure* for pasture.

17. Attaint in *Mort d’ancestor* and Novel Disseisin. (CA. 50.)

18. Perambulation of boundaries.

19. 3 Writ of Escheat: claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.

20. Darrein presentment. (CA. 40.)

21. Writ of right of advowson. (CA. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked *“alio modo sed raro.”*

22. *Quare impedit.* (CA. 52.)

23. Prohibition to Court Christian touching advowson. (CA. 41.)

24. Attachment against judges for breach of such prohibition. (B. 45.)

25. *Ne admittas personam.*

26. Mandamus to admit parson. (CA. 43.)

27. Dower *unde nihil habet.* (CA. 46.)

28. Dower *ad ostium ecclesiae.*

29. Dower in London. (CA. 48.)

30. Dower against deforceor.

31. Writ of right of dower.

32. *Warrantia cartae.* (CA. 10.)

33. *De fine tenendo:* a fine has been made *“tempore J. Regis patris nostri.”* (CA. 51.)

34. *Juris utrum* for the parson. (CA. 49.)

35. *Juris utrum* for the layman. (CA. 49.)

36. Entry, the tenant having come to the land *per* a villan of the demandant.

37. Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (CA. 11.)

38. Entry, the tenant having come to the land *per* one who was guardian.

39. Entry *cui in vita.* (CA. 12.)

40. Entry, the land having been alienated by dowager's second husband.

41. Entry sur intrusion.

42. Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.

43. Entry *sine assensu capituli.*

44. Escheat on death of bastard.

45. Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.

46. Entry when the land has been given *in maritagium.*

47. Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.

48. Entry for reversioner under a fine.

49. Writ of intrusion.

50. *Quod capiat homagium.* (CA. 13.)

51. False imprisonment: *"ostensurus quare predictum A. imprisonavit contra pacem nostram."*

52. Robbery and rape: *"ostensurus de robberia et pace nostra fracta,* vel *de raptu unde eum appellat."* (CA. 22.)

53. Homicide: *"attachiari facias B. per corpus suum responsurus A. de morte fratris sui unde eum appellat."* (CA. 23.)

54. *De homine replegiando.* (CA. 24.)

55. *De plegiis acquietandis: "justifices talem quod . . . acquietet talem."* (B. 32.)

56. *De plegio non stringendo pro debito:* do not distrain pledge while principal debtor can pay. (CA. 32a.)

57. *Quod permittat* for estovers: *"justifices A. quod . . . permittat B. rationabilem estoverium suum in bosco suo quod in eo habere debet et solet."* Variation for right to

fish: *"justifices A. quod permittat B. piscariam in aqua tali quam in eadem habere debet et solet."* (CA. 57.)

58. Debt: *"justifices A. quod . . . reddat B. xij. marcas quas ei debet,"* vel *"catallum ad valenciam xii. marcarum quas* (sic) *ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplios,"* etc. (CA. 27.)

59. Debt and Detinue before the king's justices. *"Precipe A. quod . . . reddat B. xij. marcas quas ei debet et injuste detinet* vel *catallum ad valenciam x. marcarum quod ei detinet, et nisi fecerit . . . summone . . . quod sit coram justiciariis nostris . . . ostensurus quare non fecerit."*

60. Replevin. (CA. 21.)

61. Suit to mill: *"justifices A. quod faciat B. sectam ad molendinum . . . quam facere debet et solet."* (CA. 58.)

62. Customs and services: *"non permittas quod A. distringat B. ad faciendum sectam . . . vel alias consuetudines et servicia que de jure non debet nec solet."*

63. Customs and services: sheriff is not to distrain B. for undue suit to county or hundred court, etc.

64. Customs and services: *"justifices A. quod . . . faciat B. consuetudines et recta servicia, que ei facere debet,"* etc. (CA. 25.)

65. Customs and services, by *precipe: "precipe A. quod faciat B. consuetudines et recta servicia."*

66. Waste: *"non permittas quod A. faciat vastum . . . de domibus . . . quas habet in custodia,* vel *quas tenet indotem,"* etc.

67. Waste: attach A. to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, *"contra prohibicionem nostram."* (Hib. 51.)

68. [1]*De nativo habendo:* let A. have B. and C. his "natives" and fugitives who fled since the last return of our father King John from Ireland. (CA. 17.)

69. *De libertate probanda.* (CA. 18.)

70. *De racionabilibus divisis.* (CA. 19.)

71. *De recordo et racionabili judicio.* Let A. have record and reasonable judgment in your county court in a writ of right. (CA. 7.)

72. Annuity: *"justifices A. quod . . . reddat B. x. sol. quos ei retro sunt de annuo redditu,"* etc.

73. *Ne vexes.* Do not vex, or permit to be vexed, A. or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (CA. 56.)

74. Wardship in socage: *"justifices A. quod . . . reddat B. custodiam terre et heredis C.,"* etc. (CA. 53.)

75. Wardship in chivalry, the guardian claiming the land: *"justifices,"* etc. Variation when the guardian is claiming the heir's person. (CA. 54.)

76. Aid to knight son or marry daughter: *"facias habere A. racionabile auxilium."* (CA. 34.)

77. Covenant: *"justifices A. quod . . . convencionem . . . de tanto terre."* (CA. 36.)

78. Sheriff to aid in distraining villans to do their services.

79. Prohibition against impleading A. without the king's writ. *"R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A. de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii."*

80. *Ne qui simplacitetur qui vocat warrantum qui infra aetatem est.* (CA. 9.)

81. *Ne quis implacitetur qui infra aetatem est.* (CA. 9.)

82. *Quod permittat: "justifices A. quod . . . permittat B. habere quendam cheminum,"* etc., vel *"habere porcos suos ad liberam pessonam,"* etc.

83. Account: *"justifices talem quod . . . reddat tali racionbilem compotum suum de tempore quo fuit ballivus suus,"* etc.

84. Mesne: *"justifices A. quod . . . acquietet B. de servicio quod C. exigit ab eo . . . unde B. qui medius est," etc.* (CA. 33.)

85. *De excommunicatis capiendis.* (CA. 35.)

86. Prohibition to ecclesiastical judges against holding plea of chattels or debt *"nisi sint de testamento vel matrimonio."* (CA. 30.)

87. Prohibition to the party in like case.

88. Attachment on breach of prohibition. (CA. 31.)

89. Prohibition in cases touching lay fee. (CA. 28.)

90. *Recordari facias,* a plea by writ of right in your county court.

91. [1]*Quare ejecit infra terminum. Breve de termino qui non preteriit factum per W. de Ralee: "Si A. fecerit te securum,* etc. . . . *summone,* etc., *B.* etc., *ostensurus quare*

deforciat A. tantum terre . . . quam D. ei demisit ad terminum qui nondum preteriit infra quem terminum predictus (D) terram illam predicto B. vendidit occasione cujus vendicionis predictus B. ipsum A. de terra illa ejecit ut dicit," etc.

92. 2*"Breve novum factum de communi assensu regni ubi de morte antecessorum deficit."* This is the writ of cosinage.

93. 3*De ventre inspiciendo.*

94. *"Novum breve factum per W. de Ralee de redisseisina super disseisinam et est de cursu."* Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.

95. 4*"Novum breve factum per eundem W. de averiis captis et est de cursu."* After a replevin and pending the plea, the distrainor has distrained again for the same cause . . . *"predictum A. ita per misericordiam castiges quod castigacio illa in casu consimili timorem prebeat aliis delinquendi."*

96. *"De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis."* A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.

97. Prohibition to ecclesiastical judges in a suit touching tithes.

98. Writ directing the reception of an attorney in an action. (CA. 37.)

99. *Precipe in capite.* (CA. 3.)

100. Writs directing sheriff to send knights to view an essoinee and hear appointment of attorney. (CA. 38, 39.)

101. Writ to the bishop directing an inquest of bastardy, the plea being one of "general bastardy."

102. Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.

103. *Quod permittat* for common by heir of one who died seized.

104. *Quare duxit uxorem sine licencia. Quare permisit se maritari sine licencia.*

105. 1*Monstraverunt,* for men of ancient demesne.

106. Removal of plea from court baron into county court on default of justice.

107. Surcharge of pasture; *"summone . . . B. quod sit . . . ostensurus quare superhonerat pasturam."* (CA. 20.)

108. Patent appointing justices to take an assise.

109. Prohibition to ecclesiastical judges against entertaining a cause in which B. (who has been convicted of disseising A.) complains that A. has "defamed his person and estate."

110. *De odio et hatia.*

111. Writ of extent. Inquire how much land A. held of us *in capite.*

112. Mainprise, where inquest *de odio et hatia* has found for the prisoner.

113. Writ of seisin for an heir whose homage the king has taken.

114. Writ of inquiry as to whether the king has had his year and a day of a felon's land.

115. *Warrancia diei,* sent to the justices.

116. Extent of land of one who owes money to the Jews.

117. Prohibition against prosecuting a suit touching advowson in Court Christian.

118. Writ to bishop directing an inquiry when bastardy has been specially pleaded: *"inquiras utrum A. natus fuit ante matrimonium vel post."*

119. Writ announcing pardon of flight and outlawry.

120. Writ permitting essoinee to leave his bed. Dated A. R. 33.

121. Abbot of N. has been enfeoffed in N. by several lords who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one "*quia non est moris vel juri consonum quod cum plures hereditates in unicum heredem descenderint vel per acquisicionem aliquis possideat diversa tenementa quod pro illis hereditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A. R. 43.[1]

Our first observation would be, that the Register has quite doubled in bulk since we last saw it; and our second should, as I think, be, that chronology has had something to do with the arrangement of the specimen that is now before us. The last two formulas are dated, and probably constituted no part of the Register that was copied, but were added to it, having been transcribed from writs lately issued. But leaving these two last formulas out of sight, I think that the last thirty writs or thereabouts are, for the most part, new writs tacked on by way of appendix to the older Register. The line might be drawn between No. 90 and No. 91. The latter of these, the very important *Quare ejecit infra terminum,* is expressly ascribed to William Raleigh, Bracton's master, whose judicial activity came to an end in 1239. Then No. 92, the Writ of Cosinage, is "*breve novum,*" and we know that this was conceded by a council of magnates in 1237, and was penned by Raleigh.[2] Then again, No. 94 is attributed to Raleigh. It is the Writ of Redisseisin, given by the Statute of Merton. The last of this group of "Actiones Raleighanæ" (if I may use that term) deals with the recaption of a

distress pending the action of replevin; in spirit it is allied to the Redisseisin.3 The next writ, No. 96, is given by the Statute of Merton. The prohibition in tithe suits, NO. 97, is the centre of a burning question; and so is No. 118, the writ directing the bishop to say whether a child was born before or after the marriage of its parents. One may be surprised to find this writ at all, after the flat refusal of the bishops given at the Merton Parliament. Of the other writs in this part of the *Registrum,* we may, I think, say that they form an appendix, and are not too carefully made, since some of them appeared in the earlier part of the formulary. Others may be writs newly invented, or old writs that have only of late become "writs of course." The *Monstraverunt* for men of ancient demesne, a writ of critical importance in the history of the English peasantry, is no new thing; but very possibly, until lately, it could not be obtained until the matter had been brought under the king's own eye, or at least his chancellor's eye. The same may, perhaps, be said of the equally important *De odio et hatia.*

In the next place, we see one of the causes at work, which, in the course of time, swells the Register of Original Writs to its great bulk. A group of what we may call fiscal or administrative writs have obtained admission among the writs by which litigation is begun. At present it is small: it includes two writs for "extending" land, and a writ directing livery to an heir whose homage the king has taken; in course of time it will become large.

But turning to the formulas of litigation, we see already a large variety of writs of entry; though as yet the tale is not complete, for writs "in the *post*" have not yet been devised, and would, perhaps, be resented by the feudal lords. The Assize of Mort d'Ancestor is now supplemented by *Nuper obiit* and Cosinage. We see signs of growth in the department of Waste. We have something very like a Formedon. Annuity and Account have been added to the list of personal actions, but Trespass is yet lacking.

A few words about Trespass: The MS. registers that I have seen, fully bear out the opinion that has been formed on other evidence as to the comparatively recent origin of this action.1 Glanvill has nothing that can fairly be called a writ of Trespass. His nearest approach to such a writ is "*Justicies,*" ordering the sheriff to compel the return of chattels taken "unjustly and without judgment;" but the chattels have been taken in the course of a disseisin, and the plaintiff has already succeeded in an Assize.1 In later days we do not find this writ; its object seems to have been obtained by the practice of giving damages in the Assize.2 But already, in John's reign, we find a few actions which we may call actions of trespass. In some of these, where there has been asportation or imprisonment, the true cause of action in the royal court seems to be that which our forefathers knew as the "ve de naam;" "vetitum naami;" the refusal to deliver chattels or imprisoned persons upon the offer of a gage and pledge,—a cause of action which had definitely become a plea of the crown.3 Also, it is in some instances a little difficult to distinguish an action of Trespass from an appeal of felony. Just the dropping out of a single word might make all the difference. Thus, on a roll of Richard's reign A. is said to appeal B., C., and D., for that they came to his land with force and arms, and in robbery ("felony" is not mentioned) and wickedly, and in the king's peace carried off his chattels, to wit turves; whereupon B. defends the felony and robbery, and says that he carried off the turves in question from his

own freehold.[4] Attempts were made to use the appeal of felony as an action for trying the title to land,—a very summary action it would have been. But the court of John's reign would not suffer this.[1] On the rolls of the first half of Henry III.'s reign actions of Trespass appear, but they are still quite rare. The advantages of an action in which one can proceed to outlawry are apparent,[2] but something seems to be restraining plaintiffs from bringing it. The novelty of the procedure is shown by the uncertainty of the courts as to its scope, particularly when the action relates to land, and title is pleaded by the defendant. We actually find an action of trespass leading to a grand assize. If title is to be determined at all in such an action, it must be determined with all the solemnity appropriate to a Writ of Right.[3] Bracton, however, who unfortunately has left us no account of this action, shows a reluctance to allow this writ "*quare vi et armis*" to be used for the purpose of recovering land,[4] and a little later we find it repeatedly said that a question of title cannot be determined by such a writ.[5] So late as Edward II.'s reign it was necessary to assert against a decision to the contrary that in an action *de bonis asportatis* the judgment must be merely for damages and not for a return of the goods.[6]

But meanwhile, Trespass had become a common action. This, on the evidence now in print, seems to have taken place suddenly at the end of the "Baron's war." In the *PlacitorumAbbreviatio* we suddenly come upon a large crop of such actions for forcibly entering lands and carrying off goods, and in very many of these the writ charges that the violence was done "*occasione turbacionis nuper habitæ in regno.*" This may suggest to us that in order to suppress and punish the recent disorder, a writ which had formerly been a writ of grace, to be obtained only by petition supported by golden or other reasons, was made a writ of course,—an affair of every-day justice. Such MS. registers as I have seen seem to favor this suggestion. I have seen no register of Henry III.'s reign which contains a writ of Trespass, and it is not to be found even in all registers of his son's reign.

Let us pass on to a new reign. Registers of Edward I.'s time are by no means uncommon. I believe that we have at Cambridge no less than seven which, in the sense defined above, may be ascribed to that age, and there are many at the British Museum. The most meagre of them is far fuller than those Registers of Henry III.'s reign of which we have spoken. To give an idea of their size I may mention a MS. at the Museum (Egerton 656), in which the writs are distributed into groups of sixty; there are seven perfect groups followed by a group which contains but fifty-one members; thus in all there are four hundred and seventy-one writs. This increase in size is of course largely due to the legislative activity of the reign, and this of course makes the various specimens differ very widely from each other in detail. Still I think that I have seen enough to allow of my saying that very early in the reign the general arrangement of the Register had become the arrangement that we see in the printed book. A Register of Edward's day is distinctly recognizable as being the same book that Rastall published under the rule of Henry VIII. Not to lose myself in details about statutory writs, I will draw attention to one principle which may help towards a classification of these Edwardian Registers. That principle is expressed in the question—Does Trespass appear at all, and if so where? There are specimens which have no Trespass; there are others which have Trespass at the end, in what we may

regard as an appendix; there are others again which have Trespass in its final place, namely, in the very middle of the book.

Next I will give a short description of a specimen which I am disposed to give to the earliest years of Edward I. It is contained in a Cambridge MS. (Ee. i. 1) which I will call CC, and the following notes of its contents may be enough. For the purpose of making its scheme intelligible I have supposed it to consist of various groups of writs and have given titles to those groups, but it will be understood that the MS. gives the writs in an unbroken series, a series unbroken by any headings or marks of division.

1. *The Writ of Right Group.* This includes the Writ of Right *de rationabile parte;* Writ of Right of Dower; *Praecipe in capite;* Little Writ of Right; Writs of Peace, and writs summoning the Grand Assize or Jury in lieu of Grand Assize; writ for viewing an essoinee; writs announcing appointment of attorney; *Warrantia diei; Licencia surgendi; Pone; Monstraverunt.*

2. *The Ecclesiastical Group.* Writ of Right of Advowson; Darrein Presentment: *Quare impedit; Juris utrum;* Prohibition to Court Christian in case of an advowson; Prohibition to Court Christian in case of chattels or debts; Prohibition against Waste;[1] Prohibition in case of lay fee. Then follow seven specially worded prohibitions introduced by the note "*Ostensis formis prohibicionum que sont de cursu patebit inferius de eis que sunt in suis casibus formate et sunt de precepto.*" After these come the *De Excommunicato capiendo* and other writs relating to excommunicates.

3. *The Replevin and Liberty Group.* Replevin; a writ directed to the coroners where the sheriff has failed in his duty is preceded by the remark "*primo inventum fuit pro Roberto de Veteri Ponte;*" *De averiis fugatis ab uno comitate in alium; De averiis rescussis; De recaptione averiorum; Moderata misericordia; De nativo habendo,* the limitation is "*post ultimum reditum Domini J. Regis avi nostri de Hibernia in Angliam;*" *De libertate probanda;* Aid to distrain villans; *De tallagio habendo; De homine replegiando; De minis,* i. e. a writ conferring a special peace on a threatened person.[1]*De odio et atia* (with the remark that the clause beginning with *nisi* was introduced by John Lexington, Chancellor of Henry III.).

4. *The Criminal Group.* Appeal of felony evoked from county court by *venire facias;* writ to attach one appealed of homicide by his body; writs to attach other appellees by gage and pledge.

5. *A Miscellaneous Group. De corrodio substracto; De balliva forrestarii de bosco recuperanda; Quod attachiet ipsum qui se subtraxit a custodia; Quod nullus implacitetur sine precepto Regis.* Various forms of the *Quod non permittat* and *Quod permittat* for suit of mill, etc.

6. *Account.* Account against a bailiff ("*Et sciendum est quod filius et heres non habebit hoc breve super ballivum domini* [corr. *antecessoris*] *sin, set ut dicitur executores possunt habere hoc breve super ballivum tempore quo fuit in obsequio defuncti;*" it proceeds to give a form of writ for executors in the king's court and then

adds, "*Et hoc breve potest fieri ad placitandum in comitatu. Verumptamen casus istorum duorum brevium mere pertinet ad curiam cristanitatis racione testamenti*").

7. *Group relating chiefly to Easements and the duties of neighbors.* Aid to knight eldest son; *De pontibus reparandis—muris—fossatis; De curia claudenda; De aqua haurienda; De libero tauro habendo; De racionabile estoverio; De chimino habendo; De communa,* with variations; Admeasurement of pasture; *Quo jure; De racionalibus divisis; De perambulacione; De ventre inspiciendo.*

8. *Mesne, Annuity, Debt, Detinue, etc. De medio; De annuo reditu; De debito* (only two writs of debt, one a *precipe,* the other a *justicies;* the former has "*debet et detinet,*" the latter "*detinet*"); *Ne plegii distringantur quamdiu principalis est solvendus; De plegiis acquietandis; De catallisreddendis;* (Detinue by *precipe* and by *justicies*); *Warrantia cartae.*

9. *Writs of Customs and Services.*

10. *Covenant and Fine.* The covenant in every case is "*de uno messuagio.*"

11. *Wardship. De custodia terre et heredis; De corpore heredis habendo; De custodia terre sine corpore; Aliter de soccagio.* "*Optima brevia de corpore heredis racione concessionis reddende* [sic] *executoribus alicui defuncti.*"

12. *Dower.* Dower *unde nihil; De dote assensu patris; De dote in denariis; De dote in Londonia; De amensuracione dotis.*

13. *Novel Disseisin.* Novel *disseisin,* the limitation is "*post primam transfretacionem domini H. Regis anni*[1] [sic] *nostri in Brittanniam*"; *De redisseisina;* Assize of nuisance; Attaint.

14. *Mort d'Ancestor,* and similar actions. Mort d'Ancestor, (no period of limitation named); Aiel; Besaiel (*Multi asserunt quod hoc breve precipe de avio et avia tempore domini H. Regis filii Regis Johannis per discretum virum dominum Walterium de Mertone*[2]*tunc secretorium clericum et prothonotorium* [sic] *cancellarie domini Regis et postmodum cancellarium primo fuit adinventum quia propter recentem seisinam et possessionem et discrimina brevis de recto vitandum ab omnibus consilariis et justiciariis domini Regis est approbatum et justiciariis demandatum quod illud secundum sui naturam placitent*"); Cosinage; *Nuper obiit* ("*Et hoc breve semper est de cursu ad bancum in favorem petentis seisinam quod antecessor petentium habuit de hereditate sua et similiter ut vitentur dilaciones periclose que sunt in breve de recto.*")

15. *Quare ejecit infra terminum,* ascribed to Walter of Merton;[3] Writs of Escheat.

16. *Entry and Formedon.* Numerous Writs of Entry, the degrees being mentioned (no writ "in the *post*"); Formedon in the Reverter; and a very general Formedon in the Descender.[1]

17. *Miscellaneous Group.* License to elect an abbot; petition for such license; form of presenting an abbot elect to the King; pardons; grants of franchises; a very special writ for R. de N. impleaded in the court of W. de B.; *De languido in anno bissextili* (concerning an essoin for a year and a day in leap year); *Breve de recapcione averiorum post le Pone; Quod non fiat districtio per oves vel averiis* [sic] *carucarum; Ne aliquis faciat sectam ad comitatum ubi non tenetur; Ne faciat sectam curie ubi non tenetur;* some specially worded Prohibitions.

In substance this MS. seems to represent the Register as it stood in the very first years of Edward I. I do not think that any of the statutes of his reign have been taken into account and doubt whether even the Statute of Marlborough (1267) has yet had its full effect. There is no Writ of Entry "in the *post*" and some writs about distress and suit of court founded on statutes of Henry III. still remain unassimilated in a miscellaneous appendix. The character of that appendix provokes the remark that the copyists of the Register may often have picked and chosen from among the miscellaneous forms of the Chancery those which would best suit the special wants of themselves or their employers. The *congé d'élire,* for example, looks out of place, and the petition for such a license still more out of place; but this is a monastic manuscript and these formulas were useful in the abbey.

I said above that Glanvill's scheme of the law, or rather his scheme of royal justice, might be displayed by some such string of catch words as the following: "Right" (that is proprietary right in land), "Church," "Liberty," "Dower," "Inheritance or succession," "Actions on Fines," "Lord and Tenant," "Debt," "Attorney," "Justice to be done by feudal lords and sheriffs," "Possession," "Crime." Now I will venture the suggestion that the influence of his book is apparent on the face of the Register (CC) and all the later Registers. It begins with "Right" while it puts "Possession," a title which now includes the Writs of Entry as well as the Assizes, at the very end. After "Right" comes "Church," and after "Church" comes "Replevin and Liberty," a title the unity of which is secured by the fact that when a man is wrongfully deprived of his liberty he ought to be replevied. The middle part of the Register is somewhat chaotic, and so it always remains; but it is really less chaotic than it may seem to some of us, whose heads are full of modern notions. We seem indeed to be carried backwards and forwards across the line which divides "personal" and "real" actions; Account, Annuity, Debt, Detinue, and Covenant are intermixed with actions founded on feudal dues and actions founded on easements, writs for suit of mill, suit of court, repair of bridges, actions of Mesne, actions of Customs and Services. The truth, as it seems to me, is that the line between "real" and "personal" actions as drawn in later books is, at least when applied to our medieval law, a very arbitrary line. For example, there is an important connection between an action in which a surety sues the principal debtor (*de plegio acquietando*) and an action of Mesne, in which the tenant in demesne sues the intermediate lord to acquit or indemnify him from the exaction of the superior lord; this connection we miss if we stigmatize "Mesne" as a "real action" just because it has something to do with land. The action of Debt, again, is founded on a *debet;* but so is the action for Customs and Services, at least in some of its forms. However I am not concerned to defend the Register.

In Edward I.'s day, partly it may be under the influence of Glanvill's book, it has become an articulate body. It will never hereafter undergo any great change of form, but it will gradually work new matter into itself. Such new matter will for a while lie undigested in miscellaneous appendixes, but in course of time it will become an organic part of the system. I will mention the most striking illustration of this process.

Hitherto we have never come across that action of Trespass which is to be all important in later days and it seems to me a very noteworthy fact that there are Registers of Edward I.'s day that omit this topic. It gradually intrudes itself. First we find it occupying a humble place at the end of the collection among a number of new writs due to Edward's legislative zeal. Thus, to choose a good example, there is in the Cambridge Library a MS. (Ll. iv. 18) containing a Register which is very like that (Ee. i. 1.) which we have last described. But when it has done with the Writs of Entry, it turns to Formedon, gives writs in the Reverter, Descender, and Remainder, and a number of specially worded writs of Formedon which bear the names of the persons for whom they were drawn:—we have Bereford's formedon, Mulcoster's, and Mulgrave's; clearly the Statute of Westminster II. is in full operation. Then upon the heels of Formedon treads Trespass. It is a simple matter as yet, can be represented by one writ capable of a few variations—*insultum fecit et verberavit, catalla cepit et asportavit, arbores crescentes succidit et asportavit, blada messuit et asportavit, separalem pasturam pastus fuit, uxorem rapuit et cum catallis abduxit.* Trespass disposed of, we have Ravishment of Ward; *Contra formam feffamenti; Ne quis destringatur per averia carucae;* Contribution to suit of court; Pardons; Protections; *De coronatore eligendo; De gaola deliberanda; De deceptione curiæ; cessavit per biennium; carta per quam patria de Ridal disafforestatur; Breve de compoto super Statutum de Acton Burnell,* and so forth and so forth, in copious disorder. The whole *Registrum* fills fifty-two folios, of which no less than the last fourteen are taken up by the unsystematized appendix. Another MS. (Ll. iv. 17) gives a Register of nearly the same date, perhaps of somewhat earlier date, for it does not contain the new Formedons. This again has an unsystematized appendix, and in that appendix Trespass is found. The place at which it occurs may be thus described:—the part of the Register that has already become crystallized, the part which ends with the Writs of Entry, having been given, we have the following matters: Pardon: License to hunt; Grants of warren, fair, market; *De non ponendo in assisam,* Writ on the Statute of Winchester; Leap year; Inquests touching the King's year and day; Contribution; Beau pleader; Trespass; Gaol Delivery; Intrusion; *congé d'élire; Quo Warranto;* Trespass again; Writ on the Statute of Gloucester; Mortmain; Trespass again (*pro cane interfecto*); *ne clerici Regis compellantur ad ordines suscipiendos,*—as variegated a mass as one could wish to see. Other MSS. of the same period have other appendixes with Trespass in them. They forcibly suggest that the Register was falling into disorder, the yet inorganic part threatening to outweigh the organic.

There came a Chancellor, a Master, a Cursitor with organizing power; Trespass could no longer be treated as a new action; a place had to be found for it, and a place was found. It may be that this was done under Edward I.; certainly in his son's reign it seems an accomplished fact. What was the place for Trespass? If the reader will look back at our account of the Register which we have called CC, he will find that we have labelled the third group of writs as "Replevin and Liberty," the fourth group as

"Criminal." The connection between Replevin and Liberty is obvious, it is seen in the writ *De homine replegiando,* the writ for replevying a prisoner. The transition from Liberty to Crime is mediated by the writ *De odio et atia,* a writ for one who says that he is imprisoned on a false accusation of crime. Now when the time had come for taking up Trespass into the organic part of the Register, this was the quarter in which its logical home might be found. It was naturally brought into close connection with "crime." Throughout the Middle Ages, Trespass is regarded as a crime; throughout the Year Books the trespasser is "punished;" and it is a very plausible opinion that the earliest actions of trespass grew out of appeals of felony; they were, so to speak, mitigated appeals, appeals with the "*in felonia*" omitted, but with the "*vi et armis,*" and the "*contrapacem*" carefully retained. Already in the Register that I have called CB, a writ of false imprisonment has come in immediately before the writ for attaching an appellee. Then, in CC, a writ *De minis* has forced its way into the "Replevin and Liberty Group" so as to precede the writs against an appellee. This writ *De minis,* commanding the sheriff to confer the king's peace, the king's "grith" or "mund" we may say, on a threatened person, and to make the threatener find security for the peace is the herald of Trespass: *De minis—De transgressione,* this becomes a part of our "*legalis ordo.*"

The result in the fully developed Register is curious, showing us that the arrangement of the book is the resultant of many forces. Let us see what follows Waste. We have the *De homine replegiando,* then the Replevin of chattels, then, returning to men deprived of liberty, the *De nativo habendo* and the *De libertate probanda;* these naturally lead to the writ ordering the sheriff to aid a lord in distraining his villans. There follows the *De scutagio habendo.* Why should this come here? Because in older times villanage had suggested tallage; this had been the place for a *De tallagio habendo* and then tallage had suggested scutage. Then in the printed Register we have the *De minis;* and then an action against one who has given security for the peace and has broken it by an assault, brings upon us the whole subject of Trespass, which with its satellites now fills some forty folios, some eighty pages. And then what comes next? Why *De odio et atia;* we are back again at that topic of "Liberty and Replevin" whence we made this long digression. Meanwhile these criminal writs, these writs for attaching appellees which originally attracted Trespass to their quarter of the Register, have disappeared as antiquated, since persons accused of felony now get arrested without the need of original writs.

Similar measures were taken for writing into appropriate places the result of the legislation of Edward I.; but the formation of new writs was constantly providing fresh materials. Some of these found a final resting-place at the very end of the Register, but for most of the statutory writs, a home was found in the middle. The occurrence of the Assize of Novel Disseisin marked the beginning of a new and logically arranged section of the work, a section devoted to Possession. It is between Dower and Novel Disseisin that the newer statutory writs are stored.

As already said, the printed Register is full of notes and queries. Many of these are ancient, some as old as the reign of Edward I. Speaking broadly one may say that the Latin notes are ancient, the French notes comparatively modern. Some of them must

have been quite obsolete in the reign of Henry VIII.; but the "*vis inertiae*" preserved them. When once they had got into MSS. they were mechanically copied.

During the whole of the fourteenth century the Register went on growing and by the aid of MSS., we can still catch it in several stages of its growth. Some of these MSS. show a Register divided into chapters, and thus make it possible for us to perceive the articulation of the book. As the printed volume gives us no similar aid, I will here set out the scheme of a Register which I attribute to the reign of Richard II. It is contained in a Cambridge MS. (Ff. v. 5). I the right-hand column I give the catch-words of its various chapters; in the left-hand column I refer to what I take to be the scheme of CC, the Register from the beginning of Edward I.'s reign, of which mention has already been made.

1.	The Writ of Right Group.	i.	*De recto.*
		ii.	*De recto secundum consuetudinem manerii.*
		iii.	*De falso judicio.*
		iv.	*De attornato generali; Protectiones.*
		v.	*De attornatis faciendis.*
2.	The Ecclesiastical Group, including Waste.	vi.	*De advocatione; De ultima presentacione; Quare impedit; juris utrum.*
		vii.	*De prohibitione.*
		viii.	*Consultationes.*
		ix.	*De von residentia; De vi laica ammovenda,* etc.
		x.	[1]*Ad jura regia.*
		xi.	*De excommunicato capiendo,* etc.
		xii.	*De vasto.*
3.	Replevin and Liberty Group.	xiii.	Replevin generally and *De homine replegiando.*
		xiv.	Trespass and Deceit *(transgressio in deceptione).*
		xv.	[2]Error.
[4	Criminal Group dissolved.]	xvi.	*Conspiratio; De odio et atia.*
5.	[Miscellaneous Group. See cap. xix].		
6.	Account.	xvii.	Account.
		xviii.	Debt and Detinue.
7.	Easements, Neighborly Duties, etc.	xix.	*Secta ad molendinum; curia claudenda; Quod permittat,* etc.; *Quo jure;* Admeasurement of pasture; Perambulation; *Warrantia cartae; De plegiis acquietandis.*
8.	Mesne, Annuity, Debt, Detinue.	xx.	Annuity; Customs and Services; Detinue of Charters; Mesne.

1 A group of especially stringent prohibitions called out by papal and ecclesiastical aggression.

2 The topic of Error is suggested by Trespass, just as the topic of False Judgment is suggested by “Right.”

3 The action on a fine by original writ has disappeared, because fines are now enforced by *Scire Facias.* This is noted in the printed Register, f. 169.

4 Here come two chapters of statutory appendix.

1 Here begins a long appendix consisting mainly of documents that may be called administrative.

9.	Customs and Services.		
10.	Covenant and Fine.3	xxi.	Covenant.
11.	Wardship.	xxii.	Wardship.
12.	Dower.	xxiii.	Dower.
		xxiv.	4*Brevia de Statuto* (Modern Statutory Actions)
		xxv.	*De ordinatione contra servientes* (Actions on the Statute of Laborers.
13.	Novel Disseisin.	xxvi.	Novel Disseisin.
		xxvii.	*De recordo et processu mittendo* (Writs ancillary to the Assizes).
14.	Mort d'Ancestor, and similar writs.	xxviii.	Mort d'Ancestor.
		xxix.	Aiel, Besaiel, *Nuper Obiit,* etc.
15.	*Quare ejecit.*	xxx.	*Quare ejecit; De ejectione firmae.*
16.	Entry.	xxxi.	Entry *ad terminum qui preterut.*
		xxxii.	Entry, *Cui in vita.*
		xxxiii.	Intrusion.
		xxxiv.	Entry for tenant in dower.
		xxxv.	Cessavit.
		xxxvi.	Formedon.
		xxxvii.	*De tenementis legatis.*
17.	Miscellaneous group.	xxxviii.	1*Ad quod damnum.*
		xxxix.	*De essendo quieto de theolonio.*
		xl.	*De libertatibus allocandis.*
		xli.	*De corrodio habendo.*
		xlii.	*De inquirendo de idiota; De leproso amovendo,* etc.
		xliii.	Presentations by the king, etc.
		xliv.	*De manucaptione et supersedendo.*
		xlv.	*De profero faciendo; De mensuris et ponderibus.*
		xlvi.	*De carta perdonacionis se defendendo.*

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Appendix. *De indemptitate nominis.* Statutory writs; *Decies tantum,* etc.

1 A group of especially stringent prohibitions called out by papal and ecclesiastical aggression.

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1 Here begins a long appendix consisting mainly of documents that may be called administrative.

A Register from the end of the fourteenth century is in point of form the Register that was printed in Henry VIII.'s day. If I might revert to my architectural simile, I should say that the cathedral as it stood at the end of Richard II.'s reign was the cathedral in its final form; some excrescent chantry chapels were yet to be built but the church was a finished church and was the church that we now see. In the printed book we can detect but very few signs of work done under Tudor or even under Yorkist kings, and though the Lancastrian Henries have left their mark upon it, still that mark is not conspicuous. I should guess that the last occasion on which any one went through the book with the object of adding new writs and new notes occurred late in the reign of Henry VI.[1] On the other hand we constantly find references to decisions of Richard II.'s time, and there are many signs that the book was revised and considerably enlarged in the middle of Edward III.'s reign; allusions to decisions given between the tenth and twentieth years of the lastnamed king are particularly frequent, and we read more of Parning than of any other chancellor. This is a curious point. Robert Parning, as is well known, was one of the very few laymen, one of the very few common lawyers, who during the whole course of medieval history held the great seal. He held it for less than two years; he became chancellor in October, 1341 and died in August, 1343; yet during this short period, he stamped his mark upon the Register. The policy of having a layman (a "layman," that is, when regarded from the ecclesiastical not the legal point of view) as chancellor was very soon abandoned; few if any laymen were endowed with the statecraft and miscellaneous accomplishments required of one who was to act as "principal secretary of state for all departments." But within the purely legal sphere, as manager of the "*officina brevium,*" a great lawyer who had already been chief justice may have found congenial work. After all, however, it may be chance that has preserved his name in the pages of the Register; just in his day some clerk may have been renovating and recasting the old materials and thus have done for him what some other clerk a century earlier did for William Raleigh.

During the fifteenth century the Register increased in bulk but except in one department there seem to have been but few additions made to the formulas of litigation; the matter that was added consisted, if I mistake not, very largely of documents of an administrative kind,—pardons, licenses to elect and other licenses, letters presenting a clerk for admission, writs relating to the management of the king's estates, writs for putting the king's wards in seisin, and so forth, lengthy formulas which conceal what I take to be the real structure of the Register. As a final result we

get some seven hundred large pages, whereas we started in Henry III.'s day with some fifty or sixty writs capable of filling some ten or twelve pages. The department just mentioned as exceptional is of course the department of Trespass. Here there has been rapid growth; but I do not think that the printed book can be taken as fairly representing the law of the time when it was printed, namely 1531. It draws no line at all between "Trespass" and "Case." The writs that we call writs of "Trespass upon the special Case" are mixed up with the writs which charge assault, asportation, and breach of close, and are very few. Writs making any mention of assumpsit are fewer still, and I think that there is but one which makes the non-feasance of an assumpsit a ground of action.[1] I should suppose that the practice of bringing actions by bill without original writ checked the accumulation of new precedents in the Chancery, and it seems an indubitable fact that the invention of printing had some evil as well as many good results; men no longer preserved and copied and glossed and recast the old manuscripts. But when all is said it is a remarkable thing that a Register which certainly did not contain the latest devices should have been printed in 1531, reprinted in 1595, and again reprinted in 1687. The consequence is that Trespass to the last appears as an intruder. No endeavor has been made to reduce the writs that come under that head to logical order. The forces which have determined the sequence of these writs seem chiefly those which I have called "chronology" and "mechanical chance;" as new writs, as they were made, were copied on convenient margins and inviting blank pages. There has been no generalization; the imaginary defendant is charged in different precedents with every kind of unlawful force, with the breach of every imaginable boundary, with the asportation of all that is asportable, while the now well-known writs against the shoeing smith who lames the horse, the hirer who rides the horse to death, the unskilful surgeon, the careless innkeeper creep in slowly amid the writs which describe wilful and malicious mischief, how a cat was put into a dove-cote, how a rural dean was made to ride face to tail, and other ingenious sports. It would be interesting could we bring these Registers to our aid in studying the process whereby Trespass threw out the great branch of Case, and Case the great branch of Assumpsit; but the task would be long and very difficult, because the Registers are so many, and unless we compare all of them our means of fixing their dates are few and fallible. Of course, if the task concerned the history of Roman Law it would be performed; but we are all fully persuaded, at least on this side of the Atlantic, that our own forefathers were not scientific.

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37.

AN ACTION AT LAW IN THE REIGN OF EDWARD III.[1]

By Luke Owen Pike[2]

IT has been suggested that a paper on the relation of the reports of cases in the Year Books to the records of the same cases found among the Public Records might be of some interest to those readers who are giving attention to the history of law and of legal procedure. In the following pages an attempt is made to show, not in very great detail (for the details would be endless), but in a general way, in what manner the two sources of information differ, and why.

The report and the record were drawn up for two wholly different purposes. The report was intended for the use of the legal profession, including the judges. It was designed to show general principles of law, pleading, or practice. It was, of course, always a report of a particular case, but of one reported solely because it contained, or was supposed to contain, matter of general use. For this reason, the names of the parties and of places were frequently omitted, or represented by letters chosen at hazard, or, if given at all, given most inaccurately. They were not the facts which the lawyer wished to know, and would not help to guide him in his pleading, except in cases in which an argument turned upon a description or a misdescription.

The record, on the other hand, was drawn up for the purpose of preserving an exact account of the proceedings in the particular case, *in perpetuam rei memoriam,* but only in the form allowed by the court. The report contains not only the pleadings eventually accepted, but often the reasons or arguments which preceded each, and the reasons or arguments for which other pleadings were disallowed. The record contains no arguments, and no pleadings but those actually allowed. Although it is possible to see in the report the pleadings which were admitted, they are not verbally identical with the corresponding entries on the roll. The pleadings in court were in French, but those entered upon the roll by the clerk or registrar were in Latin.

For these reasons, it frequently happens that the record in Latin differs widely from the report in French, each containing matter which is absent from the other, each serving to illustrate the other, and, for historical purposes, neither being complete without the other. The report tells how the judges and counsel addressed each other, the courtesy which they showed or did not show to each other, their education according to the principles on which education was conducted in those days, and sometimes, though rarely, their powers of making a joke. The record helps towards none of these things; but, though wanting the life and action of the report, brings to light, in a calmer fashion, innumerable details without which a perfect picture of the social condition of the country cannot be drawn.

It will, perhaps, be asked, how can the record of any case in any term be identified as that which corresponds with any particular report of the same term, when the names of persons and places are not stated in the report itself? The task does, indeed, at first seem hopeless, and certainly presents considerable difficulties. It can nevertheless be accomplished, when the report is of any importance, though the search has to be made through a roll consisting of five or six hundred skins of parchment, closely written on both sides, without index, and with no guide except the name of the county in the margin, which, in the case supposed, is no guide at all.

The report, let us suppose, is a report of an action of formedon in the descender brought by A against B, in respect of lands in C, the donor having been D. It is, of course, necessary to know how an action of this kind is entered on the roll, the form in which the contents of the original writ are represented, and where the count begins. The roll is then examined until a formedon in the descender is found. This is compared with the admitted pleadings in the report, and it will usually be found either to agree so closely as to leave no reasonable doubt that the case is the same, or to differ so widely as to leave no reasonable doubt that it is not. In the latter event, further search must be made, and so on, from case to case, until the one sought is discovered.

As the different kinds of actions were numerous, the number of actions of any one kind on the roll of any particular term is necessarily limited. There were three kinds of actions of formedon alone (in the descender, in the reverter, and in the remainder), each entered in a different form according to its nature. In looking for any particular case, technical knowledge consequently becomes its own reward, and abridges a labor which would otherwise be absolutely deterrent. The reward, too, is substantial, because not only do A, B, and D become persons with real names and additions, and not only does C become a known parish in an ascertained county, but the doubts left by corruptions or discrepancies in the manuscripts of the reports are removed, and the actual pleadings and the actual judgment are made clear beyond all possibility of question.

General principles are often most easily apprehended through particular instances. Let us now follow a case from beginning to end. A dispute arises in relation to land. The person who feels aggrieved, or his adviser, goes to the Chancery and sues out the original writ which is supposed to be applicable to the particular grievance. The Court of Common Pleas or Common Bench is the court which has jurisdiction in pleas of land, and the tenant (or party opposed to the demandant) is or ought to be summoned or warned by the sheriff, by due process, to appear. A comparatively simple case, which may serve our purpose, occurred in Michaelmas Term, 15 Edward III. (No. 71). It was a case of *cessavit,*—one in which a religious house, having had lands given to it on condition of performing certain services, had, as alleged, ceased to perform them for a period of two years. The demandant, in an action of this nature, hoped, by establishing his claim, to recover seisin of the lands in respect of which the services were due.

From the report of this case we learn that the tenant was the Abbot of Creake; but it does not tell us either who was the demandant, or where the lands were situated. In

the record1 it appears that the demandant was Margaret, late wife of John de Roos, and that the lands were in Gedney, in the county of Lincoln. In the report, the services by which the abbot was supposed to hold are said to be those of finding certain chaplains to sing divine services in her chapel (that is to say matins, mass, vespers, etc.), and of feeding certain poor persons, who were to receive daily certain loaves, etc., as well as "by a certain rent." No further details are given. In the count, however, as entered on the roll, there is far more information, and that of a character which illustrates the life of the people. The demandant counted that the abbot held of her by fealty and the service of three shillings per annum, and by the service of finding one chaplain who was to celebrate daily in the chapel of Saint Thomas the Martyr, situate in a certain messuage which was formerly John Dory's, divine services, which include not only matins, mass, and vespers, but certain prayers named, and others. The feeding of certain poor persons is seen to be the sustenance of five poor persons daily; that is to say, finding for each of them daily one loaf of the weight of fifty *solidi,* with porridge and ale, and finding a dish of meat, or fish, or other food, according to the day, between two of them, and half a dish for the fifth. Each of them was to have also a cloth tunic, suitable to his condition, every other year.

After the count, on the other hand, many matters appear in the report which are not on the roll. Counsel for the abbot, carefully guarding himself against any admission that he is tenant of the freehold or holds of the demandant, pleads in abatement of the count or declaration, which, he says, is not warranted either by statute or by common law. He complains that the demandant's counsel has included in the same count or declaration two different kinds of service, the cesser of which would produce two different effects. The tender of the arrears of the secular services might save the tenancy, whereas no tender could be made of the arrears of the spiritual services, the cesser of which would involve a forfeiture. It must, for instance, be obvious that the arrears of rent could be paid, whereas the omission of the daily performance of divine services in a chapel could never be made good in respect of days which had passed. Counsel for the demandant then says the exception taken applies to the action as commenced by a writ in the common form, because, if the count is not allowed, the particular action comes to an end. Counsel for the abbot practically accepts this argument, repeating that the count cannot be maintained on a common writ, and that the demandant ought to have had a special writ applicable to the particular case. Counsel for the demandant then argues by the analogy of such services as reapings and ploughings, for which a *cessavit* lies, even though arrears be tendered. Counsel for the abbot declines to discuss that point, but repeats that services of two different kinds are included in one declaration or count, whereas by the Statute of Gloucester (c. 4) one writ is given in respect of one kind of services, and by the Statute of Westminster the Second (c. 41) another writ is given in respect of the other kind. The chief justice here decides the point in favor of the demandant, saying that there cannot be two writs in this case, and that the plea is, in fact, to the action of *cessavit.*

Counsel for the abbot then pleads non-tenure: "We are not tenants of the freehold; ready, etc." Counsel for the demandant attempts to deprive him of this plea, on the ground that he has already pleaded to the action by his previous plea in abatement of the count. The court, however, holds otherwise. Counsel for the demandant then argues that this general plea of non-tenure is not good without a specific allegation

that the tenant does not hold of the demandant: "In this writ of *cessavit,* which is taken on the cesser and on the tenancy, if he take his plea by way of disclaimer in the freehold, it is no answer unless he say that he does not hold of us, and so take his plea to the action, or unless he admit that he holds of us as mesne, but say that the writ does not lie because another is tenant of the freehold." Counsel for the abbot easily demolishes this argument, saying: "If I be not tenant of the freehold, whether I hold of you or not, the writ does not lie. Will you accept my averment that the abbot is not tenant of the freehold?" The report shows further only that issue was joined on this point.

The count, we may be sure, was not entered upon the roll until it had been held good by the court; but there was no necessity to enter the objections which were insufficient to abate it. In like manner, the plea would not have been entered until the court had allowed it. Thus, all matters occurring in the report between the accepted count and the accepted plea are omitted from the roll. As soon as the plea is reached, however, the roll again becomes the best, and, at the end, the only source of information. The reporter's work was done when he had shown, not only what were the pleadings on which disputes occurred, but how and on what grounds the disputes were settled.

According to the roll, the plea for the abbot was that he did not then hold the tenements, and did not hold them on the day of the purchase of the writ. The demandant replied that on the day of the purchase of the writ,—to wit, on the first day of May,—the abbot did hold; and issue was joined thereon to the country. The *postea* is also entered on the roll, showing how, at *nisi prius,* a jury found that the abbot did hold on the day of the purchase of the writ. Judgment was accordingly given for the demandant to recover seisin.

In this case the entry of the judgment upon the roll was of vital importance to the demandant, as she and her heirs acquired a new root of title thereby,—a title no longer to the services, but to the land itself. This, however, did not concern the reporter, or the profession for the benefit of which he reported.

There were, however, cases in which the entry of certain matters upon the roll became of importance at stages previous to the entry of judgment. In Hilary Term, in the twelfth year of Edward III. (pages 373-75), an heir brought an action against his father's executors to recover a charter by which it appeared that the father had been enfeoffed of certain land in fee, and which he ought to have as the holder of the land. For the executors it was pleaded that the feoffment was upon condition (as shown by indenture, of which *profert* was made) that, whenever the feoffor or his heirs should pay the feoffee or his heirs or executors £40, it should be lawful for the feoffor or his heirs to reenter upon the land, and the charter should be held as null. The feoffee in his will directed that the £40 (if paid) should be given to a prior. Judgment was therefore prayed whether the heir could have an action to recover the charter, which would lose its force if the £40 were paid to the executors. Judgment, however, was given that the charter should be delivered to the heir, because the executors could not deny that he was seised of the land as heir, and could not say that the money had been paid to them, or that they had an action to demand it. It would appear that, in the absence of any express direction to the contrary, the special plea on behalf of the

executors would have been omitted from the roll, and that the declaration or count would have been followed by the simple entry that the executors could say nothing wherefore the charter should not be delivered. The counsel for the executors, however, prayed that the whole of his plea might be entered on the roll, as a protection to them against damages, in case the feoffor or his heirs should at any future time wish to pay the £40. To this the court consented, and the plea would consequently have been enrolled in its proper place.

In many cases it is apparent that the court directed, *ex officio,* what should be entered on the roll. Thus, in an oyer and terminer in Trinity Term, 12 Edward III. (pp. 615-617), where the felling of trees was alleged, the defendant claimed estovers, and on that ground avowed the carrying away of the trees, as not being against the peace, and prayed judgment whether any tort could be assigned thereon. It is not quite clear what was the plaintiff's reply, but the court decided that the issue should be that the defendant had with force and arms felled and carried away the trees, *absque hoc* that the defendant had estovers. The issue was accordingly so entered on the roll, notwithstanding that this replication was not expressly pleaded.

It may, perhaps, be thought that the clerk or registrar had a difficult task to perform in entering the pleadings correctly on the roll, and that occasionally he failed. Failure did occur sometimes, and the roll had to be amended by order of the court. Sometimes also apparently the clerk (who was a very important officer, often consulted by the judges with regard to points of practice) discovered his own mistake, and corrected it by substituting an entirely new record of the case for one erroneously entered.

In the sixteenth year of Edward III.[1] there are two records of one and the same case.[2] The first is incomplete; the second is in a different form, and complete. The clerk, however, omitted to vacate the first by placing in the margin the usual words "*vacat quia alibi.*" The proceedings were on the judicial writ of *Quid juris clamat,* brought for the purpose of compelling tenants for life to attorn after a fine had been levied. The tenants, husband and wife, alleged that the wife's estate was an estate tail in virtue of a previous fine, and not a mere estate for life, as purported in the fine on which the *Quid juris clamat* was brought. Then arose a question whether the tenants could be admitted to aver this in opposition to the particular fine on which suit was taken. The court held that they could, and that the fact must be tried by a jury, adding that the whole matter should be entered on the roll, and that inquiry should be had as to the whole.

In making the first entry on the roll a mistake had occurred with regard to the process by which the tenants were required to appear, *Distringas* having been substituted for *Venire facias.* There is also an important difference between the first entry and the second as to the tenor of the earlier fine. In the first it is stated that the tenements had been granted and rendered to the wife and her previous husband and the heirs of their bodies, that they therefore claimed a fee tail in the person of the wife, and that they prayed judgment whether they ought to attorn in respect of such an estate. This was in accordance with the earlier part of the report; counsel for the tenants having distinctly used the words "fee tail," on the ground apparently that the wife was what would in later times have been called tenant in tail after possibility of issue extinct. In the

second entry, however, the express claim of a fee tail is omitted, and the following words are substituted: "So that if the same Robert and Margaret (the first husband and the wife) should die without heir of their bodies, the tenements should remain to the right heirs of Robert, and they say that Robert died without heirs issuing from his body and the body of Margaret, and they claim to have such an estate in the person of Margaret, and pray judgment whether they ought to attorn in respect of such an estate." This also is in accordance with the later part of the report, counsel having changed the form of pleading after argument.

We thus see how faithfully the clerks attempted to place the pleadings on the roll, and the difficulties with which they were beset. The second entry on the roll is, no doubt, a faithful representation of the matter which the court directed to be enrolled, as the first entry was of words which had, in the first instance, fallen from the mouth of counsel. The second entry shows the conclusion of the case,—the verdict for the demandants, to the effect that Margaret and her husband held only for life (as supposed by the fine on which proceedings were instituted), and judgment for the demandants to recover seisin. In the report these details are deferred to a later term.

It sometimes happens that there are widely different reports of the same case, one, perhaps, giving the names of the parties, and another not; one omitting matter which another includes; and one even absolutely at variance with another in relation to what was said, done, or decided. The record of the case is then invaluable, as it is the only authoritative statement of the pleadings accepted, and of the judgment. Sometimes, however, it is necessary to look even beyond the actual record of the case as enrolled in the court in which the action was brought. In difficult cases petitions were frequently made by the parties to the king in his council in his parliament, at various stages before judgment was reached. It then becomes expedient to consult the rolls of parliament if the cause is to be followed out from beginning to end, and the working of the prevailing system of justice to be understood.

The case of the Stauntons[1] affords an apt illustration. The names of the parties are omitted from one of the reports, but given in another. In one report, that in which the names are given, the conclusion is not reached. In the other, judgment is reached, and even the fact that a writ of error was sued after judgment. The demandant was Geoffrey de Staunton, who brought a formedon in the descender against John de Staunton and Amy his wife, as appears in one of the reports and in the *Placita de Banco.*[2] Amy was admitted to defend, upon her husband's default, and, having vouched one Thomas de Cranthorne, waived that voucher, and vouched her own husband, on the following ground. A fine had been levied, by which John de Staunton acknowledged the tenements in dispute to be the right of Thomas de Cranthorne (as those which he had of John's gift) and by which Thomas rendered the same tenements to John and Amy and the heirs of John. Geoffrey, the demandant, tendered the averment that Thomas never had any estate in the tenements by John's gift. On behalf of Amy, the admissibility of this averment was denied, but the averment was entered on the roll with a protestation on behalf of Amy that, if the court should be of opinion that it was admissible, she was ready to answer over.

This was a *dignus vindice nodus,* and Geoffrey presented a petition to the king in his council in his parliament. In the report it is stated only that the demandant "sued in parliament," that being a sufficient indication to the lawyers of the period of the course actually pursued. In his petition, the text of which is to be found among the rolls of parliament,1 Geoffrey represented that the protestation as to Amy's readiness to answer over had been inserted by the clerks of the court by misprision, and prayed a decision as to whether the averment was admissible or not. It was agreed in the council in parliament that the averment was admissible, and that Amy could not be admitted to any further answer, as both parties had stood to judgment absolutely. Writs were accordingly sent to the justices of the Common Pleas, directing them to proceed without delay. The court, however, did not proceed, and another writ was sent to the same effect. Another series of arguments followed, in which Scrope and Willoughby, of the King's Bench, lent their assistance, but disagreed. These arguments, of course, appear only in the report. In the mean time no judgment was given, and Geoffrey, the demandant, presented another petition to the council in parliament, praying that the justices of the Common Pleas might be commanded to give judgment forthwith, or else bring their rolls, record, and process into parliament, so that judgment might be given one way or the other, without further delay. It was thereupon agreed by all in full parliament, and commanded by the prelates, earls, barons, and others of the parliament, "that the clerk of the parliament should go to the chief justice and other justices of the Common Bench, and require them to proceed to judgment without further adjournment or delay." In case the justices were unable to agree, they were to come into parliament, and the chief justice was to bring into parliament the rolls and the record of the plea.

Stonore, the chief justice, with the other justices, did bring the record into parliament. The chancellor, the treasurer, the justices of the King's Bench, as well as those of the Common Bench, the barons of the Exchequer, and others of the king's council were there present. The process and record were viewed and read, the point of law was decided as before, and direction was given that Geoffrey should recover his seisin against John and Amy.1

Geoffrey's last petition and the whole of the proceedings following upon it are represented in the report by the few words following: "And afterwards the matter was again sent into parliament, and there judgment was commanded for the demandant for the reason above."

Judgment was then given, as appears both by the report and by the Common Pleas roll, in accordance with the direction of the council in parliament. Even in the Common Pleas roll, however, there is not the full account of the transaction which is given in the rolls of parliament, the judgment being prefaced only by these few words: "And thereupon, after advice had as well of the prelates and magnates as of the justices and other of the council of the lord the king, there present in the full parliament last held."

It might have been supposed that the case was now at an end; but the demandant was almost as far as ever from obtaining seisin of the land. The judgment, though given by direction of parliament, was technically a judgment of the Court of Common Pleas.

From that court a writ of error lay to the Court of King's Bench, and a writ of error was accordingly sued. A full account of all the proceedings in error would be tedious, as (except in the fact that John and Amy now became plaintiffs in error, and that the assignments of error and pleadings thereupon took the place of the pleadings in the court below) precisely the same features present themselves again. There are again reports in two distinct forms differing from the record[2] in a manner similar to that in which the record of the court below differs from the reports. There are petitions and the counter-petitions to the king in his council, in his parliament, directions from parliament to the justices to proceed, further delays, and further directions. In the end, after five years of litigation, when delay had reached its utmost limit, and when a peremptory order to the justices to proceed followed a last petition from Geoffrey, John and Amy failed to appear, and Geoffrey at length obtained execution of the original judgment.

This case, as well as innumerable others, will show how necessary it is to travel beyond the Year Books in order to understand them, and how intricate is the study of the records if conducted on scientific principles. Since the passing of the Act which abolished most of the real actions, of the Act for the abolition of fines and recoveries, and of the Uniformity of Process Act, in the reign of William IV., the old learning has progressively fallen into decay. Much of it, indeed, had been forgotten still earlier. The number of persons who have any acquaintance with the old forms of action and the old modes of proceeding is every day becoming less: and there is a growing tendency to look upon the public records of England as mere curiosities, or as a hunting-ground for the antiquary and genealogist in search of isolated facts. In like manner it is not uncommonly supposed that the cases in the Year Books can but rarely be of practical utility for the purposes of the lawyer, and that beyond the range of that practical utility they are useless.

In this paper the rolls only of parliament, of the King's Bench, and of the Common Bench have been mentioned, and only the relations of a portion of their contents. The subject of the relation of the various classes of public records to each other, it need hardly be said, is far too wide for discussion in a limited space, as indeed is the relation even of the records of the courts in general to the Year Books in every detail. Enough, however, it may be hoped, has now been said to show how very necessary is a knowledge, not merely of the contents of a particular class of records, but of the bearings of the different classes of records on each other, for a thorough comprehension of the reports.

There is yet another aspect of the reports in the Year Books which has to be regarded. From the undoubted fact that the Year Books are not very intelligible without a proper use of the records relating to them, it is not to be inferred that the records will suffice for all purposes for which the Year Books could be used. In the first place, a record can never serve the purpose of a report, because, as already explained, each is drawn up with a different object. In the second place, the reports may be so treated as to render them the best guides in a search after the most valuable records. No one who knows, for instance, the bulk and contents of the *Placita de Banco* would think of publishing the whole *in extenso.* On the other hand, however, no one who has not a

knowledge of the reports and of their value, not only legal, but historical, could be trusted to make a selection from the rolls.

There are in the reports innumerable matters of interest, legal, historical, constitutional, and social, which have no counterpart in the rolls. In the rolls are the dry bones of the bare facts. In the reports are living men, dealing with the facts in their own language, in the spirit of their own age, in tones which reveal what manner of men they were. Thus, the last thing, perhaps, which might be expected to occur in a report rather than a record, is information relating to horticulture. Yet, in an action of waste,1 where waste was alleged, *inter alia,* in respect of a whitethorn-tree, there occurs a curious illustration of the practice of grafting. Counsel for the defendant said this ought not to be adjudged waste, because whitethorn is underwood which cannot be the subject of waste in a garden. On the other side, it was replied that whitethorn is a tree upon which a graft may be made, and this was not denied.

We accordingly learn that the practice of grafting on the whitethorn was well known in the fourteenth century in England, and that fruit was already cultivated with some skill.

Judges and counsel must in those days have been good linguists. They were always ready to seize upon the least slip in the grammar of any Latin writ or other instrument in Latin. Their usual language in court was at this period French, and it is real living French, very superior to the law French of a subsequent period, when the language of the courts was English, and the language of the reports became a jargon. We see from their arguments exactly how French was spoken in every-day life. Some other dead languages have something analogous in the dramatic writings which have survived; but even a drama does not reproduce the living speech so exactly as a report of words actually spoken, and written down, more or less correctly, at the time, or immediately afterwards, by persons who had actually heard them. The earlier Year Books consequently afford materials for the study, not merely of the written, but also of the spoken language.

As might have been expected, where men of high education were speaking, it usually appears that the rules of courtesy were observed among them. They lived, however, in a comparatively rude age, and in the midst of rough surroundings. Thus we find sometimes a directness of expression which would hardly occur in modern times. In one case,1 the justices say in so many words that a previous decision had been obtained by favor. In another case,2 one of the judges is openly blamed by his fellows for too hastily deciding that a writ was good, though they admitted that the decision was correct. The same case illustrates the grammatical training which the lawyers received in the days of the schoolmen, and their readiness to dispute as to the meaning of a word. An action of waste was brought by the Earl of Hereford against Alice, who held in dower by endowment of the previous earl. At the end of the writ of waste occurred the words “*ad exheredationem praedicti comitis,*” the intention being to describe the living and plaintiff earl. Counsel for the defence argued that as both earls had been mentioned in the writ, the word *praedicti* did not determine with certainty to which of the two reference was made. Counsel for the plaintiff said the word must be understood to refer to the living earl, though it might be otherwise if one earl brought

a writ against another earl. One of the judges then said: “If the words of the writ were ‘*ad exheredationem ipsius comitis,*’ *ipsius* being a demonstrative pronoun, then the word would refer to the earl who is living, but *praedicti* refers to either indifferently.” In the end, however, the writ was held good in spite of the quibble.

Judicial jokes are somewhat rare, and, when they occur, are apt to be of the grim and severe type. In Michaelmas Term in the eleventh year of Edward III. (p. 295), one of the judges introduced a little story more or less relevant to the matter in hand. A man, he said, once brought an assise before the justices at York, and the tenant pleaded that the plaintiff had been outlawed for felony. He had, in fact, been outlawed and subsequently pardoned, but had forgotten to bring his charter of pardon from the inn. He was arraigned instantly. As, however, the chancery was at York (with its records), he vouched the record of his charter of pardon in the chancery. “And,” said the judge, “if the chancery had not been at York, he would have gone on his pilgrimage to Knaresmire.” The point of the remark lies in the fact that Knaresmire was the place of execution.

Not the least valuable matter in the reports, as distinguished from the records, however, is that which shows how many propositions were accepted, without dispute, as settled law. For modern purposes there is quite as much to be gleaned from such passages as from the substantive decisions for which the Year Books are more often searched. Thus, in Trinity Term, 13 Edward III.[1] a question arose as to the sufficiency of a jury, it being alleged that when a peer of the realm was a party, it was his privilege that there should be a special jury, consisting partly of knights. The point was contested, but the privilege was affirmed by the judges. In this particular case, however, it was a bishop on whose behalf the privilege was claimed as being a peer of the realm. No one suggested that a bishop was not a peer of the realm. It was clearly admitted, as an indisputable fact, by counsel on both sides, and by the judges, that he was. So also in Easter Term in the same year,[2] it was stated by counsel that the Abbot of Ramsey held by barony, and was a peer of the realm. He did not obtain his object, which was to prevent the opposite party, who was plaintiff, having a delay or postponement known as a “day of grace.” His case, however, was like those of other peers, mentioned in the books, who did not succeed on this point, and no one argued that the abbot was not a peer of the realm.

In later times it has been the opinion commonly received that a spiritual lord, as such, is not a peer of the realm; and the two cases last mentioned are consequently of very great interest and importance, though showing no express decision on the point. So, also, other subjects from time to time force themselves upon the attention of a student of the Year Books, and indicate how much remains to be written with regard to the English constitution. It is not going beyond the bounds of truth to say that, setting aside battles and statecraft, the greater part of the history of England, as well as of its law, during many centuries in the life of the nation may be found in the Year Books and the corresponding records, which are their complement.

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38.

THE DEVELOPMENT OF WRITTEN AND ORAL PLEADING[1]

By William Searle Holdsworth[2]

THE objection has often been urged, and justly urged, against a system of case law, that the true bearings of the decision cannot be understood without some knowledge of the system of procedure and pleading which prevailed when the case was decided. This objection applies with the greater force as we go further back in our legal history; and therefore it applies most forcibly to the Year Books. It would not perhaps be too much to say that to lawyers who know only our modern reports the Year Books are hardly intelligible. The reports therein contained appear in many cases to be merely reports of desultory conversations between judge and counsel, which often terminate without reaching a distinct issue either of fact or law. Even when a distinct issue of fact or law is reached they often tell us nothing of the final result. Much of their inconclusive character is due, no doubt, to their informal shape. Notes taken by apprentices during the hearing of the facts of cases at which they happened to be present will naturally possess such characteristics; and when these notes are copied, and perhaps freely edited, such characteristics will be emphasized. But it is our want of knowledge of the legal environment in which they were produced which is the chief cause of their obscurity. There are vast differences between the mediæval and the modern conception of a trial and all the ideas involved in the notion of a trial. Differences upon matters so fundamental will explain why familiar rules of law appear in the Year Books in unfamiliar guise. They appear there bound up with the intricate manœuvres made possible to a learned profession by an intricate procedure. We who live in a state of society far remote from that of the thirteenth century miss much of the reason which such intricacies may have had to the society in which they grew up; and reports intelligible to men living in that society and practising that system are not intelligible to us. The earlier Year Books, too, are, as we have seen, often only the note-books of the apprentice, and, as every student knows, nobody else's notes can be as valuable as they are to the maker. At the same time it is only by the help of these notes, which grow fuller as time goes on, that we can accustom ourselves to the atmosphere of the mediæval law-court, and to the mind of the mediæval lawyer. Unless we can do this we shall never attain to any real knowledge of the spirit of the mediæval common law; and a knowledge of the mediæval common law is essential if we are to attempt a critical estimate of the work of the lawyers of the sixteenth and seventeenth centuries, who adapted its rules to the new needs and ideas of the modern state. Let us see, then, how far a consideration of certain differences between the mediæval and the modern in such vital matters as the rules of process and the rules of pleading will place us at the right point of view from which to look at the Year Books.

1. We must remember that when the Year Books begin the law is only just emerging from that primitive stage in which the securing of the appearance of the defendant is a difficult problem; and that it is still in that stage in which the difficulties of travel make process slow.1 Rules based upon primitive legal ideas, and upon physical necessities of an older age, became the permanent basis of an elaborate superstructure of technical rules. The rules of law upon this subject had become fixed before they had had time to become rational. It followed that with every increase in the complexity of the law these fixed rules became less rational and a greater hindrance to justice. Every action possessed its special machinery and its special formulæ for working that machinery.1 A lawyer who wished to do his duty by his client must be at home with all the capacities of that machinery, in order that he might know at each stage of the case what chances were open.2 Many a good case might be lost, or a bad case won, or, at least a decision upon it delayed, if the right step was taken at the right time, or if prompt advantage were taken of an unskilful move or a verbal error. It would be both tedious and useless to go into details about the process used to get a defendant before the court, and the various forms of process which might issue in the course of a case, or after it had been decided. In a real action the process to get the defendant before the court consisted, when 'reduced to it slowest terms,' of summons, seizure of the land into the king's hand, and finally judgment, that the land be handed over to the demandant. Even then it was open to the tenant to reopen the whole dispute by means of a writ of right.3 It would be in very few cases that process could thus be reduced to its lowest terms. The validity of the summons might be questioned.4 Both the tenant and the demandant might cast many essoins—how many depended upon the kind of action brought. If there were several tenants they might at one time have delayed the proceedings almost indefinitely by essoining themselves alternately.5 In Edward III's reign the practice was still possible in personal actions.6 In many cases the hearing of the case might be hung up by claiming a view of the premises; and we find much litigation upon the right to have a view.1 Then there might be vouching to warranty or aid prayer,2 and the person vouched or prayed in aid might wish to essoin himself. Protections must be reckoned with which would put the case without a day.3 Infants might intervene and claim their age; and this would mean that the proceedings would be stayed till the infant had attained his majority.4 All these various processes involved many writs and orders to the sheriff; and if the sheriff had taken the wrong steps to carry out the process, or if he had made any verbal fault in his returns, there was fresh material for disputes which delayed the hearing of the case.5 In 1344 it was noted that, 'If the demandant omits in his process any part of his demand included in the original writ the whole is discontinued.'6 Booth tells us that the proceeding by the Grand Assize is very dilatory, and may become 'vexatious to the Tenant by the Practice of the Demandant by not prosecuting and suing out Process as he ought, and many other Delays for want of Knights, there not appearing, or the like.'7 Process in the case of personal actions was almost if not quite as lengthy; but there were not all the opportunities for delay in the course of the case which were afforded by some of the real actions.8 The number of essoins allowed were not so numerous. There could be no vouching to warranty. But in the older personal actions the process was lengthy and ineffectual enough. There might be protections; there might as we have seen be fourching; and it was always possible to question the acts of the sheriff. One of the reasons for the spread of trespass was that, being a penal action, the process was comparatively speedy and effective. It was

possible to arrest the defendant, and in the last resort to outlaw him. The plaintiff was not left, as in some of the older personal actions, without any other remedy than to keep distraining a contumacious defendant, who very likely had nothing by which he could be distrained.1 We must not forget that the ingenious means by which the three Common Law Courts encroached upon one another's jurisdiction were merely perversions of their ordinary process which added to the technicalities of an already complicated system.2 Even in Edward I's reign it was possible for the judges themselves to make mistakes. 'How is it,' said Berewick to the sheriff, 'that you have attached these people without warrant; for every suit is commenced by finding pledges, and you have attached although he did not find pledges?' &c. 'Sir,' said the sheriff, 'it was by your own orders.' 'If it had not been so,' notes the reporter, 'the sheriff would have been grievously amerced, *et ideo cave.*'3 In Henry VI's reign Fortescue C. J. was being pressed by the absurdity of a distinction which he was laying down as to when a writ of *Scire facias* would, and when it would not, issue against a person who has possession of the goods of one attainted. All he could reply was, 'Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason.'4 When a judge of Fortescue's eminence is obliged to confess that he cannot explain the reason for a given procedural rule, and is reduced to infer its reasonableness from *a priori* views as to the inherent reasonableness of the law, we may be sure that the rule is coming to be an antique incumbrance. In fact the rules as to process were the least reasonable part of the mediæval common law. It is upon them that we must place a large share of the blame which attaches to the common law of the fifteenth century for its failure to keep the peace, and to punish wrongdoing. Their intricacy served the purpose of the unscrupulous.1 It is not until much of this complicated process has gone out of use, with the decay of the real actions, that the common law will be able to take new life. But in the period of the Year Books the land law and the law of the real actions were the principal part of the common law. Therefore there are necessarily many cases in the Year Books taken up solely with elucidating the difficulties of process in these and other actions. These cases are naturally not very intelligible to us. The changes which made this learning obsolete rendered useless whole groups of cases reported in the Year Books.

2. The rules of pleading—the mode in which and the conditions under which the parties state the case which is to be tried—go far to determine the shape of many rules of law; and they obviously have a great influence upon the form which the report takes. In old days the defendant must meet a plaintiff who has properly stated his case with a full denial.2 Though this rule was long preserved it had become possible in Bracton's day for a defendant, after making this full denial, to use divers 'exceptions,' and for the plaintiff to reply to these 'exceptions.'3 But in his day these rules were confused. It is not till Edward I's reign that we can see the beginnings of that peculiarly English branch of law—the science of pleading. The peculiarities of this science cannot better be described than in the words of Stephen4 :—

'The object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an issue. And this appears to be

peculiar to that system. . . . In all courts indeed the particular subject for decision must of course be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law. By theee g general course of all other judicatures the parties are allowed to make their statements at large . . . and with no view to the extrication of the precise question in controversy; and it consequently becomes necessaefore the court can proceed to decision to review, collect, and consider the opposed effect of the different statements, when completed on either side—to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause—and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary means to the preparation and adjustment of his *proofs;* and is also afterwards virtually effected by the judge in the discharge of his general duty of *decision;* while in some other styles of proceeding the course is different—the point for decision being selected from the pleadings by an act of the court or its officer; and judicially promulgated prior to the proof or trial. The common law of England differs from both methods by obliging the parties to come to issue; that is, to plead or to develop some question (or issue) *by the effect of their own allegations* and to *agree upon this question as the fact for decision* in the cause; thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy.'

The question which the legal historian must answer is the question why the English mode of pleading was so different from that which we find in other systems of law. The answer will probably be found in the peculiarity of the old conception of a trial, and in the mode in which that old conception of a trial was adapted to the jury system.

The old conception of a trial was very different from our modern conception. The pleadings of the parties led up to some one of many modes of proof which might be either selected by the parties or adjudged by the Court.1 How those modes of proof worked it was impossible to inquire. All the legal interest of the case was centred in the questions which led up to the award of proof.1 And all those questions were subject to the fixed rules of the game which bound the judge as strictly as the parties; for it is a characteristic of these old procedural rules that the suitor is considered as having a legal right to their enforcement as against the court, and, therefore, a grievance against the court if they are not applied or misapplied.2 The jury became almost the only mode of proof at a time when these old ideas of a trial were still prevalent; and consequently the jury was regarded as settling the matter in the same final and inscrutable manner as compurgation, battle, or ordeal.3 Therefore just as in the older law all the legal interest in the case turned upon what we should now regard as preliminary matters, such as the rules of process for getting the parties before the court, and the rules which defined the modes in which they should state their case when they were before the court. Just as in the older law all these rules must be put in motion and strictly obeyed by the parties at their own risk, so now the parties must put in motion the complicated machinery of process, and define by their own pleadings with painful and literal accuracy the issue to be tried.4 Thus we get that which

Stephen tells us is the characteristic feature of the English system of pleading—the settlement of the issue to be tried by the allegations of the parties.

But though the jury took the place of the older modes of proof, though the process and the pleading of an older age were adapted to the proof by jury, the growing elaboration of the law, and the differences between the test of the jury and the test of such proofs as ordeal or battle, begin a series of changes which eventually substitutes for the old system of proof the modern idea of a trial based upon the pleadings of the parties.

In the first place the jury were never expected to pass upon matters of law. It was open then to find a special verdict and ask for the judgment of the court thereon.[1] It soon became clear that there were some issues which were purely issues of law. Thus we get a distinction between issues of fact and law which was foreign to a primitive procedure in which the assertion of the plaintiff was met by a denial of the defendant, and followed by an award of proof.[2] In the second place it had become impossible to state a case fairly to the court, unless the parties were allowed to use many pleas (exceptiones, replicationes, triplicationes) of different kinds. It is true that the old ideas survived so far that a defendant must generally preface his defence by a denial; but after that he could urge any other pleas he liked. The rules about the pleading of these matters were at first confused. The pleas were long, argumentative, and double. But one important result followed from the new facilities allowed to the parties in the statement of their case. Many of the old formal words required to be spoken with literal accuracy by plaintiff and defendant gradually disappeared. In particular, the formal defence became merely a collection of words of court—formal words concealed in the record by an '&c.,' the meaning of which has departed.[3] The new learning as to exceptions threw the old rules into confusion.[4] If Bracton had been followed by a generation or two of judges, bound by their orders to know something of the civil and canon law, the jury might have come to be regarded merely as witnesses, and not as a body to which the parties have agreed to refer the determination of the issue; and English law would then, like continental systems of law, have adopted a procedure based upon the procedure of the civil and canon law.[1] But this was not to be. The newer ideas of pleading, drawn in the first instance from the Roman law, and necessitated by the growing complexity of the common law, were reduced to order, and given a shape which was peculiarly English, because it was determined by the peculiarly English use of the jury as a mode of proof. We have seen that the jury was put into the place of the older modes of proof with as little change as possible, and that the fundamental peculiarity of the English system of pleading—the settlement by the debate of the parties in court of the issue to be tried—was due to the survival of the older ideas as to a trial. For the same reason and in the same way the shape which these new rules as to pleading took was coloured, in the first place by some of the old ideas as to pleading which led up to the older methods of proof; and in the second place by the necessity for adapting the new ideas as to pleading to the requirements of the jury system. (1) Both the older and the newer modes of pleading were oral; and many of the fundamental rules of the common-law system of pleading were made and adapted to this system of oral pleading. 'The abandonment of the practice of oral pleading,' says Stephen,[2] 'led to no departure from the ancient style of allegation. The pleading has ever since continued to be framed upon the old

principles and to pursue the same forms as when it was merely oral. The parties are made to come to issue exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the justices of former times prescribed to the actual disputants before them are as far as possible still enforced' with respect to the later written pleadings. (2) The facts at issue were submitted to the jury as to one of the older modes of proof. But the new modes of pleading had made it possible for the parties to bring before the court complicated states of fact; and it was obvious that issues could not be placed before a reasonable body of men in the same manner as they were submitted to the decision of the older arbitrary tests. These two considerations are at the bottom of the requirements, which underlie all the rules of pleading, that the statements of the parties shall be material to the issue, single, and certain. The need for distinguishing between issues of fact and law, the need (occasionally) for distinguishing cases in which trial by jury was applicable from cases in which it was not,[1] the need for ascertaining the venue from which the jury must come, the need for placing the point at issue in an intelligible form before the judge and jury, are at the bottom of these fundamental rules of pleading. Thus the problems which originated in the adaptation of the newer ideas as to pleading to the old conception of proof, and the problems which originated in the fact that the proof was now, not an arbitrary test, but the finding of a body of reasonable men, are the factors which determined the fundamental rules of the common-law system of pleading.

This system of oral pleading in Court leading to an issue which is submitted to the jury, as if the jury were the test or proof to which the parties have agreed to submit, affects the whole character of the reports in the Year Books. It was the oral pleading leading to the issue which interested the reporter. In the course of this debate many questions of law—material to the issue and immaterial—were mooted and discussed by Bench and Bar. What view the jury took of the issue of fact so formulated was of comparatively little interest to the legal profession, unless it was made the basis of further proceedings. Decisions upon an issue of law were no doubt interesting to the profession; but cases which involved such decisions were often adjourned, and the decision was, perhaps, never given. The judges, Professor Maitland tells us,[1] were unwilling to decide nice points of law; 'too often when an interesting question has been raised and discussed, the record shows us that it is raised and then tells us no more. A day is given to the parties to hear their judgment. A blank space for the judgment is left upon the roll, and blank it remains after the lapse of six centuries.' Even if judgment were given, it might well be that the reporter did not happen to be in court on that day.[2] In the meantime the report of the debate which led to the distinct formulation of the issue contained much sound learning and showed where the doubt lay. And so it is these arguments leading to the formulation of the issue which comprise the largest part of the cases reported in the earlier Year Books. Naturally as the argument proceeded new facts were elicited, old facts assumed new aspects, new legal points were suggested, all of which were taken down by the reporter, and edited and annotated for the benefit of himself and his friends. The Year Book, therefore, does not give us a report directed to establish some particular point. Rather, it gives us an account of the discussion which preceded the formulation by the parties and the Court of that point; and the matters discussed may bear very little relation to the issue reached.[3] Sometimes no issue is reached.[4] We are reminded of what must have taken

place before the Praetor *in iure* when he was engaged, with the help of the parties and their counsel, in settling the formula. If we had some contemporary account of what took place before the Praetor, it would probably resemble the report in the Year Book far more closely than the report in the Year Book resembles the modern report of the arguments and the judgments upon an issue already determined by the pleadings of the parties.5

We may note, too, that in a report of this oral debate which preceded the formulation of the issue, the line between argument and decision will tend to become obliterated. Serjeants or apprentices present, but not engaged in the case, intervene with their advice;1 and what they say is naturally interesting to the profession. A judge even will condescend to give a little lecture for the benefit of the student.2 Naturally reports which record such proceedings will be discursive and conversational. In some of our older reports the reasons given by the judges for their formal decision are styled arguments. These Year Books are really the reports of arguments—arguments used by the Bar and the Bench. It was the argument rather than the final decision which interested the profession, partly because there was then no such rigid theory as to the binding force of decided cases as that to which we are accustomed, partly because the discussion and the elucidation of legal principles were to be found in the argument rather than in the dry formal decision, and partly because decisions upon points of law were often not given, or, if given, were difficult of collection by the private reporter.

It is clear that this fashion of oral pleading made for great freedom in the statement of the case. A painful accuracy was no doubt required in the wording of the writ, in the correspondence between writ and count, and in the observance of the elaborate rules of process. But when all objections to the writ and process had been disposed of, when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or the rulings of the judge, allowed the parties considerable latitude in pleading to the issue. Suggested pleas will appear after a little discussion to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled.3 In fact, in the earlier part of this period it was not the strictness of the rules of pleading which hindered justice, it was rather the strictness and elaboration of the rules of process. This looseness in the rules of pleading was increased, perhaps almost necessitated, by the fact that the law of evidence, as we understand it, hardly as yet existed. So far are we from the rule of later law that evidence must not be pleaded, that we might almost say that oral evidence was generally brought to the notice of the court by pleading it.1 One or two illustrations (1) of the freedom of action allowed to counsel under this system of pleading, and (2) of the manner in which evidence was brought before the Court, will illustrate these causes for the differences between the Year Books and the later reports.

(1) Illustrations of the mode in which an issue was reached by discussion at the Bar under the superintendence of the Court will be found on almost every page of the Year Books. As a simple illustration we will take a case of the year 1309.2 ‘Alice brought her writ of entry *sur disseisin* against a Prior, and counted on her own seisin as of fee and of right in time of peace, saying, “Into which the Prior has no entry save

after (*post*) the disseisin which one *G.* did to Alice." *Passeley:* "She was never seised of fee and of right in such wise that she could be disseised." *Stanton J.:* "That is no good answer in this writ, but it would be a good answer to say that *G.* did not disseise her." *Friskeney* argued that Passeley's answer was receivable because, if the plaintiff's count claiming as of fee and of right were accepted by them, they might be estopped in any subsequent proceedings from denying that she held as of fee and of right. *Stanton J.:* "What you say is wrong. What enrolment are we to have in this case? I think it should be, 'not so seised that she could be disseised,' so your averment is not receivable." *Passeley:* "The enrolment shall be, 'not so seised in such manner as she demands so that she could be disseised.' To this all agreed." The Court will sometimes suggest a plea to meet difficulties suggested by counsel in argument;[3] and the fact that the Court advised a particular mode of pleading was once stated as a reason why counsel adopted it.[1] But sometimes the Court is only wise after the event, and delivers a lecture upon what, in its opinion, would have been the proper mode of pleading.[2] Counsel once argued that what a party has pleaded and passed over without notice by the Court is wholly immaterial; and though the Court denied the proposition as thus broadly stated, there was probably a considerable element of truth in it.[3] A survival of the old idea that a pleader's words were not binding till avowed by his client no doubt made it the more possible to treat pleas as capable of amendment till one was reached by which counsel would abide.[4] Whether or not this was so it is quite clear, as Reeves says,[5] that everything advanced by counsel was, in the first instance, 'treated as matter only *in fieri* which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the Court, according as it was a point of law or fact.' We may note, too, that the complications of process sometimes gave to a pleader a chance of correcting an error which might otherwise have proved fatal. If the case were put without a day by a Protection, or, perhaps, by a default, the pleading must begin anew; and mistakes made on the occasion of the first pleading could then be amended.[1]

(2) The law knew the preappointed witness to deeds or charters: it knew also the written evidence of the deeds or charters themselves. It did not as yet recognize the independent witness called to testify to the facts of which he had knowledge; indeed, as Thayer has shown, the strictness with which the laws against maintenance were interpreted effectually discouraged him.[2] The evidence, which in modern times is given by such witnesses, was at this period supplied partly by the jury, which the law was careful to draw from the neighbourhood of the occurrence,[3] partly by the custom of pleading such evidence. For this reason questions turning upon the 'venue' of the jury are of much importance in the Year Books; and for the same reason counsel deem themselves to be in a manner responsible for the statements which they make to the Court. They examine their clients before they put forward a plea.[4] They even decline to plead a fact as to the truth of which they have doubts.[5] Sometimes, indeed, we see a distinction taken between the plea and the evidence for the plea when it is convenient to say that a statement is only evidence and not really a plea.[6] But, as a general rule, it would be true to say that such distinct things as the pleadings, the statements of counsel, and the evidence for those statements are hardly distinguished

in the Year Books.[1] To this state of things must be ascribed some peculiar doctrines in the law of pleading. It was clearly difficult under these circumstances to bring to the notice of the jury, who knew something of the facts, the exact import of similar yet legally distinct states of fact, especially having regard to the rule that, if the special facts really only amounted to the general issue, the general issue only could be pleaded, and the case therefore necessarily left to the jury. It was equally difficult to separate clearly matters of fact from questions of law under a system in which the evidence for the facts stated in the pleadings, and the arguments of counsel were all involved in the pleadings themselves, and only extricated gradually in the course of the discussion which settled the issue to be tried. To these difficulties are due the doctrine of colour in pleading,[2] and the demurrer to evidence.[3] Both these doctrines were due to a desire to withdraw the case from the jury and to submit it to the Court, in cases in which it was thought desirable to have a clear decision upon the legal consequences of certain states of fact. The older modes of proof necessarily gave a 'general verdict'; and it was equally possible for the jury, which had stepped into their place, to return a general verdict. Under a system which prevented the judge from clearly directing the jury as to the points of law involved in the case, the growing complexity of the law made it very dangerous to allow the jury to return such a verdict. Therefore these methods were devised for ousting the jury, and for getting a point of law decided by the Court. Both these doctrines lived on in the law long after their original *raison d'être* had disappeared. Neither can be understood, unless we understand the peculiar difficulties involved in the conduct of a case in court according to the procedure recognized in the fourteenth and fifteeth centuries.

Towards the close of this period this system of oral pleading began to be superseded by the system of written pleadings, which, when complete, were entered on the record. The practice in its final form is thus described by Stephen[1] :—'The present practice is to draw them (the pleadings) up in the first instance on paper, and the attornies of the opposite parties mutually deliver them to each other out of court . . . these *paper pleadings* at a subsequent period are entered on record.' This change, it may be said, is merely a mechanical change; but, as Maine has noted,[2] in reference to another change of a similarly mechanical character—registration of title—the effect of such a change on the fabric of the law may be considerable. Perhaps it was the more considerable because it was accompanied by another change, of even greater importance. It was just about this period that the practice of calling witnesses to testify to the jury was becoming common, and was giving birth to our modern law of evidence.[3] The pleading which defines the issue begins to separate itself from the explanatory statements of counsel and their arguments upon points of law on the one side, and from the sworn evidence for the facts pleaded or stated on the other. These changes had considerable effects upon the jury, the court, the legal profession, the law report, and the law. In the first place, we shall say something of the manner in which these changes were effected, and in the second place, we shall summarize their results.

As to the date at which and the stages by which the practice of pleading by means of paper pleadings were introduced, we know very little. Gilbert thought that they began to be introduced in the reign of Richard II;[1] but, as Reeves points out, there is very little foundation for this conjecture.[2] It is probable, however, that the growth of

technicality and formalism in pleading may have introduced some changes, so gradual that they were hardly noticed, in the mode of bringing the pleadings of the parties before the Court. That the rules of pleading were becoming formal and fixed is clear from the number of cases in the Year Books of Henry VI and Edward IV's reigns which turned simply upon matters of form.3 In one case it is reported that the judges were reluctant to depart from a precedent laid down in the Novae Narrationes, though apart from this precedent they would have come to another conclusion.4 It appears, too, from this case, that they sometimes consulted the prothonotaries as to the proper form of plea; and no doubt a form of plea which was sanctioned after such consultation would easily harden into a fixed rule.5 Before a plea was entered on the roll there is sometimes a friendly discussion as to its form; and then the opposing counsel promises an answer on the following day.6 As to the exact mode of entering such pleadings on the roll, there was probably no very fixed practice. In a case of Henry VI's reign three prothonotaries of the Common Bench summoned to give evidence on this point all differed. The Court apparently considered that the pleadings should be entered day by day as the case proceeded.7 This makes it the more probable that the conclusion which Reeves1 arrived at, after the study of the Year Books of this period, is correct.

'Whether it (the declaration) was drawn out . . . on paper or parchment by the party's counsel, and delivered over to the adversary's counsel, or, what is more probable, was entered, in the first instance, upon the roll of the Court, it is not easy to determine with precision: in point of effect it would be the same; for the roll might be amended by leave of the justices, during the term in which the declaration or plea was entered, and it must, at any rate, be entered on the roll, as of that term; in both of which cases the roll became afterwards, in construction of law, a record: so that the power the justices exercised over the roll during the term is, on the one hand, sufficient to show the possibility of making the amendment of pleas without resorting to the supposition of there being paper pleadings; and the different construction the judges put upon the same roll of parchment, after and during the term, satisfies us that to constitute a record, there was not required a transcript from any less solemn paper or parchment to one that was more so. . . . It seems, therefore, a reasonable conjecture that whenever pleadings *ore tenus* went out of use, it became the practice for the counsel to enter the declaration or plea upon the roll in the office of the prothonotary; that the Counsel of the other party had access to it; in order to concert his plea or to take his exceptions to it; and that when these were to be argued, the roll was brought into court, as the only evidence of the pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and handing this paper from one party to the other, the entry on the roll being deferred till the end of the term.'

But this further change to a system of paper pleadings was not well established, Reeves thinks, till the reign of Elizabeth. During the whole of the mediæval period the pleadings were usually pleaded by the serjeants or apprentices, and sometimes by the litigant in person at the Bar. They may have been enrolled as the case proceeded; and the copy of the roll may have been available to the pleader on the opposite side.1 But subject to this modification, which was no doubt caused by the growing complexity of the rules of pleading, the issue was settled in the old way. It is probable that we must

look to the development of the law of evidence for the causes of the change to the later system of paper pleadings interchanged between the parties or their attorneys.

In the Year Book of 38 Henry VI we have perhaps the first and certainly an early mention of a 'paper' pleading.2 The tenant and his attorney in a writ of right had made default at *nisi prius.* The judges had recorded this default, and discharged the jury. In the Easter term the tenant came to the Bar, and his presence was recorded. Thereon Billing and Laicon, counsel for the defendant, prayed judgment against the tenant. Choke and Littleton were counsel for the tenant; and the tenant requested them to plead the fact that while coming to the former trial he and his attorney had been stopped by floods, in order that by this plea his former default might be saved. But these floods were alleged to have been in the county Palatine of Durham and another county; and the serjeants knowing nothing of the matter, and apparently suspecting the truth of these statements, declined to plead them.

'Wherefore the tenant went to Comberford, the prothonotary, and prayed him to make him a paper upon this matter, which he did; then he came with the paper to Choke at the Bar, and prayed him to put it in to the Court, and he did so by his command without pleading it, or seeing what was in the paper; and the paper remained with Copley, another prothonotary, because he had the entry of the matter before.'3

Billing and Laicon then moved for judgment, commenting upon the character of a plea so suspicious that even the tenant's own counsel would not plead it. Choke and Littleton then tried to excuse the tenant; but Prisot C. J. said to them:—

'You will get no worship by meddling with these false and suspicious matters; for this and such like business will get no favour here. It is not the practice to put in such papers when the party is represented by counsel without pleading them at the Bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead can be said to be suspicious. Then he said to them, if you wish to plead this matter plead it, or otherwise it will be good for nothing. And they replied that they dared not plead this matter, knowing nothing of it except what the tenant told them; and they said that they did not wish to meddle any further with it.'1

There was then some further discussion, and Moile J. gave it as his opinion that since the serjeants would not plead for the tenant, the tenant could do nothing else but go to the prothonotary and get a paper drawn up and plead the matter in this way.2 After further discussion on other days, it was finally settled 'that the plea be recorded in the manner and form in which it is drawn without any amendment; and they charged the prothonotary to make no amendment,' and then Billing and Laicon were told to answer to the plea. They demurred to it; and after some further discussion the Court told Choke and Littleton to argue the demurrer.

It is clear from this curious tale that persons not represented by counsel could get their pleas put into shape and written out on paper by the prothonotary or his clerk; and that he could then put this paper in as his plea. The Court does not consider it necessary to speak the plea for such a person, as under the old practice.1 It is also fairly obvious

that, when the plea was put in or spoken, it might be amended before it was enrolled, for a special instruction is given that this extremely suspicious plea is not to be amended. We may also note that it is the party or his attorney, and not serjeant, who is identified with these paper pleadings; and we shall remember that Stephen, talking of the settled practice of later days, tells us that it is the attorneys of the parties who deliver these pleadings to one another. But for our purpose perhaps the most important point to note is the fact that as yet the serjeant who pleads a plea takes upon himself some responsibility for its accuracy. Though Moile thought there was no objection to such a manner of pleading when counsel had declined to plead, Prisot objected on the ground that it would be a bad precedent to allow persons represented by counsel to thus put in paper pleas.

In the course of the sixteenth century the practice of proving by witnesses the facts stated in the pleadings was growing.2 A very cursory inspection of Plowden's reports will show this. It may be that here, as in other cases, the competition of the Chancery exercised a liberalizing influence upon the doctrines of the Common Law Courts. Persons whose witnesses were frightened by the prospect of proceedings for maintenance applied to the Chancellor for a subpoena directed to these witnesses. The witnesses, being thus compelled to testify, ran no risk of proceedings being taken against them.3 A statute of 1563 allowed process to issue to compel the attendance of such witnesses;4 and Sir Thomas Smith regards their presence as the usual accompaniment of a trial.1 This clearly tends to shift away from counsel the responsibility for the truth of pleas pleaded by him, and to take away Prisot's objection to such paper pleas being put forward by persons represented by counsel; this being so, it would appear that even according to the view of Prisot, and certainly according to the view of Moile, there could be no objection to paper pleadings. We are not, therefore, surprised to find that in the later Year Books of Henry VII and VIII's reign the questions argued are rather questions as to the form and effect of pleadings already settled, than questions as to the form which the issue shall take; and we can say the same thing of the earlier cases in Dyer's reports. This clearly points to the growth of the practice of settling the pleadings out of court.2 When Sir Thomas Smith wrote, pleadings could be either written or spoken;3 and in 1584 the serjeants in *Dowman's* case4 treat the distinction between the pleadings and the evidence for the pleadings as well settled. In fact the growing complexity of the science of pleading was making it a very special subject, to be learned best in the office of the prothonotaries.5 Their clerks were employed by the attorneys to draw up the pleadings,6 and often themselves acted as attorneys for the parties.1 At the same time the conduct of the case in court was becoming a very different thing, and demanded very different qualities now that there were witnesses to be examined and cross-examined. The skilful construction of pleadings became a branch of legal learning distinct from the actual laying of the proofs for the pleadings before the Court, and the maintenance of their validity in court. The art of the special pleader falls apart from the art of the advocate.2 The attorney who is brought into close contact with his client collects the facts and the proofs; either he or the special pleader puts them into shape, according to the minute and technical rules of pleading; the serjeant or the apprentice conducts the case raised by the pleadings through the Court, maintaining their validity, attempting to prove by his witnesses or documents the issues of fact, and arguing the issues of law.3

In describing these changes we have gone beyond the period of the Year Books. Neither the changes nor their effects were fully felt till well on into the sixteenth century. We shall here only briefly indicate their effects in order that we may be the better able to appreciate the differences between the mediæval and the modern law and law report.

(1) These changes affected the jury. When the pleadings were drawn up and the issue fixed before the parties came into court, when the evidence was given after the jury had been summoned, it is clear that the character of the jury will change from that of witnesses to that of judges of the facts.[1] When this change has taken place the importance of drawing the jury from the locality of the disputed occurrence will be lessened. Thus many cases turning upon disputes as to venue which we find in the Year Books become obsolete. (2) They affected the Court. The practice of summoning witnesses to testify to the Court was the direct cause of the growth of our modern law of evidence, and of the growth of new modes of controlling the jury suited to the jury's new position of judges of fact.[2] (3) They probably affected the legal profession. They introduced a distinction between those who prepared the pleadings and settled the issue and those who conducted the case in court. It was in the sixteenth century that the Inns of Court began to insist upon the exclusion of attorneys.[3] It may be that the new division of duties which these changes introduced helped to accentuate an existing division in the legal profession. The old distinction between the narrator and the attorney[4] was sharpened and perpetuated by a new arrangement of the duties of the profession. (4) They certainly affected the style of the law report. We must know the pleadings to understand the argument and the decision; but it is the argument and the decision in which the interest of the case centres. Decisions which turn on mere matters of fact can be eliminated. Arguments or dicta which have no bearing upon the judgment can be likewise eliminated. Thus the modern report is no mere account of conversations between judge and counsel, leading to the formulation of an issue, in which it is difficult to distinguish argument from decision, and decision from dictum; the issue is already defined; and what is reported is the law laid down by the Court upon the point thus defined. Two consequences flowed from this. In the first place the argument of counsel tends to diminish in importance compared with the ruling of the judge. We have only to compare Plowden's or Coke's reports with our modern law reports to see the truth of this. In the second place it becomes possible to cite a case by name for the decision of a distinct point. The reports in the Year Books are, as we have said, reports of arguments upon legal topics relevant and irrelevant to the issue. One case will often touch upon many points: there are comparatively few cases which we could cite by name as laying down a special rule. For this reason the Year Books made excellent material for Abridgements; we could hardly construct from them a volume of leading cases. (5) Naturally these changes had a great effect upon the law. The newer mode of reporting which was thereby made possible tended to greater precision in the statement of the law—to a greater certainty and fixity in its principles. No doubt the new mode of written pleading tended to verbal refinements and subtleties in the statement of the case which too often defeated justice.[1] As Roger North points out, the pleaders were less under the control of the Court than they had been in the old days.[2] Perhaps, too, the greater fixity in the rules of law, which rested on the definite authority of well-known decisions, made the law less flexible than it was in the days

when the mode of reporting made it necessary to cite discussions of, rather than decisions upon, a given rule of law. These difficulties were felt in the eighteenth and nineteenth centuries. In the sixteenth and seventeenth centuries the advantages of clearness and certainty must have been felt by both lawyers and laymen. A case which really settled a point upon which it was possible to cite many conflicting dicta from the Year Books must have been welcome to all. The separation of such things as the pleadings, the evidence for the statements of fact contained in the pleadings, and the decision was necessary in the interests of legal development. That the new rules which took the place of the old were perfect no one can assert. But we who saw the latter end of these new rules, and their gradual reform or abolition, will not be able to do them justice unless we look at them, not from the point of view of our modern needs, but from the point of view of the old system as we see it in the Year Books. Under these new rules sprang up the greater part of our modern common law, which in our own day has supplied the material for many excellent codifying statutes. As the Formula in Roman law bridged the gap between the period of the Legis Actiones and the procedure of the later Empire, so our rules of procedure under the régime of the strict law of pleading bridged the gap between the period of the Year Books and the modern Rules of the Supreme Court. In both cases the foundations of the greater part of what is valuable was laid in this intermediate period.

The Year Books represent the initial stage of the purely professional development of the common law. They picture for us that stage in a more personal and a more vivid way than any subsequent stage is pictured. Law reporting is in its youth. The law reporters do not, as we have seen, deem it beneath their dignity to notice the external incidents, the ‘scenes in court,’ which pass before their eyes.[1] They give us what they see, and combine the functions of the journalist and the skilled legal reporter. For all that, we can see that the strength and the weakness of a purely professional development of law is much the same then as now. Its strength is the logical grouping of confused facts under general principles, the application of those principles in detail to new states of fact, the ingenuity with which old principles and old remedies are restricted or extended to meet the new needs, physical, commercial, or moral, of another age. We see these qualities most strikingly displayed in the gradual development of new principles of delictual liability, and new principles of contract, in the recognition of the interest of the lessee for years and the copyholder. Its weakness is caused largely by the very defects which are inherent in its virtues. It cannot take large views as to the state of this or that branch of the law. It can only advance step by step from precedent to precedent. It cannot disregard the logical consequences of its principles, though in practice their strict application may be inconvenient. It is loath to admit new principles, and will not do so unless compelled by such considerations as the loss of business consequent upon the competition of a rival Court. If once a rule or a set of rules have become established they cannot be removed, however great a hindrance they become. They can only be explained or modified; with the result that the rule with the modifications and exceptions added becomes a greater nuisance than the original rule itself. We can see from the Year Books that a purely professional development is not good for the health of any legal system. The unrestrained efforts of a hierarchy of professional lawyers is apt to produce results similar to those attributed by Maine[1] to the unrestrained efforts of a hierarchy of priests; ‘usage which is reasonable generates usage which is unreasonable.’ English law at the close of the

Middle Ages was suffering, as it suffered at the close of the eighteen century, from a development too exclusively professional. At both periods it stood in urgent need of revision by the light of outside public opinion, if it was to meet the new requirements of another age.

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39.

THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND[1]

By Charles McGuffey Hepburn[2]

The Word "Code" As A Term Of Law

THE word "code" is of comparatively recent use by American and English lawyers. As late as 1850 its appearance among our terms of law was apt to excite remark, so rarely was it then found in such company;[3] and its derivations "codify" and "codification" had scarcely escaped from the ridicule and abuse which had been heaped upon them as barbarous innovations in a bad cause. Apart from its derivations, however, "code" is an old word in English. It had appeared there, coming out of the Latin through the French, as early as the days of Chaucer; apparently it was on a secure footing in the language at the beginning of the fifteenth century. But at the beginning of the nineteenth century "code" was still without standing in the vocabulary of our law, on either side of the Atlantic.

Early Use Of "Code" In English As A Lay Word

Its general use in English meanwhile had been that of a lay term, and of vague import. Because of the etymological meaning and use of its Latin original—*codex,* or *caudex,* the trunk of a tree, and hence the wax-smeared tablet of wood originally used by the ancients in writing, and so the writing itself—"code" in English might convey, and to some extent did convey, the general notion of anything reduced to *writing.* It is synonymous in most of the early dictionaries with our native word "book," whose etymology, curiously enough, it parallels. More particularly it denoted a collection of writings. At the close of the eighteenth century Paley refers, as a matter of course, to the Bible as consisting of two "codes," the "code, or collection, of Christian sacred writings" and the "code, or collection, of Jewish sacred writings." More often, the word, while still a lay term, had a flavor of the law. Whether or not our older dictionaries define it merely as a "book," "a volume," they steadily define it as "a book of the civil law"; for the best-known collections of Roman law bore each the name of *codex.*

These two meanings are the only meanings which "code," when used by itself in English, was popularly supposed to bear, until about the year 1800. It had no definite reference to any aspect of English law. When qualified, the word might indeed denote several distinct things in the field of law, widely separated in time and in their natures. It could refer to the code of Theodosius, published in the fifth century, or to the more famous code of Justinian, published a century later. The Ordonnances of Louis the Fourteenth might be called a code. The collection of Prussian laws which was

published in French and in German under the auspices of Frederick the Great bore the name of "Code Frederic."

Its Long Absence From Our Legal Nomenclature, And The Significance Thereof

But all these applications of the word, both general and specific, lay outside of English and American law. "Code" found no place in Jacob's Dictionary "explaining the rise, progress, and present state of the English law"; even ten editions and the added researches of Tomlins had failed to note it as a term of our jurisprudence as late as the year 1797.

The real significance of this should not be overlooked. It does not lie in the absence of the word from our legal nomenclature, but in the absence of the thing from our legal system. The word was at hand, ready for use, but at this time, the beginning of the nineteenth century, there was no one thing, actual or clearly designed, in the legal system of either England or the United States, to which "code" was naturally and specifically applicable.

Appearance Of "*Code*" *As A Term Of Modern Law*

A little after the year 1800 the word began to come into use among English and American lawyers as denoting something new in the scope and purpose of our jurisprudence. The French codes, promulgated at short intervals and with reiterated emphasis between the years 1804 and 1810;[1] the writings of Jeremy Bentham, before and after this period—notably his View of a Complete Code of Laws, his offer to the president of the United States, and afterwards to the governor of every state, to prepare a code for the use of the American States, "or such of them, if any, as may see reason to give their acceptance to it,"[2] his Codification Proposal, addressed "to all nations professing liberal opinions"; the codes actually drafted by Edward Livingston for the State of Louisiana,—these and other causes operated in the opening years of the nineteenth century to give the ancient word "code" an effective introduction as an important term of modern law.[3] They gave it also a suggestive embodiment. It presently came to stand for something tangible in our science of law. More than this, it became the watchword of a new and aggressive spirit of law reform on both sides of the Atlantic.[1] And it is significant of the progress which this reform has already made that the legal neologism "code" is now in the most familiar daily use by both the bench and the bar of all the United States.

Where Code Pleading Of This Type Prevails

Apart from any question as to the merits of this type of pleading, its geographical extent gives it an easy preeminence over every other American and English statutory pleading, and over what is left of common law pleading. The latter was not so wide-spread in its palmiest days. For "code pleading" has already supplanted it or usurped its natural place in twenty-seven states of the American Union, and in essentials if not in the very letter has dispossessed common law pleading in its ancestral home, even in

England, and found a way into India, into the colonies of Australia, into the Dominion of Canada, and widely elsewhere among the British Possessions. Following the sway of the Anglo-Saxon, it has encircled the earth. It may well claim the respect which is due to widest dominion.

Within the American Union code pleading now prevails in four of the Atlantic States, in three of the Central States, and almost exclusively in the West—in Connecticut, New York, North Carolina, and South Carolina; in Kentucky, Ohio, and Indiana; and through the vast region occupied by the contiguous commonwealths of Wisconsin, Minnesota, Iowa, Missouri, Arkansas, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, Montana, Wyoming, Colorado, Arizona, Utah, Nevada, Idaho, Washington, Oregon, and California.

The twenty-seven states named above make up what are commonly called the "code states"; there is a tendency to group all the other members of the Union as "common law states." But here a distinction or two must be kept in mind. In every one of the United States statutory modifications of the older procedure have been so many and so great that the science of common law pleading no longer exists anywhere with us in its entirety. By "common law states," then, is to be understood those states in which the pleading is partly according to common law rules, whether now existing as unwritten law or in the form of statutory enactments, and partly according to new statutory requirements, *with the common law element predominating.* The term may be applied, with more or less appropriateness, to the States of Maine,1 New Hampshire, Vermont, Rhode Island, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and Florida, Illinois, and Michigan, the Territory of New Mexico, and the District of Columbia.

But not all the remaining states are "common law states" even in this loose sense. Massachusetts, Maryland, Tennessee, Georgia, Alabama, Mississippi, and Texas have not established "code pleading" in the sense already explained, but they have established fairly complete statutory systems, which, like "code pleading," arise out of the common law,2 and in other respects are very near akin to "code pleading." In a sharply drawn division between "code states" and "common law states," they are to be ranked with the former. For convenience they may be referred to as quasi-code states.

The Barbarian Invasion Of The Codes

The change from common law pleading to code pleading of the type referred to in the preceding chapter came, when it did come, as suddenly as a barbarian invasion; and for many years it was hotly resisted as something barbarous by a host of able practitioners. Conservative lawyers have scarcely yet ceased to ascribe the change to a "love of innovation," to "barbaric empiricism," to the "suggestions of sciolists, who invent new codes and systems of pleading to order."1

But such were far from being its real causes. The overthrow of common law pleading was not due to a mere whim of legislative vandalism. Its causes had grown out of an urgent, practical, long-felt need, out of an oft-repeated failure of justice, out of a

public sense of substantial injustice. They had been gathering strength for centuries. Their beginnings lay in the very foundations of our older systems of pleading.

Their True Source

Considered in their most general aspects, the causes of the change may be said to rest in one—an inveterate incongruity between our law of procedure and our substantive law. The former had early lost the power of developing along with the substantive law. It had petrified while our modern substantive law was still in its budding growth. But the chief grounds of complaint which were urged against common law pleading were more specific. They related to the wall of separation between legal and equitable relief; to the labyrinth of arbitrary forms of action at law; to the artificial restrictions of the common law as to joining parties and as to joining causes of action; to the concealment of the real facts of a case through the verbiage or the vagueness of common law pleading.

Nor did legislation in England or America omit all efforts to relieve the suitors. But there was little substantial progress. As formerly, so now, the task of change, when approached at all, was approached with trembling hands. In the four hundred years which preceded the American Revolution, in the seventy years which followed it, the reformatory statutes were comparatively few in number and all were timid in spirit. So timid and imperfect were they that the root of the evil remained untouched. The real causes of a mischief which was felt by all lay embedded in the foundation of a great and venerable system. They were not easily reached; their removal was not to be dreamed of. Meanwhile, our substantive rights steadily grew in number and complexity, and the art of pleading tended more and more to impede the practical administration of justice. "What would Sir Matthew Hale have said had he lived in these times of nicety and curiosity?" queried a learned English lawyer in 1820—"times in which pleading seems to be involved in all that perplexity can suggest or prolixity supply."[1] And what was true in England was true also in most of the American states, for the English precedents, brought to this country at the time of their most "sterile exuberance," had been copied by our practitioners with painstaking care. On both sides of the Atlantic delays and expenses continued to wear out the patience of litigants and to confiscate their property. A steadily increasing number of suitors, driven to and fro from law to equity and from equity to law, entangled in a labyrinth of actions, or lost in a wilderness of words, suffered what they felt and knew to be a practical and substantial injustice. The demand for relief became more and more urgent, and slowly took form and movement.

The New Movement In England Its Rise—Jeremy Bentham

This growing demand was not a formless clamor of ignorance. Here and there among the lawyers were critical minds who saw the need for a change; and the cause of reform found a champion—as able, bold, and tireless as any reform could wish—in Jeremy Bentham.

His entrance into the history of English and American law is one of its dramatic incidents. He had been a pupil of Blackstone. In the year 1769, when Bentham was

but twenty-one, the first complete edition of Blackstone's Commentaries was published. High as Blackstone still stands in the esteem of lawyers on both sides of the Atlantic, the excellence of his book as a popular exposition of law is probably underrated among us. It is not only the typical achievement of the eighteenth century, in the history of our law,1 but it was the first book in which the general system of English law had been set forth in an attractive form, even with consummate literary skill. For the first time in our history the study of legal rules was not repellent. And the work had a further claim upon contemporary popularity. Our ancient legal doctrines, thus placed as in the gladsome light of jurisprudence, were also treated by Blackstone with the reverent spirit in which the rank and file of the profession then delighted to consider them, as worthy of their highest veneration. For Blackstone was an excellent representative of the legal mind of his day—that conservative mental attitude which regards whatever is established law as an immutable principle of justice; and he had expressed this spirit of the times more clearly, more elegantly, than it had ever been expressed before.

But hardly had Blackstone's able and splendid laudation of the common law been heard than his pupil, Bentham, sounded a rude blast of opposition. It was the beginning of a long-continued assault upon entrenched abuses in the administration of justice. It was the first note of a contest whose end is not yet, but which has already accomplished the greatest revolution known in our law within the last six centuries.

The year for the beginning of this revolution, if a precise date can be given to so gradual a movement, may be said to have been 1776. It was the year of Bentham's first book, his "Fragment on Government," which, in general, was a criticism of Blackstone's Commentaries at large and in particular was an attack upon his "Introduction."2 Bentham himself has described his pamphlet—it was hardly more than that—as "the very first publication by which men at large were invited to break loose from the trammels of authority and ancestor-worship on the field of law." But Bentham's effective work came later. It continued for half a century, steadily growing in intensity, and ceased only when death stayed his hand in 1832.1

Bentham'S Later Influence.

For many years Bentham's was the only voice raised against "ancestor-worship on the field of law." His bold and vigorous attacks, however, set men to thinking. Slowly thoughtful lawyers gathered about him. His influence was felt on both sides of the Atlantic.2 His cherished plans, often radical to the extreme, were indeed never to be realized in full, at least within his century. Many of them were impracticable even according to present standards; nor have Anglo-Saxon peoples been able to cut loose from their historical development. But Bentham's criticisms and those of his followers gave point and force to demands for relief which were founded on something more than theory—on a long-felt, substantial failure of justice. In some measure, also, the suggestions of Bentham's analytical school supplied lines of action for reformers who urged less radical changes. "I do not know a single law reform effected since Bentham's day," said Sir Henry Maine in 1874, "which cannot be traced to his influence."1 By slow degrees the movement grew until, about the year 1825, it assumed more than respectable proportions in both England and America.

Its First Fruits

(*A*)

Parliamentary Commissions

Excepting the sporadic case of the Livingston codes in Louisiana,2 the first tangible results of this movement appeared in England. Beginning in 1828—four years after the appearance of Stephen on Pleading—parliament appointed a series of commissions to inquire into the law of procedure, and other subjects, and report such changes as should be enacted. Very radical suggestions were considered by these commissions, but their recommendations to parliament, especially as to matters of pleading, were at first extremely conservative. It was still a prevailing doctrine that the existing rules of common law pleading were founded “in strong sense and in the soundest and closest logic, and so appear when well understood and explained.” The venerable system, it was said, could be adapted to the demands of modern times without impairing its integrity. Any attempt to erect a new system would cause greater mischief than the retention of the old.

This halting conservatism in the earlier stages of the movement is well shown in a report made in 1831 by the commissioners on common law practice and procedure.

“An opinion,” say these commissioners in their third report, “is entertained by some persons that all distinction as to Form of Action should be abolished and that the plaintiff should be allowed to state the circumstances of his claim, or complaint, in ordinary language, free from all restraint of technical method; and there are others who, without rejecting forms of action altogether, think that those which are now established should be resolved into more convenient and simpler divisions. We can not, however, persuade ourselves that, with respect to the forms now in common use, any considerable change would be expedient, with the exception only of the new shape which in our second report we have proposed to give to the action of ejectment. It is not that we are insensible to certain imperfections and inconveniences incident to these forms, for we feel that their classification is arbitrary and otherwise defective. But in this, as in so many other cases, we are presented with a choice of difficulties. To those who have observed the inconveniences which in other systems of judicature are found to flow from the want of fixed forms of action, it will scarcely be doubtful that they are an invention of real merit and importance. They tend most materially to secure that certainty in the right of action itself, which is one of the chief objects of jurisprudence; they form a valuable check to vagueness and prolixity of statement; and in this and other respects they are essential to the convenient application of the rules of pleading.”

Whether the other great evil, the separate administration of law and equity, should be abolished was hardly deemed a practical question at this time. It was apparently the general impression that the distinct systems for the administration of legal and equitable rights were founded in the nature of eternal entities. Nor was the question of their fusion brought to an issue in England until about thirty years later.

(*B*)

A Spirit Of Criticism

Apart from actual legislation, these commissions and the movement of which they were a part had this result, at least: they shook the self-satisfied conservatism of the English bench and bar. A spirit of criticism was abroad in the land. Many became questioners of things established, even in the province of the law. So marked, indeed, was this new spirit among English lawyers that it presently attracted attention on the other side of the Atlantic, and roused a similar spirit there. "The zeal and activity with which the reform in the law has been conducted in England within the last few years," said an American law writer in 1832,1 "present a strong contrast to the indifference with which the subject had for a long time previously been regarded in that country by the great body, both of the profession and the public. Till recently the lawyers, with very few exceptions, appeared to feel themselves bound, on all occasions, to stand forward in defence of the system under which they had been brought up. But now they are among the most busy in examining the law, pointing out its defects, and suggesting remedies."

(*C*)

Rules Of Hilary Term

The time, however, was not yet ripe for a radical reform. The official recommendations made by the parliamentary commissions referred to above fell far short of the suggestions considered by them; and the legislation which followed was no less conservative. It found its chief expression in the Rules of Court of Hilary term—the "New Rules" of 1834.1 But these hardly touched the weightier matters of reform. Fear of plunging into a chaos brought the movement to a pause at the very threshold of its work. The "new rules" were a compromise—a lame and unhappy compromise, as it turned out—between the conservatism of six centuries and the demand of modern criticism, of modern convenience; and they had a marked professional leaning towards the past rather than the future. Their chief aim was to remedy what were essentially but incidental defects and faults in the existing systems, the vagueness of general pleading, the prolixity of special pleading, the necessity of certain formal allegations. However well intended and highly praised, the "new rules" amounted to little more than "an attempt to stave off an immediate pressing difficulty by a patchwork scheme of modification and suspension." And, like most such attempts, they not only fell behind the real needs of the day, but tended to retard the progress of reform. Through them the real reform of common law procedure in England was put off for twenty years.

The Preliminary Movement In The United States

Meanwhile, a similar movement had begun in America and, after some delay, was making startling progress here. Once fairly under way, the reform movement in

several of the United States went at a leap beyond the boldest designs then entertained in England. The most radical schemes of reform were hastily vested with the authority of law. And it is to be remembered that the enactment of what was then appropriately enough called the "American system" preceded and, in a large measure, inspired the sweeping changes which characterize the English legislation of 1873.

Its Premature Expression In The Livingston Codes

But just here it is worth while to go back a little in the history of American law and notice the curious episode of the Livingston codes. Speaking generally, the movement towards a statutory reform of common law procedure assumed a definite and aggressive shape in the United States at a somewhat later day than in England; but the new critical spirit whose earlier effects in England have been noticed had one tangible result of moment on this side of the Atlantic at a very much earlier day than these parliamentary commissions. It occurred in Louisiana under conditions which were quite out of the ordinary. Shortly after the acquisition of that territory by the United States, the question arose whether the provisions of the federal constitution as to the right of trial by jury and procedure according to the common law did not at one stroke impose upon Louisiana the whole system of English legal practice, unknown and repugnant although it was there. In 1804 a test case was made up. After earnest discussion the court held that, although the constitution of the United States required trial by jury, and made obligatory the observance of common law rules in appellate proceedings in federal courts, yet the people of Louisiana were free, in much the greater part of their legal procedure, to follow a different system. The way was thus opened for a liberal and rational treatment of the whole subject of judicial procedure. It was such an opportunity as Bentham dreamed of—such a result as, in 1804, was to be found nowhere else in the United States or in England. And, as it happened, a man worthy of the occasion was at hand. Edward Livingston had removed from New York to Louisiana shortly before the case just referred to came up for trial. He appeared for those who opposed the adoption of the common law procedure; and, following up his success in the courts, he recommended to the legislature a simplification of the existing system, which was a medley of civil and Spanish law. His suggestion meeting with approval, Livingston promptly drafted what was in effect a new code of procedure. It was adopted by the Louisiana legislature in 1805.[1] Nor did the impulse cease with this. Fifteen years later the legislature provided for the appointment "of a person learned in the law" who should prepare and present a code of criminal law, "designating all criminal offenses punishable by law, defining the same in clear and explicit terms, designating the punishment to be inflicted on each, laying down the rules of evidence on trials, directing the whole mode of procedure, and pointing out the duties of the judicial and executive officers in the performance of their functions under it."[2]

A little later this very comprehensive task was entrusted by the legislature to the hands of Mr. Livingston. With characteristic thoroughness he prepared complete codes of crimes and punishments, procedure, and evidence, and explained the nature of each with an elaborate introduction. His plan had been reported in advance to the Louisiana legislature; he had been earnestly requested to complete it, and he did complete it. But the codes when completed were not enacted in Louisiana. Their

influence, however, both at home and abroad, was hardly the less for that. They were received with the highest praise in America and in Europe, and that by recognized leaders in the law. They have since proved "an unfailing fountain of reforms" on both sides of the Atlantic. Their influence was especially noteworthy in this respect: they went far towards demonstrating the advantages of codification "in giving precision, specification, accuracy, and moderation" to a system of law.[1] They appeared, indeed, before the times were ripe for such a reform, but in no small measure they prepared the minds of men for the great changes which came a quarter of a century later. It is worth noting also, as indicating the intimate, mutual bearings of the reform movements in England and America, that Livingston looked to Bentham as his teacher in all these things.[2]

Rise Of The New York Code

Important and interesting as they were, the Livingston codes can hardly, however, be regarded as directly influencing the rise of code pleading in this country. The agitation which was immediately connected with that event began a little after the year 1826. It was most conspicuous in the State of New York, where the legal procedure had been modeled very closely after the English system, and where the relations with the mother country had continued to be both constant and intimate.[3] By 1842 the movement had made such progress that a bill was introduced into the New York legislature "for the more simple and speedy administration of justice in civil cases in the courts of common law"; and, since law and equity were then separated by the New York constitution, another bill was introduced to bring about a like result in the courts of equity. These measures failed of their intended effect at the time, but, four years later, when the New York constitution was revised, the demand for a radical reform found more emphatic expression, and a remedy was attempted. The new constitution, adopted in November, 1846, abolished the court of chancery, created a court "having general jurisdiction in law and equity,"[1] and required that the next legislature should provide for the appointment of three commissioners, whose duty it should be "to revise, reform, simplify, and abridge the rules and practice, pleadings, forms, and proceedings of the courts of record of this state, and to report thereon to the legislature."[2]

This contemplated reform, even at its outset, was part of a larger plan, that of codifying the whole law, both substantive and adjective. For the New York constitution of 1846 provided also that the legislature, at its first session after the adoption of the constitution, should appoint three commissioners "to reduce into a written and systematic code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient."[3] The commission thus appointed was distinct from the one referred to above and differently constituted.[4] Its members were designated in the New York statutes as "Commissioners of the Code," while the members of the other bore the statutory name of "Commissioners on Practice and Pleadings." The two commissions so divided the entire work between them that one took the codification of the law of procedure, and the other, the "Commissioners of the Code," took the codification of the rest of the law. The work of this commission will be noticed hereafter; it is with the commission on practice and pleadings that we have now to do.

When it came to the appointment of the latter commissioners, the legislature prescribed their duty somewhat more explicitly, instructing them, in accordance with a memorial from fifty lawyers of New York, "to provide for the abolition of the present forms of action and pleadings in cases at common law; for a uniform course of proceedings in all cases whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and of any form and proceeding not necessary to ascertain or preserve the rights of the parties."1

Nature Of The Undertaking

Most of the lawyers and many of the general public were hostile to so radical a change.2 The task imposed was, indeed, unparalleled in the history of English or American jurisprudence. A great and venerable system, deep-rooted in the past of a conservative profession and overshadowing the land, was to be supplanted in a day. The prejudices of thousands of practitioners must be disregarded and the habits of their daily lives reversed; the active opposition of many able men recognized as profoundly learned in the law must be overborne; a community accustomed, especially in such matters, to be led by their lawyers must be assured of safety in turning aside to follow a few reformers. In the face of such obstacles the three commissioners were asked to design and construct a new system which they could recommend as capable of doing all the work of the old, and doing it better.

Drafting The Code Of 1848

One member of the commission resigned rather than comply with the command of the statute. The other two, Mr. Arphaxed Loomis and Mr. David Graham, had publicly expressed themselves against changes so sweeping as those contemplated; but, disregarding opinions no longer held, they now accepted the appointment in the spirit in which it was made. Most opportunely, also, Mr. David Dudley Field, who at first had been thought too radical in his plans of reform to hold a place on the commission, was chosen to fill the vacancy, and the three united in the promptest execution of the work.

Some portions of the proposed code were already formulated in the two bills which had been submitted to the legislature in 1842, "for the more simple and speedy administration of justice in civil cases." But, with all allowances, it is seldom that so great a work is accomplished in so short a time. The commission was first appointed by the legislature in April, 1847, and reorganized, as indicated above, in the following September; five months later it reported the draft of an act, in fifteen chapters, and nearly four hundred annotated sections, "to simplify and abridge the practice, pleadings, and proceedings of the court of this state."

Impetuous Haste In New York

So far we have dealt with code pleading in its formative state; we now come to its realizations. The official draft of the New York code, framed and filled in, as we have

seen, with astonishing rapidity, was passed into an operating law no less quickly. The commissioners' bill, "to simplify and abridge the practice, pleadings, and proceedings" of the New York courts, having been reported to the legislature about the beginning of March, 1848, was considered, amended in some eighty of its three hundred and ninety-one sections, and passed before the middle of the following month.[1] And the new law, revolutionary as it was in theory and in its practical effects, went into operation on the first day of the following July.

Less expedition might have imperiled the whole enterprise. Opposition to the measure was bitter and intense, among both lawyers and laymen. Given time for organization, the "sons of Zeruiah," it was feared, might again, as in Cromwell's day,[1] have been too strong for the spirit of law reform. But, being once clothed with the authority of actual, operating law, the new movement was better able to make head against that "antipathy to reformation" which lawyers feel, and, perhaps, are bound to feel.

The Course In Other States And Countries

If the legislation thus begun had gone no further, the result would still have been among the great events in the history of modern law. But the really significant thing here is that the enactment of this New York code opened, as it were, the floodgates of reformatory legislation, and determined the course of its progress. Within five years after 1848, the older systems of pleading at law and in equity had been dispossessed of their inheritance by similar codes in Missouri, California, Iowa, Kentucky, Minnesota, Indiana, and Ohio; the civil procedure of Mississippi, Massachusetts, and Alabama had been largely reformed upon somewhat similar lines; the procedure of the English courts of law and of equity had been simplified by the acts of 1852. Within twenty-five years, that is, by the end of 1873, the New York code of 1848 had been enacted in substance, and often in its very letter, by sixteen other American commonwealths—Oregon, Washington, Nebraska, Wisconsin, Kansas, Nevada, Dakota, Arizona, Montana, Idaho, North Carolina, Wyoming, Arkansas, South Carolina, Florida,[2] and Utah; the procedure on the law side of the federal courts had been brought into conformity with these same principles, wherever they prevailed in the state courts; and in England the great Judicature Act of 1873 had prescribed for our most ancient courts of law and of equity a more radical change of this same general nature than any which had preceded it in America—a greater change withal than any other in English law for six centuries.

Distinction In The Order Of Treatment

Two or three distinctions are to be kept in mind—primarily, the distinction between the codes of the United States and the codes of the British Empire. They belong, indeed, to one movement, but the latter are a more recent development of code pleading. Their influence, however, is apparent in one or two of our later codes, that of Connecticut, for instance. The British codes, moreover, are the result of a gradual movement, whereas with us code pleading came *per saltum.* But the beginnings of the movement in both cases are not far apart. The year 1848 may be fixed as the date in America; the year 1852, as the date in England.

Within the United States also a distinction is to be kept in mind. Here the reform has three aspects. A majority of all the states have followed the lead of New York with more than common unanimity. For convenience we may call them the "code states," which in fact is their more common designation in our legal nomenclature. Some states, however, while reforming their procedure upon similar lines, have not ventured quite so radical a change. These can not be called common law states—their departure from the older procedure is too radical for that. They are more nearly code states, but it is confusing to refer to them as such. Perhaps the most convenient way will be to group them under a distinct head, as "quasi-code states." The progress of the change has affected also the procedure of the federal courts, but in a different and altogether unique way—their procedure at law being made to conform to that of the state in which the court is sitting, while their procedure in equity remains independent. The enactment of the reformed procedure in the United States has, therefore, these three heads, (1) Its progress in the "*code states*"—the procession, as it were, of the codes, their uniformity, and their stability; (2) Its progress in the *quasi-code states;* (3) Its progress in the *federal courts.*

In the British Empire the reform movement has been kept more closely within one path. The mother country leads the way; the colonial legislatures follow in her footsteps. The model here is found in the Judicature Acts and Rules of 1873 and 1875.

THE CODE STATES

Stability Of The Codes—In General

Drafted in haste and hurriedly enacted, as most of the codes were, they have naturally enough suffered frequent alteration at the hands of the legislatures. Change begot change in some codes with startling rapidity. But, in view of the character of the original legislation—its novelty, its wide scope, its varied application, the changes have been less radical and scarcely more frequent than might fairly have been expected. It held true of the codes as of legislation in general that a system complete and perfect in all its parts can not be struck out at a heat by the most able law-giver that ever lived. "No code," says Austin, "can be perfect."[1] Almost all the codes, however, passed through the experimental stages and became established systems without material departure from the form in which they were first enacted. But there are two notable exceptions in New York and Florida.

The Experiment In New York

After twenty-five years of amendatory legislation[2] and judicial construction, the New York code had reached, as its friends hoped, a definite and secure position. It had, indeed, sustained five hundred and fifty-one changes; the aggregate of its amendments had exceeded the total number of its sections. But many of these amendments were formal, and many were repeated attempts to frame the same section in a satisfactory form. Of the four hundred and seventy-three sections in the revised code of 1849, nearly one-half had never been amended in 1876. And among them were found the more important and substantial features of the original act. Moreover, the code as a

whole had received extended judicial discussion; the practice provided by it had become fairly well understood. All reasonable criticism, it was believed, had been answered or was in process of being answered, without another revolutionary change.[1]

The New York Revision In 1876

But at this point the spirit of innovation attacked the code, with serious results. In 1870 the New York legislature appointed a commission of three to revise and simplify all the general statutes of the state.[2] Six years later this commission reported a bill for a new code of procedure, covering the ground of the existing code; and the bill was presently passed in an act of thirteen chapters and fourteen hundred and ninety-six sections, relating to the jurisdiction of the courts and the ordinary proceedings in courts of record. To this new code the statute gave a new name, the "Code of Remedial Justice," for which, however, the popular phrase, the "Code of Civil Procedure," was soon substituted by another enactment.[3]

Its Characteristics

While retaining the fundamental requirements of its predecessor, the new code differed from it widely in phraseology and in the nature of its provisions. It was reactionary in spirit. It showed a vast increase in bulk—a figure of Falstaffian proportions among the other codes. It was "built up under a microscope." Its requirements ran into the most minute and trivial details of practice.[1] So smothered in details were its principles that New York practitioners have since been working under a civil procedure which scarcely any approve, and which is far enough from the ideal of those who framed the original code, and from what they succeeded in constructing. However defective and faulty the code of 1848 may have been, the faults of this code of 1876 are greater still. Such degree of clearness as the old code possessed is obscured; its conciseness is rendered diffuse; its simplicity is made intricate; its authority, settled by thirty years of judicial construction, was destroyed, and the task of reconstruction again became necessary.[2]

Like the "Code of Procedure" in 1848, the "Code of Remedial Justice" in 1876 was but part of a proposed code of civil procedure. The remainder of the commissioners' draft was reported in 1877 in the form of a bill containing nine chapters to be added to the thirteen chapters of the new code. This bill, however, met with such persistent opposition that it did not become a law until 1880.[3] In the meantime the first thirteen chapters had been repeatedly amended. And from 1880 down "The Completed Code of Civil Procedure," now numbering twenty-two chapters and almost four thousand sections, has been amended or supplemented at every session of the legislature no less copiously than before. With its annotations, the revised code makes "three gigantic volumes which appall the legal mind, and fill the lay mind with awe and dismay."[4]

The Proposed New York Revision Of 1896

Hasty, unsystematic, and piecemeal, these multitudinous changes only confirmed the character of this New York code of civil procedure as a "Brobdignagian conglomeration of heterogeneous rules of law and practice." The evil grew to such proportions that in June, 1895, the legislature passed an act requiring the governor of New York to appoint a commission to "examine the code of procedure of this state and the codes of procedure and practice acts in force in other states and countries, and the rules of court adopted in connection therewith, and report thereon to the next legislature in what respects the civil procedure of this state can be revised, condensed, and simplified."[1] This commission was appointed at once. It speedily ascertained that the "very decided preponderance of opinion" among New York lawyers was in favor of a general revision of their code. The commissioners themselves were clear in the conviction that the civil procedure of New York could "doubtless be revised, condensed, and simplified, and the administration of justice thereby greatly improved."

The Commissioners' Recommendations, And The Attitude Of The Bar

In December, 1895, they made a preliminary and suggestive report, looking to a thorough revision upon an historical basis.

"The civil procedure in the courts of this state," say they, "is the product of many years of slow and halting growth, and a revision, such as might be justified by the terms of this law, should be the result of close study of principles and methods, and much deliberation. A commission should study not only the whole subject of procedure, historically and scientifically, but the comparative merits of different systems which are, or have been, in force in different states and countries. We are unwilling to submit a revision which does not embody substantially the result of such care and study, and hence, at this time, we deem it proper to suggest only general recommendations, with an outline of the changes proposed, together with a brief statement showing the development of civil procedure and the systems of practice in use in other states and countries."[2]

In August, 1895, the commission sent to the judges and to nearly ten thousand other lawyers of New York a circular defining the possible scope of the proposed revision, and asking for the bar's opinion upon the subject. The suggestions thus evoked have been many and varied. That the New York code of 1876 stands in need of revision appears to be taken for granted. "It is universally and properly condemned as the product of unskilled workmen, ill equipped for the task."[1] But some members of the New York bar, constrained by that "antipathy to reformation" which shows itself so quickly when a change in the law is proposed, urge that the code be let alone. Their argument is the argument of inconvenience. They would "avoid the uncertainty in practice which may be created by a new code," and are far from claiming that the existing code is as systematic and convenient as it should be. Others suggest that the code of 1848 be restored as it stood in 1876, before the adoption of the "code of civil

procedure." Others point to the English reforms of 1873 and 1875—the judicature acts and rules[2] —as in the true line of progress. Others are still more radical, and recommend an assimilation to the German or French practice. But the prevailing tone, at large as in the commission, appears to be in favor of a conservative reform upon an historical and comparative basis, with a view to embodying the best which the experience of other states and countries has to offer on the subject of a codified civil procedure.

The Conservatism Of The New Movement

This aspect of the present reform movement in New York—its conservatism, but with reference to the results attained not in New York alone, but in all other commonwealths which have tried the experiment of codification—is very significant, so marked is it among some who recognize most clearly the faults of the present system of code pleading.

"While our code needs revision," says the Albany Law Journal in September, 1896,[1] "our bar and the public demand a careful, searching, painstaking examination as to its defects and methods by which they can be remedied, and deprecates anything like undue haste or work prepared by others than those specially fitted for the task, and who will give the necessary time and attention demanded by its importance. The sentiment of the bar as voiced by the state association requires that suitable provision shall be made for a thorough examination and analysis of the methods of procedure adopted in this country and abroad, and a selection of what is best and omission of what is most objectionable in our present code. We should either have the best work of the most thoroughly trained minds, which shall embody the best results of all human experience on the question, or we should let code revision remain a thing of the future, when such a result may be accomplished."

"My first notion of the best method of revising this Brobdignagian conglomeration of heterogeneous rules of law and practice," says Mr. Wm. B. Hornblower, of the New York City bar, referring to the code of 1876,[2] "was to abolish it out of hand; substitute in its place a few general provisions as to pleading and procedure; authorize the courts to regulate by rules all other matters of practice, and relegate to other portions of the statutes the provisions of substantive law. Reflection, however, has satisfied me that this radical course would be unwise and inexpedient. This body of statutory rules, built up with so much care, although not with the most skillful workmanship, ought not to be ruthlessly destroyed. It has become the chart of our professional navigation in practice; many of its provisions have been judicially construed by the courts, and I am constrained to the conclusion that to abolish it out of hand would be a great mistake.

"The work of revision should be placed in the hands of men who can give, and who shall be required to give, their entire time to this business. It can not be done in fragmentary intervals of an active professional practice. Men who are to do the work should have salaries equal to those of the justices of the supreme court in the state at large, and they should be prohibited from practicing law during their term of office as commissioners. . . . The coöperation of the various bar associations throughout the

state should be actively and earnestly sought by the commissioners, and their proposed revision should be submitted to these bodies in such shape and at such times as will enable them to carefully consider and criticise before the work of the commissioners is submitted to the legislature. There is always great danger in any work of this kind that we may take a step backward instead of forward. On general principles it is best ‘to let well enough alone,’ unless we are very sure that we are substituting for the ‘well enough’ a distinctly better thing. We can afford to wait and bear the ills we know rather than plunge ahead into ills that we know not of.”

The Possible Effect Of The New Movement

It is a strange sight to see these conservative forces of the bar, so long and so bitterly opposed to the New York code, thus arrayed in its support. But if this conservatism does not result in stagnation, if it merely keeps the movement to the lines of cautious progress, the outcome may be of farreaching benefit, although it fall short of “embodying the best results of all human experience on the question.”

The effect on other states is, of course, very problematical. General legislation by New York seldom fails to influence legislation far and wide in the Union. But the “code of civil procedure” which New York enacted in 1876 is without a following in the states which so readily adopted the New York “code of procedure” of 1848. Moreover, “the completed code of civil procedure” which became a law in New York in 1880 has been far less productive of similar legislation by other states than the proposed code of civil procedure which was submitted, *eo nomine,* to the New York legislature in 1850 and ultimately was rejected by that state. Apparently the impulsive movement of the early fifties has largely spent its force. The states which eagerly accepted the earlier results of codification in New York show no great readiness to adopt its later results.

Historical Relation Of Code Pleading To Codification In General

The inception of the New York code of procedure of 1848, as has already been indicated, was part of a much more ambitious design—that of codifying the substantive law as well as the law of procedure. Both purposes found expression in the New York constitution of 1846; and the outcome was that the codification of the substantive law was entrusted to three “commissioners of the code,” while the codification of the procedure was assigned to three “commissioners on practice and pleadings.”

The former commission accomplished very little; but the movement which resulted in its appointment had far-reaching effects further on. In 1857 a new commission was appointed, with Mr. David Dudley Field, then for some years prominent in the commission on practice and pleadings, at its head.[1] Its instructions were to reduce the substantive law of the state to a systematic code consisting of three parts, a “political,” a “civil,” and a “penal code.” The political code was completed in 1860; the other two were reported to the legislature in 1865. Only one of these codes has as yet become a

law in New York—the penal code, and this after sixteen years of waiting.[2] The civil code, however, has on two occasions been almost in touch of its goal, having twice passed both branches of the New York legislature and failed of ultimate adoption only for want of the governor's approval.

Complete And Partial Codification

But, while failing of effect at home, this code of substantive law and the others have had great influence abroad. Their career has been something like that of the New York "code of civil procedure," which was proposed at the beginning of the fifties. In the far West especially the results have been noteworthy.

Thus the civil code and the penal code drafted by the New York commissioners were adopted as early as 1865 by the territory of Dakota, the first English commonwealth to venture upon a codification of its substantive law.[3] The state of California has had a full suit of codes since 1872—a political code, a civil code, a code of civil procedure, and a penal code, which includes a code of criminal procedure as its second part. Each of the four was a separate act and is commonly published as a distinct volume.[1] A similar series of codes has been completed in the Dakotas, whose activity in codifying has been quite remarkable,[2] and in Montana.[3]

Besides these instances of all-round codification, the half century since 1848 has seen many instances of partial codification, in addition to the codes of civil procedure. The latter, indeed, make not quite half the total list of codes now extant in the United States. Notably and naturally there has been great activity in codifying the law of criminal procedure. It began in 1850, with the enactment of a penal code in California;[4] and nineteen other codes of criminal procedure have followed.[5] By the same showing the codes of *substantive* law are still few in number. But it is to be remembered that piecemeal changes of the common law here have been very numerous. The result lacks the system of a code; but the repeated incursions of legislatures into the domain of the substantive common law have very greatly diminished its extent. Many of its doctrines have been overthrown, many have been brought within the statute book.

QUASI - CODE STATES

Their Aspects In General

The causes which brought on the codes of civil procedure were not peculiar to any one state. They operated more or less strongly through all the Union, with the exception of Louisiana. The result is that the older systems of pleading have been greatly modified by statute even in that minority of our commonwealths which have not adopted the new pleading. In no state of the Union has common law pleading preserved its integrity. But in some states the modified system is more nearly that of the common law than the code system. These states, for convenience of reference, we may call "common law" states. There are other non-code states, however, in which the statutory changes have gone very far in the direction of "code pleading," as that

term is commonly understood. And these states, for the sake of a better term, we may call "quasi-code states." They comprise Mississippi, Massachusetts, Alabama, Maryland, Tennessee, Georgia, and Texas. Historically considered, the changes in their procedure rank with those in the earlier code states. And they show in a partial yet very suggestive way the impetus and general character of the reform movement in the early fifties. Its causes and effects appear in nearly every state in the Union, and on both sides of the Atlantic. The surprising thing is that, with so brave a start, the movement has gone no further than it has, either in these "quasicode" states, or in the larger field of the "code" states.

THE ENGLISH CODE

State Of The Reform Movement In England About 1848

Before the change considered in the foregoing pages—this change from common law to code pleading in the state and the federal courts of most of the American commonwealths—had run its course, a similar yet greater revolution had occurred in the ancestral home of the common law. The movements towards this end had taken definite form in England at a somewhat earlier day than with us; the year 1832 promised much for the cause of law reform on the other side of the Atlantic. But the chief immediate results in actual legislation were some partial reforms in the chancery, and the halting rules of Hilary Term of 1834. As things stood in the first year of Victoria's reign, English law was entering upon another lease of youth, and thinking lawyers felt the new influence. "The flood-tide of 1832 had not yet ebbed. In letters, in science, in trade and industry, there was on all hands consciousness of fresh vigor and expectation of great results. As it must needs fall out, men's expectation was in some things beyond the mark, in some, wide of it, in many, far short of it."[1] But, in matters of procedure, the enactment of the New York code of 1848 found the English legislators still standing in doubt over the weightier questions of reform.

Influence Of The First American Codes

The startling character of this New York legislation, however, its radical and extensive aims, going far beyond the boldest designs then entertained in England, had a notable effect there. The practical workings of the new system were watched by English reformers with care. Its comparative success stimulated them to new efforts. "While all people," said an English law writer of that day,[2] "are agreed that reform is needed, and while the new common law commission are issuing suggestions, halting and faltering, willing, perhaps, but unable, to free their minds from that peculiar tone which long and successful practice under our present system inevitably induces—a practical people in the western hemisphere have appointed a commission, and, quietly, expeditiously, and cheaply, and out of laws similar to our own and derived from us, have created a simple, single, and intelligible judicial system, which has hitherto worked well in the state (New York) by which it was first sanctioned, and has in consequence been adopted by several other states of the American Union. And let us not forget that it is not among a poor, homely, uneducated, and simple people that this great experiment in legislation is being tried, but among a people who are our

rivals in commerce, equal to us at least in intelligence, wealth, and luxury, with all the wants of a high taste of civilization, and whose laws to be successful must embrace nearly as wide a field as our own. The boldness of the attempt, and the righteousness of the motives which led to it should at least command our respect and sympathy. We venture to express a hope that the example may not be entirely lost upon ourselves, but that it will stimulate our law reformers to raise their minds at once to the contemplation of a radical and efficient reform; for they now have before them a proof that it is possible to sweep away all preëxisting laws without rushing into chaos."

The Actual Legislation On The Subject

Whatever the inducing causes, actual reformatory legislation on the English procedure began anew, and more vigorously than before, shortly after the year 1848. But the movement was still a cautious one. As it turned out, the English reformers were to go further than the American reform has ventured to go, but they were still resolved that a venerable system should not be overturned, as in America, at a single blow. They felt their way slowly. The enactment of their leading reformatory statutes, which began in 1852, extended through twenty years.[1]

The more notable changes were at first by distinct series of statutes, relating respectively to the courts of law and the court of chancery; afterwards the whole system of English courts and their pleading, at law and in equity, were recast in one series of statutes. These reformatory enactments are accordingly divided into three distinct groups: (1) a series of statutes establishing a reformed system of pleading at law—the "Common Law Procedure Acts," so called, whose course of enactment extended through eight years from 1852;[1] (2) a series of statutes establishing a reformed system of equity pleading, enacted under different titles during the course of ten years from 1852;[2] and (3) the judicature acts, whose beginning was in 1873, whose amendments have run through many years, 1875, 1877, 1879, 1881, 1884, 1890, 1891, and 1894,[3] and whose end is not yet.

(*1*)

Common Law Procedure Acts

The first of these statutes became a law in June, 1852, and went into operation in the following October.[4] It was a right extensive enactment, running to two hundred and thirty-six sections, and including two schedules of forms—a short *code of procedure,* as it were, for courts of law. It was followed within two years by an amending and enlarging statute of more than one hundred sections,[5] which in turn was followed, six years later, by another enlarging and moderating statute, the common law procedure act of 1860.[6]

These statutes, destined although they were to a short life in England, were no sudden growth. They were based in the main upon the reports of distinguished law commissioners whose labors had begun and produced some positive results as early as

1831. In other words, parliament was some twenty years preparing for the partial reform effected by the common law procedure acts.

Their Effect In England.

Their direct effect was in large part negative; they pruned away the faults of the older pleading at law. Still they wrought great and positive changes for the better, a few of which may be noticed here.

"Causes of action of whatever kind," it was provided, "may be joined in the same suit, provided they be by and against the same parties."1

Much of the old verbiage was abolished. "All statements which need not be proved, such as the statement of time, quality, quantity and value, when these are not material; the statement of losing and finding, and bailment, in actions for goods or their value; the statement of acts of trespass having been committed with force and arms, and against the peace of our Lady the Queen; the statement of promises which need not be proved, as promises in indebitatus counts, and mutual promises to perform agreements, *and all statements of a like kind, shall be omitted.*"2 Special demurrers also are abolished, with all the frivolous learning which they rendered necessary.3 And, still more significant, the reform breaks down part of the wall of separation between the administration of law and the administration of equity; for, under the act of 1854, several equitable defenses were permitted.4

Their Influence In America

The influence of these changes was quickly felt in America. Such notable alterations in common law procedure, deliberately made at its ancestral home, where its virtues stood in the clearest light, came at an opportune moment in some of our states, which were hesitating over the problems of reform. The commissioners who framed the Iowa code of 1860 left it on record that they were "most largely indebted" to the English common law procedure acts of 1852 and 1854.1 The Maryland act of 1856, "to simplify the rules and forms of pleadings and practice in the courts of law," was in the main a close copy from the same statutes. Other states, also, although, like Maryland, unwilling to enter upon the new and untried way of the codes, found themselves able to follow this reform by English legislation. But, curiously enough, some of these same states were not able to follow the statutory reforms which were presently to come in England; so that, while the common law procedure acts already belong to ancient history in England, they have to-day a present interest in more than one community on this side of the Atlantic. For in several of our states the movement towards a simplification of the law has gone but little, if any, beyond the point reached by these statutes.

Their Short Life In England

But in England they were, as I have said, only a temporary expedient, soon to give place to far more extensive and radical legislation.

They left the reform incomplete in at least two points of vital importance. The great principle that a pleading should be a plain and concise statement of the material facts alone had not yet been established—it was still possible for substance to be sacrificed to form;2 and the wall of separation between legal and equitable procedure was still retained. The drift, however, was setting very strongly towards a simple, harmonious, and systematic procedure in which substantial justice should prevail over formal justice, so strongly that the common law procedure acts make a short chapter in the history of English law. Within twenty-five years they had given place to the very comprehensive scheme for reform prescribed in the judicature acts.

(*2*)

Chancery Reform Acts

Meanwhile a similar movement was making important changes in the administration of equity. In the year 1852, the year of the first common law procedure act, parliament passed also two statutes, one "to amend the practice and course of proceeding in the High Court of Chancery,"1 and one "for the relief of suitors of the High Court of Chancery."2 They were followed in six years by the short but important chancery amendment act of 1858.3 Four years later came a "Chancery Regulation Act, 1862," scarcely a page in length, but very significant in its requirements.4

The Drift Towards Fusion

It is plain to see, in these enactments, that the court of chancery and the courts of law in England were now drifting rapidly towards the idea of "fusion," which had been given effect in the American codes not long before. The act of 1852 permits chancery to require the oral examination of witnesses before itself.5 The act of 1858 confers on chancery power to award damages in some cases, and permits it to impanel a jury for the purpose of assessing damages or trying questions of fact "before the court itself." Upon every such trial, "the Court of Chancery," declares the statute, "shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said superior courts sitting at nisi prius."6 The short act of 1862 goes further into the fundamentals. It required that chancery should no longer refuse or postpone the application of remedies within its jurisdiction until questions of law and fact on which the title to such remedies depended had been determined or ascertained by courts of law, but that the court of chancery must determine every question of law and fact incident to the relief sought, "whether the title to such relief or remedy be or be not incident to or dependent upon a legal right." There was a proviso, however, quite in harmony with the principle—when questions of fact before a court of chancery could be more conveniently tried by a jury at the assizes, it was declared lawful for chancery to direct such a trial.

But these statutes, like the common law procedure acts, were tentative measures; they failed to satisfy the demand of their day. The reformed system of equity pleading which they created flourished for twenty years and then was merged, with the reformed common law pleading, in the greater system created by the judicature acts.

(*3*)

Judicature Acts. Chief Characteristic Of This Stage

The most characteristic thing about this stage of the movement was its “fusion” of law and equity. The mischief which arose from their separation was early recognized. Before the passage of the first common law procedure act, indeed, a commission on law reform had reported that “a consolidation of the elements of a complete remedy in the same court was obviously, not to say imperatively, necessary to the establishment of a consistent and rational system of procedure.” About the time of the third common law procedure act, 1860, three law judges publicly declared that the existence of two conflicting systems of law recognizing inconsistent and incompatible rights, administered by two tribunals, each refusing to give effect to rights which would be enforced by the other, was not only an anomaly in jurisprudence, but had been found to be attended by practical inconvenience and mischief of the most serious character. In 1869, also, a judicature commission reported that “the first step towards meeting and surmounting the evils complained of would be the consolidation of all the courts of law and equity into one court, in which should be vested all the jurisdiction exercisable by each and all the courts so consolidated.” In the following year a bill constructed in conformity with this plan was introduced into parliament, but it failed of passage.

Passage Of The Judicature Acts

The hour, however, was now almost ripe for the revolution. A similar measure, introduced by Lord Chancellor Selborne, was carried in 1873, the first and most important of the judicature acts.[1] It was followed in 1875 by an amendatory and supplemental act,[2] and both came into operation at the same time, November 1, 1875.[3] This was in the Chancellorship of Lord Cairns, whose name and that of Lord Selborne will, therefore, says an English writer, “forever remain associated with the greatest and probably most useful change in the way of law reform which has taken place in this country for centuries.”[4] But the movement which resulted in the judicature acts had been promoted by all the recent chancellors and by most of the leading judges.

The Historical Bearings Of The Judicature Acts

The general effect of the judicature act of 1873 was to sweep away the English system of common law pleading even more completely than our codes have swept it away. And yet, as with us, the practitioner in England can not afford to forget the old procedure entirely.

Both the radical nature of this latest phase of the English reform and its historical bearings may be illustrated from the remarks of Mr. Montague Crackanthrope, of the English bar, before the American Bar Association in 1896.[5]

"The English system of common law pleading," said he, "was finally swept away by the English judicature act of 1873. It had been encumbered with obsolete learning, and had been terribly abused by the ingenuity of pleaders during centuries of adroit manipulation. The abuses were not, I think, original, and much had been done to remedy them; but the system had fallen into discredit, and had become the scapegoat for the sins of the profession. It was determined that it should no longer be necessary to plead formal causes of action, but that each party should tell his plain tale unfettered by technicalities, or, as the rules expressed it, that his pleading should contain, and contain only, a summary statement of the material facts on which he proposed to rely.

The change was of enormous historical importance. The old system had been the mould upon which the whole common law had been gradually formed. All legal conceptions had been defined, analyzed, and formulated through the operation of that elaborate machinery. It provided a natural classification of the law, saving it from absolute chaos, so that students learned their principles as they went along, by mastering their procedure. Declarations, pleas, and demurrers have now become matters of antiquarian interest, as far as actual practice is concerned. But, until the whole system of English law shall be recast and codified, the old learning respecting them will be indispensable to all who wish to be sound common lawyers. Without it a great deal of quite recent authority will remain obscure, and the old books in great measure unintelligible. Even in so simple a matter as an action of contract, it is necessary to know the peculiar and not unromantic history of the action of assumpsit. In an action for injuries against a carrier we must still be familiar with the distinction between the breach of a duty to carry safely and a breach of a contract to carry, though we are no longer put to a choice between the one and the other form of action. And so long as written pleadings remain, the best masters of the art will be they who can inform the apparent license of the new system with that spirit of exactness and self-restraint which flows from a knowledge of the old."

Rules Of Court Instead Of Direct Legislation

Their general purpose and main results considered, the English and the American system of pleading are in remarkable accord, as will presently appear;1 but they have one very salient point of divergence in the way in which they were framed. In the American codes almost all the principles and rules of judicial procedure were framed *for but not by* the judicial power. They were the direct work of the legislature. They exist in the forms of inexorable law. In the English system, on the other hand, almost all these principles and rules are framed *for and by* the judicial power, but under a delegated authority from the legislature. Excepting a few general provisions, the principles and rules of procedure in the English code exist not directly as statutes, but as rules of court. In other words, the courts themselves were permitted and required to build the complicated machinery which they must operate, and they may modify it as their experience suggests, without resorting to direct legislation. Parliament, however, was careful to retain a veto power upon proposed changes in procedure. By the terms of the act of 1873,2 all rules of court made in pursuance of the statute were to be laid before each house of Parliament within forty days next after the same were made, if Parliament was then sitting, or, if not, within forty days after the then next meeting of

Parliament, and thereupon Parliament, by means of an address presented to the Crown within forty days, might cause any of these rules to become void and of no effect, "but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same."

Scope Of The Rules Of Court In The English Code

The principle that the rules of judicial procedure may be framed in the first instance by judges of the superior courts is, of course, no novelty in either American or English law. It is hardly less familiar to the profession than rational. Every code state has its rules of court. Still better known are the equity rules of the federal system, framed by the Supreme Court of the United States under authority of the act of 1792—a partial code of procedure which has been before the country since 1822.1 Nor is it a strange doctrine with us that courts may, on their own motion and without direct resort to the legislature, repeal, amend, or add to the established rules of judicial procedure as experience or changing conditions require from time to time.2 The difference between the English code and our own in this respect is therefore in degree rather than in kind.

How far the rules of court extend in the English code may be illustrated from the judicature acts of 1873 and 1875. Under the terms of the act,3 rules of court might be made, at any time after the passage and before the commencement of the act, by order in council on the recommendation of certain judges for any of the following topics:

(1) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other court thereof respectively, and of the judges of the said High Court sitting in chambers; and,

(2) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and,

(3) Generally for regulating any matters relating to the practice and procedure of the said courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or the costs of proceedings therein.

From and after the commencement of the act, the Supreme Court was authorized "at any time, with the concurrence of the majority of the judges thereof present at any meeting for that purpose held (of which the Lord Chancellor shall be one) to alter and annul any rules of court for the time being in force, and to have and exercise" the power of making new rules on the subjects specified.

The statute proper1 numbers but one hundred sections, and the great majority of these relate to the constitution of the consolidated court, its jurisdiction, the powers of its different judges, its officers and offices. Rules of pleading are scarcely touched upon. But the statute as amended in 1875, when it went into effect, is followed by a schedule of "rules of court," numbering sixty-three "orders" with an aggregate of four hundred and fifty-three sections, and dealing with the familiar topics of pleading which appear in the direct *enactment* of our codes.

It may be added that the power of the judges to alter, annul, or add to these rules has been somewhat freely exercised, notably in 1883, when a new code superseded the rules of 1873 and 1875. In 1893 there was another revision affecting a considerable number of the rules. They are sometimes referred to as the new rules of 1893.

The Advantage Of Rules Of Court

There is, of course, much to commend this manner of framing the English code. A hurried legislative committee is hardly the body to define the rules of judicial procedure; it is naturally a task for the judges.

But, apart from this, the English codifiers appear to have had two other things in mind—(1) the certainty that use would presently reveal in the new pleadings errors and defects which should have a readier cure than direct legislation could afford; and, (2) the danger that however fully the rules of a statutory procedure might be in touch with the current needs of the day, the system would fossilize (as common law pleading has fossilized, as some of our codes tend to fossilize) unless the courts themselves were authorized and empowered to adapt their procedure readily to new conditions. The English code gives better heed than our own code to Lord Coke's aphorism, Nihil simul inventum est et perfectum;2 and it is more nearly in line with the wise suggestion made by Austin about 1832. "No code," said he, "can be perfect; there should, therefore, be a perpetual provision for its amendment on suggestions from the judges who are engaged in applying it, and who are in the best of all situations for observing its defects. By this means the growth of judiciary law, explanatory of and supplementary to the code can not indeed be prevented altogether, but it may be kept within a moderate bulk by being wrought into the code itself from time to time."1

But, while American lawyers commend the plan which has been adopted for framing the English code, it is well to bear in mind that a similar plan, if adopted by the New York reformers in 1848, would probably have stopped short of any radical change. The rules of Hilary Term or some equally faltering reform would have been the main result. The legal mind was then, far more than now, timid of changes in the law, fearful of plunging into chaos if it left the trodden path. Crude as the reform of 1848 was in many respects, it was yet bold and stimulating. It enabled even lawyers to contemplate a radical departure from an established system of law as not necessarily fatal. It has been largely instrumental in bringing on the more radical, even if more cautious reforms of the English code, whose later development can now offer in return many valuable suggestions.

It does not follow, however, that the special feature which is under consideration—the use of rules of court instead of direct legislation for declaring and amending the principles of procedure—is entirely suited, in its length and breadth, to our conditions. The arrangement does indeed give the procedure much more elasticity than is possible when direct legislation must be invoked for every alteration which the experience of practitioners shows to be desirable. But so great a power of change may prove not an unmixed blessing. Its success presupposes not only a high degree of learning and prudence in the judiciary, but stability in the office of judge. A procedure which might

change with the fancy of five-year judges would bring a host of evils in its train. Ever fruitful of contention and delay, a changeable procedure is a grievous burden to the community, which must pay the price of interpreting all new regulations of procedure, whether by rules of court or direct enactments.[1] The safer principle is that alterations in the law should be made only when shown to be necessary; and other things being equal, that is the better system which tends to prevent unnecessary change.

The Suggestive Resemblance Between English And American Code Pleading

The timid conservatism which marked the earlier history of the reform in England, and for years kept it in the rear of the similar movement on this side of the Atlantic, had evidently passed when the judicature acts and rules appeared. A new influence was abroad. The judicial spirit itself suffered a change. Technicality after technicality was brushed away with a rapidity which only those recognized who watched the process closely. Rules which a few years before had been deemed of essential importance were swept aside as worse than useless subtleties. The tide of ridicule turned back upon the common law itself. It was a Lord Chief Justice of England who suggested, in 1883, the formation of a *museum* of common law procedure. As the Yellowstone Park was intended to preserve "the strange and eccentric forms which natural objects sometimes assume," he would have a kind of *pleading park,* in which the glories of the negative pregnant, absque hoc, replication de injuria, rebutter, and surrebutter, and all the other weird and fanciful creations of the pleader's brain might be preserved for future ages, to gratify the respectful curiosity of our descendants, and "where our good old English judges, if ever they revisit the glimpses of the moon, may have some place in which their weary souls can still find the form preferred to the substance, the statement to the thing stated."[1]

The Common Purpose Of Both Systems

Quite as many of the old landmarks in pleading have been swept away by this recent English legislation as by the American codes. In many instances, indeed, the comprehensive provisions of the judicature acts and rules carry the change not only as far as the codes of civil procedure have gone, but considerably beyond the point at which American legislatures have deeemed it prudent to stop. The framers of the English system appear to have thought that the most direct course to the end which both systems have in view—a complete and final determination of a controversy in its entirety, and according to its essential facts—was to put the least possible restraint upon the discretion of the court in dealing with a case; on the other hand, our codes have kept closer to the common law theory that judges should be required to exercise no more discretion than is absolutely necessary. Where the provisions of the American system are imperative, the corresponding rules in the English system are often subordinated to the discretion of its judges, who may make such modification as is just, with a view to the convenient "determination of the real matter in dispute." But the underlying principle of both systems is the same. They are in more than substantial agreement as to what they overturn and as to what they establish. One purpose runs through the changes in both—to establish a simple and uniform

procedure in all civil causes, to open one broad and straight highway into a complete court of justice for every violated civil right. In each system the theory of the pleading has the same fundamental purpose, that of enabling the court to render substantial justice in one proceeding as to the whole controversy. The rules of *practice,* which point out the particular steps to be taken in the disposition of a case, do indeed differ under the two systems in many respects, but the rules of *pleading* under the judicature acts and rules are in remarkable accord with those of the American codes.1

Other Codes In The British Empire.—General Character Of The English Reform Movement In The Provinces

The movement which brought on the codes of civil procedure in the United States and the judicature acts in England was not confined to these countries. Wherever English law prevailed, the need of a more simple and direct relation between the substantive law and the law of procedure came to be regarded as an urgent and practical matter. Once fairly started by definite enactments in America and England, the reform spread so rapidly through the wide limits of the British Empire that "code pleading," despite the radical nature of its changes and the ultra conservatism of practitioners, made the circuit of the earth in less than fifty years. The statutory changes in the British colonies commonly followed those of the mother country, both in time and in their general character; but in some instances they ran ahead of the actual legislation for England.

Indian Code Of Civil Procedure

This was especially true of British India, so long the great experimental field of English codification.2 As early as 1854 a body of commissioners in England, appointed under a statute of the previous year,3 addressed themselves to the task of preparing a simple and uniform code of pleading and practice for India. The result of their labors was an elaborate act, passed in 1859, and known as a "Code of Civil Procedure." Greatly amended and revised, it now contains many provisions copied from the judicature acts; but it still keeps its name, code of civil procedure. Some of its provisions appear to come at first hand from the New York code; the differences, however, are many and suggestive.

Influence Of The English Judicature Acts And Rules

1 At a later day, the influence of the judicature acts and rules brought on similar legislation in widely separated commonwealths of the British Empire—in Ireland, in North America, in Australia, and elsewhere.2 The general result has been the rise within the British Empire, and for the most part since the year 1880, of an influential group of codes, similar in spirit, and often in the letter, to the great family of codes within the United States.

Value Of The British Codes To American Code Pleaders And The Cause Of Reform

Further than this it seems unnecessary to go. Our interest in the codes of the British Empire is indirect—for purposes of illustration; and the examples already given will suffice.

But it may be said again, and in conclusion, that although indirect, the American practitioner's interest in these codes is very considerable. They are later efforts towards the same end which is sought by code pleading in the American Union. They occupy a very wide field; they meet many diverse conditions. They have been framed in the light of our own experience, and themselves throw no little light upon the essentials of code pleading, and upon the path of development which the codes of the United States will naturally follow. For it is still true that the purpose declared in our earliest code, the code of 1848—"to simplify and abridge the practice, pleadings, and proceedings of the courts"—has been realized as yet in part only. Nor has the movement which brought on the code of 1848 and its successors in this country come to a perpetual end.

Our seven and twenty codes, even at the end of a half century, are a beginning, essentially bold and progressive, yet only a beginning, and as such often crude and imperfect. Certainly a final code was not to be expected as the direct result of this first movement in 1848 and its succeeding years.[1] Sooner or later the movement to simplify our procedure will begin again. Already there are signs of the discontent which precedes organized efforts for reform. And it is possible, at least, that the present generation may see considerable progress towards the greater American code, which, while preserving the essentials of the existing system, will be at once more simple, elastic, and durable.

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40.

A GENERAL SURVEY OF THE HISTORY OF THE RULES OF EVIDENCE[1]

By John Henry Wigmore[2]

THE details of the history of the rules of evidence can best be examined while considering the particular rules each in its place. But it is worth while to notice here summarily the historical development of the general system in its main features, and the relative chronology of the different rules. Some notion can thus be obtained of the influence of certain external circumstances on the rules at large and of some of the individual principles upon the others.[3]

The marked divisions of chronology, for our law of evidence, may be said to be seven,—from primitive times to 1200 ad, thence to 1500, thence to 1700, to 1790, to 1830, to 1860, and to the present time:

(1) *ad 700-1200.* Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei,* and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnesses;[1] for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document,—these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

(2) *ad 1200-1500.* With the full advent of the jury, in the 1200s, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests. The change is of course gradual; and trial by jury is as yet only one of several competing methods; but at least a system for the process of persuasion becomes possible. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths, and documentary originals is developed. The rule for the conclusiveness of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision; for they are not commonly caused to be informed by witnesses, in the modern sense.

(3) *ad 1500-1700.* By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered systemless jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500s the foundations were laid for all the rules of disqualification which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple failure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsorily if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the Crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period,—the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period—the end of the 1600s—an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the "parol evidence" rule enlarged its scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the Restoration of 1660 than with the Revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Crudities which Matthew Hale permitted, under the Commonwealth, Scroggs refused, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of evidence—find their first full recognition in the last days of the Stuarts.

(4) *ad 1700-1790.* Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical

efficiency. On the one hand, the final establishment of the right of cross-examination by counsel, at the beginning of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture,—that great instrument of the continental system,—it is almost equally powerful for the creation of false impressions). A notable consequence was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came into new prominence. All through the 1700s this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence;[1] but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later Lord Chancellor) were printed, under the significant title of the "Theory of Evidence." But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's "Trials at Nisi Prius") the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the "best evidence" doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century Mr. Burke could argue down the rules of evidence, when attempted to be enforced upon the House of Lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable.[1] But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents—such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals—now also received their general and final shape.

(5) *ad 1790-1830.* The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiæ relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centring around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings.[1] This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be

reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowledged." The room for new treatises was rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie,—in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while Phillipps and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

(6) *ad 1830-1860.* Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the inconsistent ones. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that sometimes the contrary is true,—if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects,—the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853,

on the common law procedure, is perusing epoch-making deliverances of the century.1 The other circumstance that favored Bentham's causes was the radical readiness of the times. The French Revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was convinced that there must be a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came about,—in the economic, or the political, or the juridical field,—if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice,—criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chronological order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform Bill, in 1832, under Russell and Grey; next the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not until the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch,—a beginning which would doubtless have culminated more rapidly if urgent economic and political crises had not intervened to absorb the legislative energy.

In the United States, the counterpart of this period came only a little later. It seems to have begun all along the line, and was doubtless inspired by the accounts of progress made and making in England, as well as by the writings of Edward Livingston, the American Bentham, and by the legislative efforts of David Dudley Field, in the realm of civil procedure. The period from 1840 to 1870 saw the enactment, in the various jurisdictions in this country, of most of the reformatory legislation which had been carried or proposed in England.

(7) *ad 1860.* After the Judicature Act of 1875, and the Rules of Court (of 1883) which under its authority were formulated, the law of evidence in England attained rest. It is still overpatched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demands of justice, and above all to be so certain and settled in its acceptance that no further detailed development is called for. It is a substratum of the law which comes to light only rarely in the judicial rulings upon practice.

Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common law rules and of statutory reforms, were restated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports,—partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended,—partly because of the moral obligation of the judiciary, in new communities, to vindicate by

intellectual effort its right to supremacy over the bar,—and partly also because of the advent, coincidently, of the same rationalizing spirit which led to the reformatory legislation,—this very necessity of re-statement led to the elaboration of a finely reasoned system. The "mint, anise, and cummin" of mere precedent[1] were not unduly revered. There was always a reason given,—even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exemplified, that "so far as evidence is concerned, the English practice needs no improvement but from its own stores. Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished."[2]

But the newest States in time came to be added. New reports spawned a multifarious mass of new rulings in fifty jurisdictions,—each having theoretically an equal claim to consideration. The liberal spirit of choosing and testing the better rule degenerated into a spirit of empiric eclecticism in which all things could be questioned and re-questioned *ad infinitum.* The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency. Added to this was the supposed necessity in the newer jurisdictions of deciding over again all the details that had been long settled in the older ones. Here the lack of local traditions at the bar and of self-confidence on the bench led to the tedious re-exposition of countless elementary rules. This lack of peremptoriness on the supreme bench, and (no less important) the marked separation of personality between courts of trial and courts of final decision, led also to the multifarious heaping up, within each jurisdiction, of rulings upon rulings involving identical points of decision. This last phenomenon may be due to many subtly conspiring causes. But at any rate the fact is that in numerous instances, and in almost every jurisdiction, recorded decisions of Supreme Courts upon precisely the same rule and the same application of it can be reckoned by the dozens and scores. This wholly abnormal state of things—in clear contrast to that of the modern English epoch—is the marked feature of the present period of development in our own country.

Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice—by slow formation of professional habits—or in the direction of attempted legislative relief from the mass of bewildering judicial rulings—by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting, until there has been more explicit discussion of the reasons for the rules and more study of them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the profession, "every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[1]

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PART IV.

EQUITY

41. Early English Equity.Oliver Wendell Holmes, Jr.
42. Common Law and Conscience in the Ancient Court of Chancery.Luke Owen Pike.
43. The Origin of Uses and Trusts.James Barr Ames.
44. The Development of Equity Pleading from Canon Law Procedure.Christopher Columbus Landgell.
45. Courts of Chancery in American Colonies.Solon Dyke Wilson.
46. The Administration of Equity through Common Law Forms in Pennsylvania.Sidney George Fisher.

[Other References on the subjects of this Part are as follows:

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41.

EARLY ENGLISH EQUITY[1]

By Oliver Wendell Holmes[2]

I.

Uses.

AT the end of the reign of Henry V. the Court of Chancery was one of the established courts of the realm. I think we may assume that it had already borrowed the procedure of the Canon law, which had been developed into a perfected system at the beginning of the thirteenth century, at about the same time that the Chancellor became the most important member of the King's Council. It had the 'Examination and oath of the parties according to the form of the civil law and the law of Holy Church in subversion of the common law.'[3] It had the subpoena, which also it did not invent,[4] and it had a form of decree requiring personal obedience.[5]

Down to the end of the same reign (Henry V.) there is no evidence of the Chancery having known or enforced any substantive doctrines different from those which were recognized in the other courts except two. One of them, a peculiar view of contract, has left no traces in modern law. But the other is the greatest contribution to the substantive law which has ever been set down to the credit of the Chancery. I refer to Uses, the parent of our modern trusts. I propose to discuss these two doctrines in a summary way as the first step toward answering the question of the part which Equity has played in the development of English law.

As a preliminary, I ought to state that I assume without discussion that the references to *aequitas* in Glanvill, Bracton, and some of the early statutes passed before the existence of a Chancery jurisdiction, have no bearing on that question.[1] I ought also to say that the matters of grace and favour which came before the Council and afterwards before the Chancellor do not appear to have been matters in which the substantive rules of the common law needed to be or were modified by new principles, but were simply cases which, being for some reason without the jurisdiction of the King's ordinary courts, either were brought within that jurisdiction by special order, or were adjudged directly by the Council or the Chancellor according to the principles of the ordinary courts.[2]

[3] I agree with the late Mr. Adams[1] that the most important contribution of the Chancery has been its (borrowed) procedure. But I wish to controvert the error that its substantive law is merely the product of that procedure. And, on the other hand, I wish to show that the Chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society

correcting the defects of a more archaic system. With these objects in view, I proceed to consider the two peculiar doctrines which I have mentioned.

First, as to Uses. The feoffee to uses of the early English law corresponds point by point to the Salman of the early German law, as described by Beseler fifty years ago.2 The Salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions. Most frequently the conveyance was to be made after the grantor's death, the grantor reserving the use of the land to himself during his life.1 To meet the chance of the Salman's death before the time for conveyance over, it was common to employ more than one,2 and persons of importance were selected for the office.3 The essence of the relation was the *fiducia* or trust reposed in the *fidelis manus,*4 who sometimes confirmed his obligation by an oath or covenant.5

This likeness between the Salman and the feoffee to uses would be enough, without more, to satisfy me that the latter was the former transplanted. But there is a further and peculiar mark which, I think, must convince every one, irrespective of any general views as to the origin of the common law.

Beseler has shown that the executor of the early German will was simply a Salman whose duty it was to see legacies and so forth paid if the heirs refused. The *heres institutus* being unknown, the foreign law which introduced wills laid hold of the native institution as a means of carrying them into effect. Under the influence of the foreign law an actual transfer of the property ceased to be required. It was enough that the testator designated the executors and that they accepted the trust; and thus it was that their appointment did not make the will irrevocable, as a gift with actual delivery for distribution after the donor's death would have been.1

There can be no doubt of the identity of the continental executor and the officer of the same name described by Glanvill; and thus the connection between the English and the German law is made certain. The executor described by Glanvill was not a universal successor. Indeed, as I have shown in my book on the Common Law, the executor had not come to be so regarded, nor taken the place of the heir in the King's courts even as late as Bracton. To save space I do not copy Glanvill's words, but it will be seen on reading that the function of the executor was not to pay debts—that was the heir's business,2 but to cause to stand the reasonable division of the testator as against the heirs.3 The meaning of this function will be further explained when I come to deal with the rights of the *cestui que use.*4

The executor had already got his peculiar name in Glanvill's time, and it would rather seem that already it had ceased to be necessary for the testator to give him possession or seizin. But, however this may be, it is certain that when the testator's tenements were devisable by custom, the executor was put in possession either by the testator in his lifetime or else immediately after the testator's death. As late as Edward I. 'it seemed to the court as to tenements in cities and boroughs which are left by will (*que legata sunt*) and concerning which there should be no proceeding in the King's Court, because it belongs to the ecclesiastical forum,1 that first after the death of the testator the will should be proved before the ordinary, and the will having been proved, the

mayor and bailiffs of the city ought to deliver seizing of the devised and devisable tenements (*de tenementis legatis et que sunt legabilia*) to the executors of the will saving the rights of every one.'[2] A little later the executor ceased to intervene at all, and the devisees might enter directly, or, if the heir held them out, might have the writ *Ex gravi querela.*[3]

If, as I think, it is sufficiently clear that in the reign of Edward I. the distinction between an executor and feoffee to uses was still in embryo, it is unnecessary to search the English books for evidence of the first stage when the testator transferred possession in his own lifetime. A case in 55 Henry III. shows executors seized for the purpose of applying the land to pious uses under a last will, and defending their seizing in their official capacity, but does not disclose how they obtained possession.[4] A little earlier still Matthew Paris speaks of one who, being too weak to make a last will, makes a friend *expressorem et executorem.*[5] It is a little hard to distinguish between such a transaction and a feoffment to uses by a few words spoken on a death-bed, such as is recorded in the reign of Henry VI.[1] But the most striking evidence of the persistence of ancient custom was furnished by King Edward III. in person, who enfeoffed his executors, manifestly for the purpose of making such distribution after his death as he should direct; but because he declared no trust at the time, and did not give his directions until afterwards, the judges in Parliament declared that the executors were not bound, or, as it was then put, that there was no condition.[2]

Gifts *inter vivos* for distribution after death remained in use till later times.[3] And it may be accident, or it may be a reminiscence of ancient tradition, when, under Edward IV., the Court, in holding that executors cannot have account against one to whom the testator has given money to dispose of for the good of his soul, says that as to that money the donee is the executor.[4]

At all events, from an early date, if not in Glanvill's time, the necessity of a formal delivery of devised land to the executor was got rid of in England as Beseler says that it was on the Continent. The law of England did in general follow its continental original in requiring the two elements of *traditio* and *investitura* for a perfect conveyance.[5] But the Church complained of the secular courts for requiring a change of possession when there was a deed.[6] And it was perhaps because wills belonged to the spiritual jurisdiction that the requirement was relaxed in the case of executors. As has been shown above, in the reign of Edward I. possession was not delivered until after the testator's death, and in that of Edward III. it had ceased to be delivered to them at all. Possibly, however, a trace of the fact that originally they took by conveyance may be found in the notion that executors take directly from the will even before probate, still repeated as a distinction between executors and administrators.

[1] It is now time to consider the position of the *cestui que use.* The situations of the feoffor or donor and of the ultimate beneficiaries were different, and must be treated separately. First, as to the former. In England, as on the Continent, upon the usual feoffment to convey after the feoffor's death, the feoffor remained on the land and took the profits during his life. Feoffors to uses are commonly called pernors of profits in the earliest English statutes and are shown in possession by the earliest cases.[2] As Lord Bacon says in a passage cited above, pernancy of the profits was one

of the three points of a use. It was the main point on the part of the feoffor, as to make an estate, or convey as directed, was the main duty on the side of the feoffee. But all the German authorities agree that the pernancy of the profits also made the *gewere,* or protected possession, of early German law.3 And in this, as in other particulars, the English law gave proof of its origin. In our real actions the mode of alleging seizin was to allege a taking of the esplees or profits.4

If the remedies of the ancient popular courts had been preserved in England, it may be conjectured that a *cestui que use* in possession would have been protected by the common law.1 He was not, because at an early date the common law was cut down to that portion of the ancient customs which was enforced in the courts of the King. The recognitions (assizes), which were characteristic of the royal tribunals, were only granted to persons who stood in a feudal relation to the King,2 and to create such a relation by the tenure of land, something more was needed than *de facto* possession or pernancy of profits. In course of time the fact that the new system of remedies did not extend itself to all the rights which were known to the old law became equivalent to a denial of the existence of the rights thus disregarded. The meaning of the word 'seizin' was limited to possession protected by the assizes,3 and a possession which was not protected by them was not protected at all. It will be remembered, however, that a series of statutes more and more likened the pernancy of the profits to a legal estate in respect of liability and power, until at last the statute of Henry VIII. brought back uses to the courts of common law.4

It is not necessary to consider whether the denial of the assizes to a *cestui que use* in possession was peremptory and universal from the beginning, because the feoffor had another protection in the covenants which, in England as on the Continent, it was usual for him to take.5 For a considerable time the Anglo-Norman law adhered to the ancient Frankish tradition in not distinguishing between contract and title as a ground for specific recovery, and allowed land to be recovered in an action of covenant, so that it would seem that one way or another feoffors were tolerably safe.6

But *cestuis que use* in remainder were strangers both to the covenant and the possession. There was an obvious difficulty in finding a ground upon which they could compel a conveyance. The ultimate beneficiaries seem to have been as helpless against the salman in the popular courts on the Continent as they were against the feoffee in the Curia Regis. Under these circumstances the Church, which was apt to be the beneficiary in question, lent its aid. Heusler thinks that the early history of these gifts shows that they were fostered by the spiritual power in its own interest, and that they were established in the face of a popular struggle to maintain the ancient rights of heirs in the family property, which was inalienable without their consent.1 In view of the effort which the Church kept up for so long a time to assert jurisdiction in all matters of *fidei laesio,* it would seem that a ground for its interference might have been found in the *fiducia* which, as has been said, was of the essence of the relation, and which we find referred to in the earliest bills printed in the Chancery Calendars.

This is conjecture. But it seems clear that on some ground the original forum for devisees was the Ecclesiastical Court. Glanvill states that it belongs to the ecclesiastical courts to pass on the reasonableness of testamentary dispositions,2 and,

while he shows that the executor had the King's writ against the heir, gives no hint of any similar right of legatees or devisees against the executor. The Decretals of Gregory disclose that a little later the Church compelled executors to carry out their testator's will.[3] And Bracton says in terms that legatees and devisees of houses in town or of an usufruct could sue in the ecclesiastical courts.[4] As we have seen, in the case of houses in town the executor ceased to intervene, the ecclesiastical remedy against him became superfluous, and devisees obtained a remedy directly against deforciants in the King's courts. But with regard to legacies, although after a time the Chancery became a competing, and finally, by St. 20 & 21 Vict. c. 77, s. 23, the exclusive jurisdiction, as late as James I. 'the Lord Chancellor Egerton would say, the ecclesiastical courts were more proper for Legacies and sometimes would send them thither.'[1]

These courts were unable to deal with uses in the fulness of their later development. But the chief instances of feoffment upon trust, other than to the uses of a last will or for distribution after death, of which there is any record until sometime after the Chancery had become a separate court under Edward III. were for the various fraudulent purposes detailed in the successive petitions and statutes which have come down to us.[2] It should be mentioned too, that there are some traces of an attempt by *cestuis que use* who were strangers to the feoffment to enforce the trust by way of a condition in their favour, and it seems to have been put that way sometimes in the conveyances.[3]

For a considerable time, then, it would seem that both feoffors and other *cestuis que use* were well enough protected. The first complaint we hear is under Henry IV. It is of the want of a remedy when property is conveyed by way of *affiance* to perform the will of the grantors and feoffors and the feoffees make wrongful conveyances.[4] As soon as the need was felt, the means of supplying it was at hand. Nothing was easier than for the ecclesiastics who presided in Chancery to carry out there, as secular judges, the principles which their predecessors had striven to enforce in their own tribunals under the rival authority of the Church. As Chancellors they were free from those restrictions which confined them as churchmen to suits concerning matrimony and wills. Under Henry V. we find that *cestuis que use* had begun to resort to equity,[1] whereas under Richard II. the executors and feoffees of Edward III. had brought their bill for instructions before the Judges in Parliament.[2] In the next reign (Henry VI.) bills by *cestuis que use* become common. The foundation of the claim is the *fides,* the trust reposed and the obligation of good faith, and that circumstance remains as a mark at once of the Teutonic source of the right and the ecclesiastical origin of the jurisdiction.

If the foregoing argument is sound, it will be seen that the doctrine of uses is as little the creation of the subpoena, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with. It is true, however, that the form of the remedy reacted powerfully upon the conception of the right. When the executor ceased to intervene between testator and devisee the connection between devises and uses was lost sight of. And the common law courts having refused to protect even actual pernors of profits, as has been explained, the only place where uses were recognized by that

name was the Chancery. Then, by an identification of substantive and remedial rights familiar to students, a use came to be regarded as merely a right to a subpoena. It lost all character of a *jus in rem,* and passed into the category of choses in action.3 I have shown elsewhere the effect of this view in hampering the transfer of either the benefit or burden of uses and trusts.4

II.

Contract

I must now say a few words of the only other substantive doctrine of which I have discovered any trace in the first period of English Equity. This is a view of Contract, singularly contradicting the popular notion that the common law borrowed Consideration from the Chancery. The requirement of consideration in all parol contracts is simply a modified generalization of the requirements of *quid pro quo* to raise a debt by parol. The latter, in certain cases at least, is very ancient, and seems to be continuous with the similar doctrine of the early Norman and other continental sources which have been much discussed in Germany.1

I may remark by way of parenthesis that this requirement did not extend to the case of a surety, who obviously did not receive a *quid pro quo* in the sense of the older books and yet could bind himself by parol from the time of the Somma to Edward III. and even later where the custom of various cities kept up the ancient law.2 Sohm has collected evidence that suretyship was a formal contract in the time of the folk laws, in aid of his theory that the early law knew only two contracts; the real, springing from sale or barter and requiring a *quid pro quo;* and the formal, developed from the real at an early date by a process which has been variously figured.1 I do not attempt to weigh the evidence of the continental sources, but in view of the clear descent of suretyship from the giving of hostages, and the fact that it appears as a formless contract in the early Norman and Anglo-Norman Law, I find it hard to believe that it owed its origin to form any more than to *quid pro quo.* Tacitus says that the Germans would gamble their personal liberty and pay with their persons if they lost.2 The analogy seems to me suggestive. I know no warrant for supposing that the *festuca* was necessary to a bet.

I go one step further, and venture hesitatingly to suggest that cases which would now be generalized as contract may have arisen independently of each other from different sources, and have persisted side by side for a long time before the need of generalization was felt or they were perceived to tend to establish inconsistent principles. Out of barter and sale grew the real contract, and if the principle of that transaction was to be declared universal, every contract would need a *quid pro quo.* Out of the giving of hostages, familiar in Cæsar’s time, grew the guaranty of another’s obligation, and if this was to furnish the governing analogy, every promise purporting to be seriously made would bind. But the two familiar contracts kept along together very peaceably until logic, that great destroyer of tradition, pushed suretyship into the domain of covenant, and the more frequent and important real contract succeeded in dividing the realm of debt with instruments under seal.3

To return to Equity. In the Diversity of Courts (*Chancery*) it is said that 'a man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law.' This was in 1525, under Henry VIII., and soon afterwards the contrary was decided.[1] But the fact that a decision was necessary confirms the testimony of the passage quoted as to what had been the tradition of the Chancery. I do not propose to consider whether thus broadly stated it corresponded to any doctrine of early law, or whether any other cases could be found, beside that of the surety, in which a man could bind himself by simply saying that he was bound. For although the meaning of the tradition had been lost in the time of Henry VIII. when the textbook spoke of covenants generally, the promise with which Equity had dealt was a promise *per fidem.* Thus, under Edward IV.,[2] a subpoena was sued in the Chancery alleging that the defendant had made the plaintiff the procurator of his benefice and promised him *per fidem* to hold him harmless for the occupation, and then showing a breach. The Chancellor (Stillington) said that 'in that he is damaged by the non-performance of the promise he shall have his remedy here.' And to go back to the period to which this article is devoted, we find in the reign of Richard II. a bill brought upon a promise to grant the reversion of certain lands to the plaintiff, setting forth that the plaintiff had come to London and spent money relying upon the *affiance* of the defendant, and that as he had no specialty, and nothing in writing of the aforesaid covenant, he had no action at the common law.[3] This is all the direct evidence, but slight as it is, it is sufficient to prove an ancient genealogy, as I shall try to show.

Two centuries after the Conquest there were three well-known ways of making a binding promise: Faith, Oath, and Writing.[4] The plighting of one's faith or troth here mentioned has been shown by Sohm and others to be a descendant of the Salic *Fides facta,* and I do not repeat their arguments.[1] It still survives in that repertory of antiquities the marriage ceremony, and is often mentioned in the old books.[2]

Whether this plighting of faith (*fides data, fides facta*) was a formal contract or not in the time of the Plantagenets, and whether or not it was ever proceeded upon in the King's courts, it sufficiently appears from Glanvill and Bracton that the royal remedies were only conceded *de gratia* if ever.[3] The royal remedies were afforded at first only by way of privilege and exception, and, as I have already shown, never extended to all the ancient customs which prevailed in the popular tribunals. But if the King failed the Church stood ready. For a long time, and with varying success, it claimed a general jurisdiction in case of *laesio fidei.*[4] Whatever the limit of this vague and dangerous claim it clearly extended to breach of *fides data.* And even after the Church had been finally cut down to marriages and wills, as shown in the last note, it retained jurisdiction over contracts incident to such matters for breach of faith, and, it seems, might proceed by way of spiritual censure and penance even in other cases.[1]

Thus the old contracts lingered along into the reign of Edward III. until the common law had attained a tolerably definite theory which excluded them on substantive grounds, and the Chancery had become a separate Court. The clerical Chancellors seem for a time to have asserted successfully in a different tribunal the power of which they had been shorn as ecclesiastics, to enforce contracts for which the ordinary King's Courts afforded no remedy. But, I think, I have now proved that in so doing

they were not making reforms or introducing new doctrines, but were simply retaining some relics of ancient custom which had been dropped by the common law, but had been kept alive by the Church.

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42.

COMMON LAW AND CONSCIENCE IN THE ANCIENT COURT OF CHANCERY[1]

By Luke Owen Pike[2]

IT has commonly been supposed that the equitable jurisdiction of the Court of Chancery was altogether different in origin from its ordinary or common law jurisdiction. The opinion is, perhaps, not inconsistent with the evidence upon which it was formed, but seems to deserve reconsideration in connection with three distinct but closely associated branches of enquiry. These are:—

> (1) The functions of the Chancery as the *Officina Brevium* or fountain-head of justice sending forth its remedies for wrongs in the form of Original Writs returnable in other Courts.
> (2) The judicial functions of the Chancery in proceedings commenced otherwise than by Bill.
> (3) The judicial functions of the Chancery in proceedings commenced by Bill.

The first of these three subjects appears to have been commonly regarded as being less closely connected with the other two than it really was; and the last two appear to have been insufficiently illustrated by early cases.

There was a doctrine, so old that it is difficult to fix its age with precision, according to which there could not be any wrong which had not its appropriate legal remedy. The remedy existed in the form of the Original Writ which issued out of the Chancery upon a proper representation there of the facts to which it was to be adapted. It was, however, very soon found that this theory, though most satisfactory as a theory, was sometimes a little at variance with the exigencies of every-day practice and the circumstances of human life. The difficulty was recognised in the Statute of Westminster the Second, c. 24. By that Act an attempt was made to provide for cases to which the writs in the Chancery Register were not strictly applicable. The conclusion is of great importance in relation to the subject now under consideration:—'And whensoever it shall happen from henceforth in the Chancery that in one case a writ is found, and that in like case falling under the same law and needing like remedy a writ is not found, let the Clerks of the Chancery agree in making a writ, or adjourn the complainants to the next Parliament. And let the cases in which they cannot agree be set forth in writing, and let the Clerks refer the cases to the next Parliament. And let a writ be made by agreement among men learned in the law, so that it happen not from henceforth that the Court of the Lord the King do fail complainants when seeking justice.'[1]

The Chancery is here recognised as the place in which new remedies are to be devised when necessary, but subject, in cases of extraordinary difficulty, to a reference to

Parliament and the assistance of those who are learned in the law. The reference to Parliament and the agreement of men learned in the law appear at first sight to be somewhat abruptly brought into juxtaposition. But the Judges were members of the Council; petitions were commonly presented to the King 'in his Council in his Parliament' in relation to suits actually pending in various Courts; and, as will presently appear, decisions were given on judicial proceedings in the Chancery 'de avisamento peritorum de Concilio.' The Council, in fact, or the Council in Parliament, exercised a general supervision over all legal matters, though for certain purposes the Chancery was regarded as an office of Parliament.

If, now, we consider for a moment the judicial proceedings on what is usually called the Common Law side of the Court, under what is usually called its ordinary jurisdiction, we shall find much to remind us of the Act which provided for writs *in consimili casu.* In cases of *Scire facias* to repeal Letters Patent or upon Recognisances in the Chancery, and in Traverses of Office, the nature of the jurisdiction exercised may be best understood by the aid of the form in which the judgment was given. Without always preserving exact verbal identity it preserved a general uniformity in its outline or framework. Judgments of this kind have been preserved in considerable numbers *in filaciis Cancellariae* among a class of documents usually assigned to the common law side of the Court and now known as 'County *Placita.*' The following instances may sufficiently illustrate the subject:—'Habita plena deliberatione cum toto Concilio domini Regis, videtur Curiae,' &c.; 'De avisamento Justiciariorum et Servientium ipsius domini Regis ad Legem, ac aliorum peritorum de Concilio ejusdem domini Regis in eadem Cancellaria ad tunc existentium, consideratum fuit quod literae praedictae revocentur et adnullentur;' 'De avisamento domini Cancellarii Angliae, Justiciariorum, Servientium ad Legem, et Attornati ipsius domini Regis consideratum est,' &c.

From these examples, ranging in date from the reign of Edward III. to that of Henry VI., it will be seen that judicial functions in the Chancery, even on the so-called Common Law side, were not always, if ever, exercised by the Chancellor alone. The authority of the Council or of constituent members of the Council was commonly asserted, or at any rate their advice was considered necessary. The proceedings are thus wholly distinct from those in the Courts of King's Bench and Common Pleas, where (though points of law might be referred to the Council during the progress of an action) judgment was given on the authority of the Justices of those courts respectively.

These facts should be borne in mind in considering the case of *Hals and others* v. *Hyncley,*[1] to call attention to which is one of the principal objects of this article. It is probably the earliest (being of the reign of Henry V.) in which proceedings by Bill addressed to the Chancellor can be traced from the Bill itself to the decision. It was clearly not at common law, because the want of a common law remedy was the ground of the Bill, and yet it bears in many respects the strongest resemblance to proceedings which have in later times been thought to belong to the Common Law side of the Chancery.

The general heading or description of the proceedings is in the same form as the headings or descriptions of proceedings upon *Scire facias.* It is, perhaps, worth quoting in its entirety:—

'Placita coram Domino Rege in Cancellaria sua apud Westmonasterium in Octabis Sancti Michaelis anno regni Regis Henrici quinti post Conquestum septimo.'

Then follows a statement commencing, 'Be it remembered' ('Memorandum' in the original Latin) to the effect that John Hals, William Clopton, esquire, Robert Chichele, Thomas Knolles, William Cavendish, citizens of London, Robert Cavendish, John Tendryng the younger, William Bartilmewe, chaplain, James Hog, and Philip Morcell had exhibited 'venerabili in Christo patri Thomae Episcopo Dunolmensi, Cancellario Angliae, quandam Billam, quae sequitur in haec verba.'

The Bill (which, it will be seen, itself suggests the idea of a *Scire facias* towards the end) is in French, and may be thus translated:—

John Hals [and the other plaintiffs, as above] very humbly pray [*supplient*] that (whereas one John Hyncley, of Thurlow in the County of Suffolk, esquire, has wrongfully disseised the said orators [*suppliauntz*], since the last passage of our Sovereign Lord the King to the parts of Normandy, of the manor of Pentlow and the advowson of the church of the vill of Pentlow with their appurtenances in the vill and lordship of Pentlow, whereof they were in peaceable possession at the time of the same passage, and it was so ordained by our same Sovereign Lord the King, upon his said passage, that no assise of Novel Disseisin should be prosecuted against any person whatsoever until our said Lord the King should return into England, wherefore they cannot have remedy by assise of Novel Disseisin to recover the said manor with the advowson and appurtenances aforesaid, to the great damage and annihilation of the poor estate of the said orators if they be not aided by your very gracious Lordship in this behalf) it may please your very gracious Lordship to consider this matter, and thereupon to command the said defendant to answer to the said orators in respect of the disseisin aforesaid, and whether he hath or knoweth anything to say for himself[1] wherefore the said orators should not be restored to their former possession of the manor with the advowson of the church and appurtenances aforesaid together with the issues and profits thereof in the meantime taken, for the sake of God and as a work of charity ('pur Dieu et en eovere de charite').

The *subpoena,* to compel Hyncley's appearance, then appears at length. Both the writ and all the subsequent proceedings are in Latin.

Hyncley appeared, prayed and had oyer of the Bill, and then answered or pleaded[2] to the following effect:—

One John de Cavendish, being seised of the manor and advowson, enfeoffed thereof one Andrew Cavendish and Rose his wife to hold to them and the heirs of the body of Andrew. Andrew and Rose were seised, and had issue William, who is still living and with the King in Normandy. Andrew died seised, and Rose, who survived him, leased the manor and appurtenances to one Thomas Clerk for a term of years still unexpired

and, during that term, executed a charter of feoffment of the manor and advowson to John Hals and other feoffees (being the plaintiffs named in the Bill), and a letter of attorney directing certain persons to give livery of seisin to the feoffees. The feoffees and the persons named in the letter of attorney went to the manor with the intention respectively of receiving and giving livery of seisin, but the tenant for years did not and would not attorn to the feoffees. Rose thereafter took the profits of the manor to her own use, and so died seised thereof in her demesne as of free-hold. After her death John Hyncley, the defendant, as father of Katharine, the wife of Andrew's son William and his next friend, at the time at which the disseisin is supposed to have been made, while William was abroad with the King, entered upon the manor and took and is at present taking the profits thereof to the use of William and with his consent. And Hals and the other feoffees, by colour of the charter and letter of attorney, would have entered upon the manor upon the possession of William and expelled him therefrom, and this John Hyncley, the defendant, would not permit them to do. 'Quæ omnia et singula idem Johannes paratus est verificare, pro-ut Curia, &c. Unde non intendit quod prædictus Johannes Hals et alii feoffati prædicti restitutionem manerii prædicti cum pertinentiis habere debeant, &c.'

The plaintiffs (saying by way of protestation that they did not admit the allegations of the defendant) replied to the effect that Rose was seised in her demesne as of fee of the manor and advowson, and enfeoffed thereof John Hals and the other feoffees, long before the King's last passage into Normandy, and while William was in England, and that Thomas Clerk, the tenant for years, attorned to them so that they were seised of the manor and advowson in their demesne as of fee long before the last passage of the King into Normandy. And afterwards Rose by a deed (produced in Court) released to the feoffees then in possession of the manor and advowson all her right and estate therein, and bound herself and her heirs to warranty. And now her heir is William. And Rose had nothing in the manor and advowson, nor did she take any profits thereof, after the feoffment, except at the will of the feoffees; and they were seised until driven out by the defendant after the last passage of the King into Normandy 'in forma qua ipsi per Billam suam prædictam supponunt. Et hoc parati sunt verificare, &c. Unde, ex quo prædictus Johannes Hyncley expresse cognovit expulsionem prædictam, petunt quod ipsi ad possessionem manerii prædicti una eum exitibus et proficuis inde a tempore expulsionis prædictæ in forma prædicta factæ restituantur, &c.'

The defendant (saying by way of protestation that he did not admit that Rose had ever been seised in her demesne as of fee, or had released to the feoffees, as they alleged), rejoined that Rose died seised of the manor and advowson as he had previously alleged, *absque hoc* that the tenant for years attorned to the feoffees, and *absque hoc* that the feoffees had any thing in the manor and advowson at the time at which the release was supposed to have been made. 'Et hoc paratus est verificare pro-ut Curia, &c. Unde petit judicium, et quod prædictus Johannes Hals et alii feoffati prædicti de restitutione sua manerii prædicti in hac parte præcludantur, &c.'

The plaintiffs sur-rejoined that Rose was seised and enfeoffed them, that the tenant for years attorned, and that Rose released to them while they were in full possession of the manor, as they had previously alleged, *absque hoc* that Rose died seised of the

manor and advowson, or took any profits thereof after the feoffment, except at the will of the feoffees. 'Et hæc omnia petunt quod inquirantur per patriam.'

The defendant joined issue—'et prædictus Johannes Hyncley similiter'—just as in any other Court.

The issue was tried in a manner which is very remarkable. It was not sent into any other Court, but was treated as the subject of an Inquisition to be returned into the Chancery in the same manner as an Inquisition *post mortem* or other Inquest of Office. The special commission to take inquisition or verdict appears among the proceedings:—

'Henry, by the grace of God, King of England and France, and Lord of Ireland, to his beloved and faithful William Hankeford, Richard Norton, and William Cheyne, greeting. Know that we have assigned you jointly and severally to enquire by the oath of good and lawful men of the county of Essex by whom the truth of the matter may best be known whether' &c. [Here follow at length the allegations made on both sides, which it is unnecessary to repeat.] And if the jurors found in accordance with the allegations of the plaintiffs they were further to enquire on what day the expulsion from the manor and advowson took place, and the value of the manor *per annum,* 'and the truth respecting all other points and circumstances in any way concerning the premises. And therefore we command you that at certain days and places which ye shall have appointed for this purpose, ye make diligent Inquisitions on the premises and send them clearly and openly made without delay, to us in our Chancery, under your seals or the seal of one of you, and under the seals of those by whom they shall have been made.'

Hankeford alone took the Inquisition and returned it into the Chancery. The jurors found in accordance with the allegations of the plaintiffs, stating also the day of the expulsion and the value of the manor *per annum.* 'In cujus rei testimonium juratores prædicti huic Inquisitioni sigilla sua apposuerunt.'

Thereupon the plaintiffs 'venerunt coram ipso domino Rege in Cancellaria sua prædicta,' and prayed that they might be restored to their possession of the manor and advowson, together with the mesne profits, according to the form and effect of their Bill.

Then follows the judgment in these words:—'Super quo, habita super præmissis matura et diligenti deliberatione cum Justiciariis, et Servientibus dicti domini Regis ad Legem, ac aliis peritis de Concilio suo in Cancellaria prædicta existentibus, de eorum avisamento consideratum est quod prædicti Johannes Hals, Willelmus Clopton, Robertus, Thomas Knolles, Willelmus, Cavendisshe, Robertus, Johannes Tendryng, Willelmus Bartilmewe, Jacobus, et Philippus ad possessionem suam manerii et advocationis prædictorum cum pertinentiis, una cum exitibus de eodem manerio a prædicto die Mercurii perceptis, restituantur.'

With the exception that they were commenced by Bill, and that appearance was compelled by *subpoena,* the whole of the proceedings resembled those on the so-

called Common Law side of the Court. The pleadings between the Bill and the joinder of issue were, except in the conclusions praying for restitution or refusal of restitution, just such as might have been used in the Court of Common Pleas; and the final conclusion to the country with the *similiter* was in the ordinary common law form. The mode of arriving at the truth concerning the facts upon which issue was joined was simply that with which the Chancery had long been familiar in the ordinary Inquests of Office.

A word or two, however, may be necessary in relation to the persons who were appointed Commissioners for the purpose of taking the Inquest, Inquisition, or verdict. It will be observed that they are not described as Justices, or as holding any office, but simply as 'dilecti et fideles.' But as they were named William Hankeford, Richard Norton, and William Cheyne, and as the Chief Justice of the King's Bench was named William Hankeford, the Chief Justice of the Common Pleas Richard Norton, and a puisne Judge of the King's Bench William Cheyne, the triple coincidence leaves hardly any room for doubt that the Commissioners may thus be identified. They were no doubt included among those Justices and members of the Council upon deliberation with whom the judgment was ultimately given.

The Court, therefore, which heard the cause, and which, whatever may be its proper designation, gave judgment as prayed in the Bill addressed to the Chancellor, practically never lost sight of the matter even when the parties concluded to the country. The Letters Patent nominating the Commissioners passed under the Great Seal. The warrant—whether 'by the King himself'—'by writ of Privy Seal'—or otherwise—does not appear. But the whole transaction was very different from that of sending an issue to be tried in another Court, and comes very near if it does not actually amount to the calling of a jury by the authority of the Chancery itself for the purpose of trying an issue joined in the Chancery. This, it has generally been said, the Chancery had not the power to do. It is however clear that a power existed, and was actually exercised, to obtain the verdict of a jury in proceedings by Bill addressed to the Chancellor without the aid of the Courts of King's Bench or Common Pleas. The power did not, perhaps, exist in the Court of Chancery, but may have been derived from a higher source. The Petition or Bill to the Chancellor was only a substitute for a Petition to the King, or King in Council, or King in Council in Parliament, the proceedings were before the King in his Chancery, and judgment was not given without the advice of the Council. The Chancery, in fact, appears to have been regarded as an office connected with the Council and Parliament, and, being the office for the issue of original Writs, was the most natural place for the discussion of the proper remedy when, for any reason, an Original Writ was inapplicable. A Commission to enquire concerning certain matters as well as for other purposes could, of course, issue under the Great Seal by authority of the King in Council. If, then, the whole proceedings are regarded as being under the King and Council, through some general delegation of power to the Chancellor to receive and examine Petitions or Bills, there is a complete unity of jurisdiction throughout.

It will be observed that the decision is in the form of a Judgment ('consideratum est'), and not of a Decree ('ordinatum et decretum est'), and that judgment ('judicium') was prayed in the course of the pleadings. It is commonly stated that there was a decree in

Chancery as early as the reign of Richard II.; and could such a decree be produced it would be of great value for comparison with the proceedings in *Hals and others* v. *Hyncley.* That decrees were made by the King with the advice of his Council in the reign of Richard II. is a fact which admits of no dispute, but that they were made in Chancery, or in consequence of a Bill presented to the Chancellor, has yet to be shown. The proceedings in *Hals and others* v. *Hyncley* render it far more probable that the first decisions upon a Bill in Chancery took the form of judgments, and that the adoption of the form of a decree resembling that in which the King and Council administered extraordinary remedies, was of later date.

Sir Edward Coke, whose authority was once regarded as almost infallible, is responsible for a statement often copied and commonly accepted that the first known Chancery Decree was in the seventeenth year of the reign of Richard II. It is strange that so painstaking an author as Spence should have accepted Coke's assertion on this point without referring to the authority which Coke gave. Had he taken this simple precaution he would never have written the following sentence and note: 'References to the Council were still made in extraordinary cases of a nature purely civil, but it seems to have been considered there that the Chancery was the proper Court for making decrees in such matters. See the case Rot. Parl. 17 R. II. 2 Inst. 553, 4 Inst. 83.'[1] Even in the cited passages in the Institutes there is little to warrant Spence's general proposition, for Coke merely says that the Chancellor '*confirmed* by his decree the King's award made by the advice of his Council.' Had the Chancellor really done this it would have been a very memorable proceeding, but, as a matter of fact, he did nothing of the kind.

Coke's account of the case is erroneous in many particulars. He has not even correctly stated the names of the parties. What appears upon the Roll of Parliament[2] is briefly this. There is a Petition of John de Wyndesore to the King and to the 'tres sages Seignours de Parlement.' It contains a very long recital to the effect that the Petitioner and 'Monsire Robert de Lisle' had put themselves upon the order, award, and judgment of the King in respect of all disputes relating to certain manors; that the King had charged and commanded his Council to hear and examine the matters in dispute; that it appeared to the Council that Wyndesore had been ousted by De Lisle from the manors; that the King by advice of his Council ordered and decreed ('ordeigna et decrea') that Wyndesore should be restored to his previous estate in the manors; and that while Wyndesore was suing the necessary writs to be restored in accordance with the decree, Richard le Scrope purchased the manors of De Lisle by champerty, so that no execution could be had. Wyndesore therefore prayed restitution in accordance with the Decree made, not by the Chancellor but by the King with the advice of his Council.

His petition was read in Parliament, and various documents relating to the matter were there exhibited, including some produced by the Keeper of the Privy Seal and the Keeper (*custos*) of the Rolls. Among these was the King's writ of Privy Seal, reciting the decree of the King and Council, and directing the Chancellor 'to cause to be made out writs under our Great Seal, in due form, to the said Robert that he make restitution to the same John of the manors,' &c., 'and also to our Sheriff of the said county of Cambridge, that he be intendent' in carrying out the restitution. The writs drawn

pursuant to these instructions and enrolled were also read. In them the King's Decree is recited (*ordinavimus et decrevimus,* &c.). The operative part of the writ, or, as Coke calls it, 'Injunction,' addressed to De Lisle, is 'ideo vobis mandamus quod restitui faciatis,' and equivalent words are used in the writ addressed to the Sheriff. The Decree is throughout described as the Decree of the King, made by the advice of his Council; and the authority given to the Chancellor under the Privy Seal, is expressly limited to that of preparing and issuing writs, '*de executione Decreti facienda.*'

Upon a subsequent petition from De Lisle, the King sent another writ of Privy Seal, directing the Chancellor to prepare Letters Patent to the effect that Wyndesore was to be left to his remedy at common law, 'aliqua ordinatione seu decreto *per nos* in contrarium factis non obstantibus.' Thus, even after the supposed 'confirmation' in Chancery, the decree is described in the same words as before. From first to last there is no decree in Chancery mentioned, for the simple reason that no decree in Chancery was made.

Spence has cited another alleged decree in Chancery of the reign of Richard II. upon the authority of Sir Francis Moore's Reports.[1] In the place to which he refers there certainly do occur the words 'Decree en Chancery per ladvice des Judges' as applied to something which happened in the reign of Richard II.; but they occur in such a manner as at once to suggest a doubt and to render verification impossible. The report or note consists of a few lines only; there is nothing to show at what time it was made by Moore (who was King's Serjeant in the 12th year of James I.), and it is referred to the forty-first year of the reign of Elizabeth. In Easter Term in that year it is stated that Egerton, then Keeper of the Great Seal, said he had seen a precedent ('president') of the time of Richard II., to which he applied the above words 'decree,' &c. But neither the year of the reign nor the names of the parties are given, and any attempt to identify the case in any contemporary documents would therefore necessarily be vain. The actual words in the report can be accepted only as subject to all the following possible causes of error:—that Egerton did not care to distinguish carefully between a decree made by the King with the advice of his Council, and a decree made by the Chancellor; that Moore did not quote the precise words of Egerton in his manuscript notes; that the notes may have been inaccurately transcribed before they were sent to the printers; and that the printers did not reproduce the transcript with exact fidelity. Any one who has compared printed reports in French with the MSS. will know how frequently mistakes creep in. If the case cited by Coke, when examined and tested by the enrolment to which he refers, is found to give no sort of warrant for the assertion that it is an example of a decree in Chancery, it would hardly be prudent to accept as an example the case cited by Moore, which comes to us at third hand, and does not afford the means of further investigation.

The case of *Hals and others* v. *Hyncley* may, therefore, perhaps fairly be regarded as the first in which we have the complete proceedings on a Bill addressed to the Chancellor; and it is remarkable that the decision did not technically take the form of a Decree, but followed the lines of a Judgment given upon *Scire facias,* and other proceedings on the socalled Common Law side of the Court. Even the Bill was made to savour of the latter jurisdiction by the introduction of a clause borrowed from the writ of *Scire facias.* There appears to be here a real instance of a connecting link in a

process of development. It is to be remembered that a writ of assise of Novel Disseisin would in this case have issued out of the Chancery but for the fact of the King's general ordinance to the contrary. It was in the Chancery that another remedy was sought and was applied. But the methods used were for the most part those already familiar to the Chancery not as a Court of Equity according to later notions, but as a Court which, according to those later notions, is clearly distinguished from a Court of Equity. On the other hand, these familiar Chancery methods were not in early times regarded as being at common law. It was a subject of complaint in a petition in Parliament that the Justices of the King's Bench and Common Pleas were withdrawn from their own Courts to hear proceedings on *Scire facias* and Traverses of Office in Chancery; and the mischief which was alleged in consequence of this practice was the delay which it caused in the administration of the common laws of the realm.[1]

On the whole, it seems clear that, as late as the reign of Henry V. there was no broadly marked distinction, as defined at a later period, between the two classes of judicial functions exercised in the Chancery. There was naturally a distinction (though apparently not any difference of origin) between the more or less extraordinary judicial functions exercised in it and the ordinary functions exercised in it as the office for the issue of Original Writs which were returnable and triable in other Courts. But, in the regular course of human affairs, that which is at one time extraordinary comes at length, from long familiarity, to be regarded as ordinary. If, too, in earlier times the extraordinary remedies took the form of Judgments, and some of them in later times the form of Injunctions or Decrees, a new element of difference was at length introduced. The proceedings which followed the old methods were classed as ordinary, those which followed the new as extraordinary.

The division between the two kinds of judicial functions was, however, wanting in clearness even as late as the end of the sixteenth century. Staunford, whose 'Exposition of the King's Prerogative' was published in 1590, was evidently in some uncertainty about the matter. In one passage[2] he says, in relation to a Traverse of Office in the Chancery, 'Note, that if the party take a Traverse which is judged insufficient in the law, this is peremptory unto him, and he shall not be received after to take a new, as appeareth in 40 Assise, 24. Howbeit T. 14 E. 4[1] the contrary opinion is holden, and that it is not peremptory, because it proceedeth in the Chancery which is the Court of Conscience. But, as to that, a man may answer and say that a Chancellor hath two powers, the one absolute, the other ordinary, and this Traverse is before him by an ordinary power, in which case all things touching the same must proceed as it should before any other ordinary Judge of the common law, and therefore it should appear . . . that if the party be nonsuit in his Traverse it is peremptory unto him, for so might he delay the King infinitely. *Tamen quære.*' Staunford probably leaned to the opinion that Traverses of Office belonged to a jurisdiction different from that of the Court of Conscience; but the words '*Tamen quære*' show that he did not consider the point to be settled. In another passage[2] he allows the contrary opinion to pass unchallenged:—'In 14 E. 4, fo. 7[3] it appeareth that one had traversed an Office which was sent into the King's Bench to try, and had forgotten to sue his *Scire facias,* and yet he was suffered to go again into the Chancery to pray a *Scire facias* upon the first Traverse, for it was said that the

Chancery is a Court of Conscience, and for that cause the thing that was there amiss may be reformed at all times.'

In the end, of course, the difference between the two branches of the judicial functions of the Chancery became very distinctly marked, and was recognised by Statute. The case of *Hals and others* v. *Hyncley,* however, seems to be a curious monument of a time when the Chancery was not very clearly distinguished from the Council, and when lawyers had not arrived at any satisfactory distinction between a Court of Conscience and a Court of Common Law in Chancery.

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43.

THE ORIGIN OF USES AND TRUSTS[1]

By James Barr Ames[2]

I

USES

IN his well-known essay, "Early English Equity,"[3] Mr. Holmes agrees with Mr. Adams,[4] that the most important contribution of the chancery has been its procedure. But he controverts "the error that its substantive law is merely the product of that procedure," and maintains that "the chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system." In support of these views he brings forward as his chief evidence feoffments to uses. He gives a novel and interesting account of the origin of uses, which seems to him to make it plain that "the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with."

The acceptance of these conclusions would be difficult for any one who has studied his equity under the guidance of Professor Langdell. Moreover, time has strengthened the conviction of the present writer that the principle "Equity acts upon the person" is, and always has been, the key to the mastery of equity. The difference between the judgment at law and the decree in equity goes to the root of the matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages because they are his.[1] Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo,* is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make pecuniary compensation for his wrong. It is this higher standard that equity enforces, when the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy. Instances of the exclusive jurisdiction of equity are found among the earliest bills in chancery. For example, bills for the recovery of property got from the plaintiff by the fraud of the defendant;[1] bills for the return of the consideration for a promise which the defendant refuses to perform;[2] bills for reimbursement for expenses incurred by the plaintiff in reliance upon the defendant's promise, afterwards broken;[3] bills by the bailor for the recovery of a chattel from a defendant in possession of it after the death of the bailee.[4]

In most of these cases, it will be seen, the plaintiff is seeking restitution from the defendant, who is trying to enrich himself unconscionably at the expense of the plaintiff. Certainly in these instances of early English equity, chancery was giving effect to an enlightened sense of justice, and in so doing, was supplying the defects of the more archaic system of the common law. Nor, although the decrees in these cases are not recorded, can there be any doubt that the equitable relief was given in early times, as in later times, by commanding the obedience of the defendant.[5]

Is it possible that what is true of the early equity cases just considered is not also true of the equitable jurisdiction of uses? Let us examine the arguments to the contrary brought forward in the essay upon Early English Equity. Those arguments may be summarized as follows. The feoffee to uses corresponds, point by point, to the Salman or Treuhand of the early German law. The natural inference that the English feoffee to uses is the German fiduciary transplanted is confirmed by the facts that the continental executor was the Salman or Treuhand modified by the influence of the Roman law, and that there is no doubt of the identity of the continental executor and the English executor of Glanville's time. Although the *cestui que use* did not have the benefit of the common law possessory actions, he could, if the feoffor, take a covenant from the feoffee, and might, if not the feoffor, have the assistance of the ecclesiastical court. So that for a considerable time both feoffors and other *cestuis que use* were well enough protected. But the ecclesiastical court was not able to deal with uses in the fulness of their later development, and the chancellors carried out as secular judges the principles which their predecessors had striven to enforce in the spiritual courts.

It may be conceded that the feoffee to uses, down to the beginning of the fifteenth century, was the German Salman or Treuhand under another name. It is common learning, too, that bequests of personalty were enforced for centuries by suits against the executors in the ecclesiastical courts. It is possible, although no instance has been found, that devisees of land, devisable by custom in cities and boroughs, at one time proceeded against the executor in the spiritual court.[1] If this practice ever obtained, it disappeared with the reign of Edward I, the devisee recovering the land devised by a real action in the common law court of the city or borough. That the ecclesiastical court ever gave relief against the feoffee to uses is to the last degree improbable. The suggestion to the contrary[2] is wholly without support in the authorities.[3] Nor has any case been found in which the feoffor obtained relief against the feoffee to uses on the latter's covenant to perform the use. Such a covenant, it is true, is mentioned in one or two charters of feoffment, but such instances are so rare that the remedy by covenant

may fairly be said to have counted for nothing in the development of the doctrine of uses. If, indeed, a feoffment to uses was subject to a condition that the land should revest in the feoffor if the feoffee failed to perform the trust, the feoffor or his heir, upon the breach of this condition subsequent, might enter, or bring an action at common law for the recovery of the land. Only the feoffor or his heir could take advantage of the breach of the condition,[1] and the enforcement of the condition was not the enforcement of the use, but of a forfeiture for its non-performance. Moreover, such conditions seem not to have been common in feoffments to uses, the feoffors trusting rather to the fidelity of the feoffees. We find in the books many references to uses of lands, from the latter part of the twelfth to the beginning of the fifteenth century, but no intimation of any right of the intended beneficiary to proceed in court against the feoffee.[2] But the evidence against such a right is not merely negative. In 1402 a petition to Parliament by the Commons prays for relief against disloyal feoffees to uses because "in such cases there is no remedy unless one be provided by Parliament."[3] The petition was referred to the King's Council, but what further action was taken upon it we do not know. But from about this time bills in equity become frequent.[4] It is a reasonable inference that equity gave relief to cestuis *que use* as early as the reign of Henry V (1413-1422), although there seems to be no record of any decree in favor of a *cestui que use* before 1446.[1] The first decree for a *cestui que use,* whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law of today. The feoffee to uses, so long as his obligation was merely honorary, may properly enough be identified with the German Salman or Treuhand. But the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development.[2]

There is no reason to doubt that this development was brought about by the same considerations which moved the chancellor to give relief in the other instances of early equity jurisdiction. The spectacle of feoffees retaining for themselves land which they had received upon the faith of their dealing with it for the benefit of others was too repugnant to the sense of justice of the community to be endured. The common law could give no remedy, for by its principles the feoffee was the absolute owner of the land. A statute might have vested, as the Statute of Uses a century later did vest, the legal title in the *cestui que use.* But in the absence of a statute the only remedy for the injustice of disloyal feoffees to uses was to compel them to convey the title to the *cestui que use* or hold it for his benefit. Accordingly the right of the *cestui que trust* was worked out by enforcing the doctrine of personal obedience.[1] It is significant that in the oldest and second oldest abridgments there is no title of "Uses" or "Feffements al uses." In Statham one case of a use is under the title "Conscience" and the others under "Subpena." In Fitzherbert all the cases are under the title "Subpena."[2]

It must have been all the easier for the chancellor to allow the subpœna against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use[3] of a third person, or to be redelivered to the person from whom he had received the chattels or the money. In the case of chattels the bailor could, of course, maintain detinue against a bailee who broke his agreement to redeliver. But

the same action was allowed in favor of a third person when the bailment was for his benefit.4 So in the case of money the fiduciary was not only liable in account to him who entrusted him with the money, but also to the third person if he received it for the benefit of that person.5

As the chancellor, in giving effect to uses declared upon a feoffment, followed the analogy of the common law bailment of chattels, or the delivery of money upon the common law trust, so, in enforcing the use growing out of a bargain and sale, he followed another analogy of the common law, that of the sale of a chattel. The purchaser of a chattel, who had paid or become indebted for the purchase money, had an action of detinue against the seller. Similarly the buyer of land who had paid or become a debtor for the price of the land, was given the right of a *cestui que use.* But the use by bargain and sale was not enforced for about a century after the establishment of the use upon a feoffment. In 1506 Rede, J., said: "For the sake of argument I will agree that if one who is seised to his own use sells the land, he shall be said to be a feoffee to the use of the buyer."1 But Tremaile, J., in the same case dissented vigorously, saying: "I will not agree to what has been said, that, if I sell my land, I straightway upon the bargain and money taken shall be said to be a feoffee to the use of the buyer; for I have never seen that an estate of inheritance may pass from the one seised of it except by due formality of law as by livery or fine or recovery; by a bare bargain I have never seen an inheritance pass." Just how early in the reign of Henry VIII the opinion of Rede, J., prevailed is not clear, but certainly before the Statute of Uses.2 Equity could not continue to refuse relief to the buyer of land against a seller who, having the purchase money in his pocket, refused to convey, when under similar circumstances the buyer of a chattel was allowed to sue at law. The principle upon which equity proceeded is well expressed in "A Little Treatise concerning Writs of Subpœna,"3 written shortly after 1523: "There is a maxim in the law that a rent, a common, annuity and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be percepted of his lands in D, &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and thereupon inasmuch as he that sold the rent hath *quid pro quo,* the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna."

The reader will have noted the distinction taken in this quotation between the oral grant for value and the parol gratuitous grant. In the latter case there was neither glaring injustice nor a common law analogy in the treatment of a similar grant of chattels or money to warrant the intervention of equity. Further evidence that equity never enforced gratuitous parol undertakings is to be found in this remark of counsel in 1533: "By Hales, a man cannot change [i. e. create] a use by a covenant1 which is executed before, as to Covenant to bee seised to the use of W. S. because that W. S. is his cousin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration present or future, for the same purpose, as for one hundred pound paid for the land *tempore*

conventionis, or to be paid at a future day, or for to marry his daughter, or the like."[2] It is evident from these authorities that equity in refusing relief upon gratuitous parol undertakings, or upon promises given only upon a past consideration, was simply following the common law, which regarded all such undertakings or promises as of no legal significance whether relating to land, chattels, or money.

But grants of chattels and money, although gratuitous, were operative at common law, if in the form of instruments under seal. The donee in a deed of gift of chattels could maintain detinue against the donor who withheld possession of them. The grant or promise by deed of a definite amount of money created a legal debt, enforceable originally by an action of debt, and in later times by an action of covenant also.[1] If, as we have seen, equity enforced the use upon a feoffment or sale of land after the analogy of the bailment of a chattel (or trust of money), and the sale of a chattel, why, it may be asked, did not the chancellor create a use in favor of the donee of land by deed of gift after the analogy of the deed of gift of chattels or money? Chancery, it is conceived, might, without any departure from principle, have taken this step and treated every donee of land by deed of grant as a *cestui que use.* But to one who keeps in mind the jealousy with which the common law judges regarded the growing jurisdiction of the chancellor, it is not surprising that for the most part equity declined to enforce gratuitous instruments under seal. There was, however, one class of gratuitous grants of land by deed in which equity created a use in favor of the donee; namely, grants or covenants to stand seised to the use of a blood relation, or of one connected by marriage.[2] These uses are commonly said to arise in consideration of blood or marriage. But consideration in such cases is not used in its normal sense of the equivalent for a promise, but in the general sense of reason or inducement for the agreement to stand seised. The exception in favor of those related by blood or marriage had in truth nothing to do with the doctrine of consideration and was established in the interest of the great English families. The aristocratic nature of this doctrine is disclosed in the following extract from Bacon's Reading on the Statute of Uses:[3] "I would have one case showed by men learned in the law where there is a deed and yet there needs a consideration . . . and therefore in 8 Reginae [Sharrington *v.* Strotton, Plowd. 298] it is solemnly argued that a deed should raise an use without any other consideration . . . And yet they say that an use is a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum,* tho' the interest appear never so clearly where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

II

TRUSTS[1]

"The strange doctrine of Tyrrel's Case."[2] "The object of the legislature appears to have been the annihilation of the common law use. The courts, by a strained construction of the statute, preserved its virtual existence."[3] "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to."[4] "This doctrine must have surprised every one who was not sufficiently learned to have lost his common sense."[5] Such are a few of the many criticisms passed upon the common law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's Case was due to "the absurd narrowness of the courts of law"; that the liberality of the chancellor at once corrected the error of the judges by supporting the second use as a trust; and "by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance."[1]

This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's Case was older than the Statute of Uses,—presumably, therefore, a chancery doctrine,—and that the statute so far accomplished its purpose, that for a century there was no such thing as the separate existence in any form of the equitable use in land.

The first of these propositions is proved by a case of the year 1532, four years before the Statute of Uses, in which it was agreed by the Court of Common Bench that "where a rent is reserved, there, though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it for his own use; and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use; this is a void limitation of the use; for the law, by the consideration of money, makes the land to be in the vendee."[2] Neither here nor in Benloe's report of Tyrrel's Case[3] is the reason for the invalidity of the second use fully stated. Nor does Dyer's reason, "because an use cannot be ingendered of an use,"[4] enlighten the reader. But in Anderson's report we are told that "the bargain for money implies thereby a use, and the limitation of the other use is merely contrary."[5] And in another case in the same volume the explanation is even more explicit: "The use is utterly void because by the sale for money the use appears; and to limit another (although the second use appear by deed) is merely repugnant to the first use, and they cannot stand together."[6] The second use being then a nullity, both before and after the Statute of Uses, that statute could not execute it, and the common law judges are not justly open to criticism for so deciding.

Nor is there any evidence that the second use received any recognition in chancery before the time of Charles I. Neither Bacon nor Coke intimates in his writings that a use upon a use might be upheld as a trust. Nor is there any such suggestion in the cases which assert the doctrine of Tyrrel's Case.[1] There is, on the other hand, positive evidence to the contrary. Thus, in Crompton, Courts:[2] "A man for £40 bargains land

to a stranger, and the intent was that it should be to the use of the bargainor, and he in this court [chancery] exhibits his bill here, and he cannot be aided here against the feoffment [bargain and sale?] which has a consideration in itself, as Harper, Justice, vouched the case." Harper was judge from 1567 to 1577.

As the modern passive trust, growing out of the use upon a use, is in substance the same thing as the ancient use, it would seem to be forfeitable under the Stat. 33 Henry VIII, c. 20, § 2, by which "uses" are forfeited for treason. Lord Hale was of this opinion, which is followed by Mr. Lewin and other writers. But it was agreed by the judges about the year 1595 that no use could be forfeited at that day except the use of a chattel or lease, "for all uses of freehold are, by Stat. 27 Henry VIII, executed in possession, so no use to be forfeited."1 There is also a *dictum* of the Court of Exchequer of the year 1618, based upon a decision five years before, that a trust of a freehold was not forfeitable under the Stat. 33 Henry VIII. Lord Hale and Mr. Lewin find great difficulty in understanding these opinions.2 If, however, the modern passive trust was not known at the time of these opinions, the difficulty disappears; for the freehold trust referred to must then have been a special or active trust, which was always distinct from a use,3 and therefore neither executed as such by the Statute of Uses nor forfeitable by Stat. 33 Henry VIII.

In Finch's Case,4 in chancery, it was resolved, in 1600, by the two Chief Justices, Chief Baron, and divers other justices, that "if a man make a conveyance, and expresse an use, the party himself or his heirs shall not be received to averre a secret trust, other than the expresse limitation of the use, unless such trust or confidence doe appear in writing, or otherwise declared by some apparent matter." But the trust here referred to was probably the special or active trust, and not the passive trust. The probability becomes nearly a certainty in the light of the remark of Walter, *arguendo,* twenty years later, in Reynell *v.* Peacock.5 "A bargain and sale and demise may be upon a secret trust, but not upon a use." And the case of Holloway *v.* Pollard6 is almost a demonstration that the modern passive trust was not established in 1605. This was a case in chancery before Lord Chancellor Ellesmere, and the defendant failed because his claim was nothing but a use upon a use.

Mr. Spence and Mr. Digby cite the following remark of Coke in Foorde *v.* Hoskins,7 as showing that chancery had taken jurisdiction of the use upon a use as early as 1615: "If *cestuy que use* desires the *feoffees* to make an estate over and they so to do refuse, for this refusal an action on the case lieth not, because for this he hath his proper remedy by a subpœna in Chancery." "It seems," says Mr. Digby, "that this could only apply to a use upon a use."1 But if the *cestuy que use* here referred to were the second *cestuy,* he would not proceed against the *feoffees,* for the Statute of Uses would have already transferred the legal estate from them to the first *cestuy.* It would seem that Coke was merely referring to the old and familiar relation of *cestuy que use* and *feoffees* to use as an analogy for the case before him, which was an action on the case by a copy-holder against the lord for not admitting him.

The earliest reported instance in which a use upon a use was supported as a trust seems to have been Sambach *v.* Dalton, in 1634, thus briefly reported in Tothill:2 "Because one use cannot be raised out of another, yet ordered, and the defendant

ordered to passe according to the intent." The conveyance in this case was probably gratuitious. For in the "Compleat Attorney," published in 1666, this distinction is taken: "If I, without any consideration, bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use), it seems the court will order this. But if it was in consideration of money by him paid, here (it seems) the express use is void, both in law and equity."[3] On the next page of this same book the facts of Tyrrel's Case are summarized with the addition: "Nor is there, as it seems, any relief for her [the second *cestuy que use*] in this court in a way of equity, because of the consideration paid; but if there was no consideration, on the contrary, Tothill, 188." As late as 1668, in Ash *v.* Gallen,[4] a chancery case, it was thought to be a debatable question whether on a bargain and sale for money to A to the use of B, a trust would arise for B. Even in the eighteenth century, nearly two hundred years, that is, after the Statute of Uses, Chief Baron Gilbert states the general rule that a bargain and sale to A to the use of B gives B a chancery trust with this qualification: "*Quære tamen,* if the consideration moves from A."[1]

In the light of the preceding authorities, Lord Hardwicke's oft quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. Lord Hardwicke himself, some thirty years afterwards, in Buckinghamshire *v.* Drury,[2] put the matter much more justly: "As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so)." The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement.

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44.

THE DEVELOPMENT OF EQUITY PLEADING FROM CANON LAW PROCEDURE[1]

By Christopher Columbus Langdell[2]

PLEADING IN THE ECCLESIASTICAL COURTS

THE system of pleading which has prevailed in courts of equity was derived partly from the common-law system, and partly from that of the civil law, as administered in the English ecclesiastical courts; though much more from the latter than from the former.

2. It will be assumed that the reader is already acquainted with the elementary principles of common-law pleading; and therefore that system will be referred to, as occasion arises, without preliminary explanation. But one who is unacquainted with the elements of equity pleading must be supposed, *a fortiori,* to be ignorant of civil-law pleading. It is necessary, therefore, to begin with an exposition of the leading principles of the latter system, unless all reference to it is to be dispensed with. The latter course would undoubtedly be practicable; but it is hoped the following pages will convince the reader that it would not be desirable.

3. The procedure of the ecclesiastical courts is called the civil-law system, not because it ever prevailed among the ancient Romans, but because it has grown out of the latest Roman procedure, and because it prevails generally in those countries and jurisdictions which derive their procedure from the Romans. In what points it is like the procedure which prevailed in the time of Justinian, and in what points it differs from that procedure, cannot be stated in detail, for we have very little direct information in regard to the latter. We are still more in the dark, as to the long period between the reign of Justinian and the revival of learning in the twelfth century; but from the latter epoch we have abundant information in the writings of civilians and canonists, and in the legislation contained in the "Corpus Juris Canonici." The earliest of these writings exhibit the system in full operation, substantially as it has remained ever since; but they seldom give any information as to its previous history. As thus exhibited, the system is characterized by two striking features, of which there is no trace in the Roman procedure, and which clearly originated after the time of Justinian. They relate to the mode of proof; and they consist, first, in requiring each party to a suit to submit to an examination under oath by his adversary, his answers being evidence against him as admissions or confessions, but not in his favor; secondly, in requiring all the witnesses in a cause to be examined before the trial, and in secret, their testimony being reduced to writing by the examiner in the form of depositions, and kept secret until all the witnesses have been examined on both sides.

4. The introduction of these changes had put a new face upon the procedure generally, and in particular upon the system of pleading. The changes in the latter, however, consisted in the addition of new requirements, all the principles of the previous system still remaining in full operation. What those principles were may be ascertained with sufficient certainty, notwithstanding the want of direct information before referred to; for we know from the "Corpus Juris Civilis," and from the remains of *ante*-Justinian law, the nature of the system which existed in the times of the classical jurists, and which was in form abolished ad 294;1 and from that, and the modern system, it is easy to construct a skeleton of that which intervened. Indeed, it differed but slightly in principle from that which preceded it, known as the formulary system. Under the latter, the names of the pleadings were as follows: intentio, exceptio, replicatio, duplicatio, triplicatio, quadruplicatio, &c. After the abolition of the formulary system, the term "intentio" gave way to that of "libellus;" but the other names remained so far as any specific names were made use of.

5. The libel contained a very brief statement of the plaintiff's case, its object being not to state the facts which the plaintiff would prove at the trial, but to identify the claim, to indicate its legal nature, and to specify the relief which the plaintiff sought; and thus to enable the defendant to decide whether he would resist the claim or submit to it, and to assist the judge in framing his sentence.1 The exception stated the legal nature of the defence in the same brief manner that the libel stated the plaintiff's case, and it was always consistent with the libel, *i. e.,* it was always what a common-law lawyer would call a plea in confession and avoidance. The replication bore the same relation to the exception which the exception bore to the libel, *i. e.,* it set up matter which, if true, would destroy the exception without denying its truth. All the subsequent pleadings were of the same character, each bearing the same relation to the one immediately preceding which the latter bore to the one next preceding. When the party whose turn it was to plead could allege no matter which would destroy the last pleading without denying its truth, the pleadings terminated.

6. There was no pleading corresponding to a demurrer with us. Instead of that, every pleading had to be submitted to the judge and receive his approval before it could be pleaded. If it was not objected to by the adverse party, it would generally be admitted as of course. If it was objected to, the judge would hear an argument, and would then make an order admitting or rejecting the pleading, as the case might be; or, instead of rejecting it, he might order it to be amended. An order admitting or rejecting a pleading produced no further effect upon the action than the terms of the order imported. In no case did it terminate the action, like a judgment on a demurrer with us. If a pleading was rejected, it was simply out of the case, and there was no technical objection to the party's pleading another plea; and, if he did not, the only consequence was that the pleadings stopped where they were, and the cause went to trial with the same effect as if no attempt had been made to plead the unsuccessful plea.

7. Nor was there any pleading corresponding to our traverse. The necessity of such a plea with us arises from the technical rule that an affirmative pleading which is not denied is admitted; but no such rule ever prevailed in the civil-law system.1 The object of the rule with us is to reduce the controversy to a single issue, to be tried by a

jury; but the civil law aimed at nothing of that kind. It is true that, when a libel was admitted by the judge, the defendant was required to state orally in court whether he admitted or denied its truth (25); and, if he denied it, he was said to contest the suit. But this bore no analogy to our pleas by way of traverse, nor was it a pleading at all. The ceremony as well as the name (*litis contestatio*), was derived from an older and obsolete system of procedure. The defendant had an unqualified right to put the plaintiff to his proof in all cases, and a denial of the libel meant no more than that; hence the defendant always denied the truth of the libel, unless he decided to submit to the plaintiff's demand. Indeed, he must do so; for if, when called upon in court, he admitted the truth of the libel, sentence was pronounced immediately in the plaintiff's favor. Nor would the failure of the defendant to answer at all, when called upon, amount to an admission. Nothing but an express admission would have that effect. The only effect of the defendant's failing or refusing to answer was to embarrass the plaintiff in the prosecution of his suit, the technical rules of procedure requiring a *litis contestatio* before any further step could be taken. The plaintiff's remedy, therefore, was to call upon the court to compel the defendant to answer.[1] After the defendant had contested the suit (suit in that connection meaning simply the plaintiff's case stated in the libel), it was in order for the defendant to plead an exception, if he had one. But, as the libel stated the plaintiff's case in very brief and general terms, most defences would amount to a denial of the libel, and so would not be pleaded. In the great majority of cases, therefore, the libel would be the only pleading in the case, and the next step after the *litis contestatio* would be the trial. If the defendant pleaded an exception, the plaintiff was considered as denying it as of course, there being nothing corresponding to the *litis contestatio,* as to any pleading after the libel.[2] The exception, therefore, was immediately followed by the replication, and so on, until the pleadings were ended.

8. The next step was the trial. This took place before the judge alone, and there seems to be no doubt that the witnesses were called, and examined and cross-examined orally, as at a jury trial with us. There were or might be as many stages in the trial as there were pleadings. The first stage consisted of the trial of the plaintiff's case as stated in the libel. For this purpose the plaintiff would first put in his evidence in support of his case, and the defendant would then put in his evidence, if he had any, in contradiction. The evidence bearing upon the libel being exhausted, the next stage was the trial of the exception; which proceeded in the same manner as the trial of the libel, except that the defendant began, he having the burden of proof as to his exception. In this manner the trial proceeded, until all the evidence bearing upon each of the pleas in succession was exhausted, each party being required in turn to prove his own pleading, if he would avail himself of it. When the evidence was all in, the advocates were heard, and the cause was submitted to the judge for his decision.

9. The judge examined the evidence in the order in which it had been put in. If he decided that the libel had not been proved, that was an end of the cause, the remainder of the pleadings and the evidence bearing upon them going for nothing. If he decided that the libel had been proved, he then proceeded to examine the evidence upon the exception. If he decided that that had not been proved, there was again an end of the cause, and sentence was pronounced in the plaintiff's favor, just as if there had been no pleading subsequent to the libel. If the exception was found to be proved, the judge

next proceeded to the replication, and so on to the end. Whenever any plea in the series was found not to be proved, that decided the cause against the party who had thus failed in his proof. But finding a plea to be proved was never decisive of the cause, unless the plea was the last of the series. Whoever succeeded on the last plea, all the previous pleas having been proved, of course won the cause.[1]

10. In a trial at common law, on the contrary, there is properly but one stage, the contest from beginning to end being upon the *issue* joined between the parties; and the pleadings in the cause are of no importance upon the trial, except as leading up to and explaining the issue.[1] The verdict of the jury also simply finds the issue in favor of the plaintiff or the defendant, and this finding decides the cause, and judgment is entered accordingly. Yet the judgment may have no apparent connection with the issue, for the judgment is founded upon the declaration, and is always that the plaintiff do or do not recover the claim therein stated; while issue may be joined upon some wholly different question, *e. g.,* whether the defendant was a married woman when she entered into the contract sued upon. While the contest, therefore, is always upon the issue joined, the *object* of the contest is always the case stated in the declaration; and the reason why judgment may be entered in the plaintiff's favor upon a claim which has neither been the subject of proof nor of finding by the jury is, that the claim has been admitted by the defendant's plea; for the defendant must either put the declaration in issue by a traverse, or he must admit it by a plea in confession and avoidance, and it is only when the defendant pleads in confession and avoidance that issue can be joined upon any matter not stated in the declaration.

11. In the civil law also the object of the contest is always the same, namely, the case stated in the libel, and the sentence is always founded upon the libel, being either that the plaintiff recover his claim, or that the libel be dismissed; and yet the decision of the cause may turn upon a wholly different question, namely, whether some subsequent pleading has been proved or not. But whatever the decision may turn upon, the plaintiff can never recover without proving his libel; and, if sentence is pronounced in the plaintiff's favor, it is based upon the proof of the libel, and not at all upon the proof which has won the cause, if that relates to some subsequent plea. The reason why the decision may turn upon some plea subsequent to the libel, while the sentence is always based upon the libel and the proof in support of it, is, that the sole object of all the defendant's pleas is to defeat the libel on grounds independent of its truth, while the sole object of all the plaintiff's pleas subsequent to the libel is to prevent the defendant's accomplishing his object. Hence, when the decision turns upon any plea subsequent to the libel, and is in favor of the plaintiff, it involves two points,—first, that the libel is true; secondly, that it is not defeated upon any ground independent of its truth. So the reason why a verdict at common law, upon an issue joined upon a plea subsequent to the declaration, decides the cause, is, that it decides in effect that the defendant has or has not defeated the declaration upon grounds consistent with its truth.

12. Finally, it will be found that all the essential differences between a trial at common law and by the civil law, arise from this; namely, that by the common law a cause goes to trial with everything alleged in the pleadings on either side admitted,[1]

except the single point upon which issue is joined, while by the civil law it goes to trial with nothing admitted.

13. It has been assumed hitherto that the defendant pleaded his exception, if at all, after the *litis contestatio.* But sometimes it was pleaded before the *litis contestatio* took place, and as a general rule it had to be so pleaded when it was dilatory, *i. e.* when it did not go to the merits.2 In that case, the exception was followed immediately by the other pleadings in their order as before stated; and, when the pleadings terminated, the cause was ready for a trial of the exception and the subsequent pleadings, but not for a trial of the libel, there having been no *litis contestatio.* The trial, therefore, began with the exception, and proceeded in the manner before stated. If the decision was in the defendant's favor, the libel was dismissed, and the suit was ended; but if it was in the plaintiff's favor, it simply rid the plaintiff of the exception, just as if the exception had been rejected by the judge as being bad upon its face. The suit then proceeded from the point where it stopped, *i. e.,* the *litis contestatio* took place; and if the first exception was merely dilatory, and the defendant had another exception going to the merits, he might now plead that, and everything would then proceed as if there had been no previous exception. If the defendant had no further exception to plead, the cause would then go to trial upon the libel alone.1

14. When the important changes referred to in § 3 were introduced into the civil-law procedure, everything might still have proceeded (and it is reasonable to suppose that at first everything did proceed) as before until the pleadings terminated; but at that point there was a necessary divergence, for, instead of the cause being ready for trial as before, all the testimony must now first be taken in writing. But that was not all, for the witnesses were to be examined in secret; *i. e.,* no one could be present but the witness under examination, the judge, and the notary, the latter reducing the answers of the witness to writing. Each of the parties was also liable to be examined at the election of his adversary; and though the principle of secrecy did not apply here, yet parties (like witnesses) could only be examined by the judge,2 and neither the adverse party nor his representatives had any right to be present.

15. How then were these examinations to be conducted? The method which would most naturally occur to us would be for the counsel for each party to prepare interrogatories in writing for each witness or party to answer. But this method was not adopted, and it is believed that, for the purposes of such an examination, it would have been inferior to the method actually adopted, which was as follows: When the pleadings were completed, each of the parties, if he wished to examine his adversary, prepared a detailed statement in writing of the facts in support of his own pleadings, so far as he supposed them to be within the knowledge of his adversary. This statement was divided into paragraphs, which were numbered, and each paragraph was called a position (*positio*), and hence the document as a whole was called positions. It was brought into court and submitted to the judge, and by him admitted, or rejected, or ordered to be amended, precisely as in case of a pleading; though the questions which would arise upon it would be very different, being similar to those which would arise upon questions put to a witness. The positions having been admitted by the judge, the adverse party was required to appear before him, or his

assistant, and be examined. The judge used the positions as the basis of his examination, framing oral questions upon them, and requiring the examinee to answer as to every point stated in the positions, but not requiring him to go any further, or into any more detail than the positions did. The positions were answered separately, as if they had been a series of interrogatories. The answers were reduced to writing, and when completed, sworn to, and filed, a copy was furnished to the party who had exhibited the positions; and who was thus enabled to learn how much of his case he must prove by witnesses, for he had no occasion to examine witnesses as to any thing admitted by his adversary, such admissions being conclusive.

16. Accordingly, the next step was for each party to prepare a statement of the facts which he expected to prove by witnesses. This was drawn in the same manner as the positions, but it was distinguished by a different name; each paragraph being called an article, and the document as a whole being called articles. The articles were brought into court and admitted or rejected or amended in the same manner as positions.[1] Having been admitted, the judge next granted to the parties a certain length of time in which to examine their witnesses, and which was called a term probatory. The witnesses were examined upon the articles in the same manner as the parties upon positions, except that it was strictly secret, as before stated; but there was this difference between parties and witnesses that, the testimony of the latter being evidence against the adverse party, he was entitled to cross-examine them; and though he was obliged to do this in ignorance of what they had testified to on their examination in chief, yet he was perfectly informed as to what each witness *might* have testified to, for he was furnished with a copy of the articles, and was informed upon which of them each witness was to be examined. The cross-examination was by means of written interrogatories delivered to the judge; and the adverse party was not furnished with a copy of these, as it would enable him to tamper with the witnesses, and instruct them how to answer. The document containing a witness’s answers was called a deposition; the witness being said to depose, and being called a deponent; terms which were never applied with reference to the answers of a party, he not being a witness.

17. Each party was bound at his peril to take all his testimony before the term probatory expired, unless he could get it enlarged by applying to the judge; for, at the end of the term probatory, the testimony was published, and, after that, no more testimony could be taken, the object of secrecy being to prevent the perjury and subornation of perjury, which it was thought would be committed if parties were permitted to examine witnesses at their leisure with a full knowledge of what had been already testified to.

18. It has been stated that both parties and witnesses were examined by a judge; but this ceased to be the case practically at a very early period. Instead of that, parties were permitted to prepare their own answers to the positions with the aid of their own counsel; but they were still in legal contemplation taken by the judge, and were sworn to before him when completed. If they were not satisfactory to the adverse party, he could object to them; and if he made good his objections, the judge would compel further answers. As to witnesses, their examination came to be conducted by the notary (*i. e.* the judge’s clerk), the judge simply swearing them to their depositions.

19. When the testimony was published, it was competent for either party to apply to the judge to have any portion of it suppressed as incompetent or illegal; but it must be for reasons which had not come to the party's knowledge till after publication, for such objections must be raised at the earliest opportunity, in order that they might be remedied, if possible. As examples of objections which could be raised after publication, if a witness in testifying went beyond the articles, the adverse party could have so much of his testimony suppressed as being a surprise to him. Such testimony was said to be extra-articulate. So if a witness on cross-examination went beyond the interrogatories, the party cross-examining him could have the testimony suppressed, he not being bound to receive answers from a hostile witness which he had not called for. Such testimony was said to be extra-interrogate.

20. The testimony being completed and published, and all objections to it disposed of, the cause was ready for a hearing or argument, for such it was now more properly than a trial.

21. There being no difference in substance between positions and articles, it was an obvious and easy step to combine them in one document, each paragraph being made both a position and an article. This was accordingly done, at least in some jurisdictions; and the course then was first to require the adverse party to answer all the positions and articles to the extent of his knowledge, and afterwards to prove by witnesses, if possible, whatever the adverse party denied or refused to admit. In this way all distinction between positions and articles came in time to be lost sight of in great measure. Another possible step, though less obvious and easy, was to combine the positions and articles with the pleadings proper. This also was done in certain jurisdictions; and in particular such has been the practice from time immemorial in the English ecclesiastical courts.[1] The system of pleading which resulted from this combination will be described presently.

22. As to when, where, and by whom the change from oral to written evidence, and the changes connected with it and consequent upon it, were introduced, there appears to be little direct information. It seems pretty clear, however, that they were of recent introduction in the twelfth century, if, indeed, they were introduced before the thirteenth century; and that they originated with the canonists, having been first introduced into the spiritual courts.[1] During the twelfth and thirteenth centuries, the canonists paid great attention to the subject of procedure, in that respect taking the lead of the civilians proper. They were in a much better position also to make their influence felt, as they had in the Pope and in the councils of the church a central authority which was acknowledged throughout western Europe; a consideration of decisive importance in reference to the subject of procedure, as it is necessarily founded upon positive law, and so is in its nature local. Upon the whole, there is little doubt that, during the period in question, the civil-law procedure was moulded into the shape that it has ever since retained, and that it was mainly done by the canonists.[2] No apology, therefore, is required for resorting to spiritual, rather than secular, courts for a type of this procedure.

23. As to the English ecclesiastical courts, they were established by an ordinance[1] of William the Conqueror, upon the model of the spiritual courts which had long existed

on the continent of Europe. The ordinance expressly directed that the new courts should not be governed by the municipal law of England, but by the canon law (*canones et episcopales leges*); *i. e.,* by the same law which governed all spiritual courts which recognized the authority of the Pope. Nothing was said expressly upon the subject of procedure; but it was assumed that the adoption of the canon law included its precedure; which was accordingly introduced in all its integrity, and has continued to be the procedure of those courts from that day to this. Down to the time of the Reformation, the only appeal from the highest of those courts was to the Pope,[2] and by his Decretals he regulated their procedure in common with that of all other spiritual courts which acknowledged his authority. It is stated by competent authority that, as a matter of fact, the practice of the English courts was identical with that of the Pope's consistory court at Rome.[3] After the Reformation, everything proceeded in those courts as before, there being no interference from without (until since 1830), and the courts themselves not being disposed to make changes. Moreover, the judges and practitioners of those courts being all educated in their own system, and having no connection with the secular courts, their procedure has not been influenced perceptibly by the common law.

24. In directing attention, therefore, to this procedure, one can claim for it, in addition to the fact that it is the immediate source of equity procedure, all the interest and importance that belongs to the best type of civil and canon law procedure.[4] To this, however, one qualification must be made; namely, that, from the limited nature of the ecclesiastical jurisdiction, it does not call into requisition all the resources of the civil-law procedure. Thus, by that system actions are either *in personam* or *in rem;* but, as the ecclesiastical courts have no jurisdiction over property, they do not entertain actions *in rem.* So also they have no power to interfere with the personal liberty of the subject or citizen; and hence the subjects of arrest and bail make no figure in their procedure. It is for these reasons that the procedure in admiralty seems at first sight to differ so materially from that of the ecclesiastical courts. But this furnishes no argument against resorting to the ecclesiastical procedure for our present purposes; for it is still true that the procedure in equity has been derived wholly from that source, so far as it is of civil-law origin.

25. It remains to describe the course of pleading in the ecclesiastical courts, as it actually takes place. The libel combines in itself the libel proper, and also the positions and articles founded upon it. The effect of this is, that the libel is neither brief and general, as it originally was, nor does it state the facts of the plaintiff's case according to their legal effect, as at common law; but it goes to the other extreme, and sets forth the plaintiff's evidence in the same detail with which it is to be proved; so that the defendant will obtain a perfect knowledge from the libel of everything that the plaintiff will be at liberty to prove in support of his case. Nor is this confined to what is to be proved by witnesses or by the defendant's admissions; for, if any part of the plaintiff's evidence consists of written instruments, the plaintiff states in a distinct paragraph whatever he will have to prove to make the instrument evidence, and annexes the instrument itself to the libel.[1] When completed, the libel is brought into court, and is either admitted or rejected, as before explained. If it is bad in substance as a pleading,—that is, if it does not state any case in the plaintiff's favor, admitting it all to be true,—of course it is absolutely rejected. On the other hand, if it states

evidence which is inadmissible, or states admissible evidence improperly, there being still enough remaining to make out a case, it will be reformed. Being finally settled and admitted, the *litis contestatio* takes place,[1] it seldom happening in practice that a dilatory exception is pleaded before the *litis contestatio.* Assuming that the defendant contests suit negatively, the usual practice is for the plaintiff to proceed immediately to the proof of his libel, before any pleading on the part of the defendant; and accordingly, upon the conclusion of the *litis contestatio,* the judge orders the defendant to be cited to answer the libel in the quality of positions, and assigns a term to the plaintiff for the proof of it in the quality of articles. The plaintiff, however, does not begin to examine witnesses, nor does his term probatory begin to run, until the defendant's answers are brought in (15). These are called personal answers, to distinguish them from pleadings, which are always in the name of the party's proctor. The personal answers being filed, and being found satisfactory, the plaintiff proceeds to examine witnesses in the manner before stated, upon such paragraphs of the libel (in the quality of articles) as have not been sufficiently admitted by the defendant. The defendant also cross-examines the plaintiff's witnesses, if he wishes to do so, by means of interrogatories; but he can examine no witnesses of his own as yet, for he has brought in no articles.

26. When all the plaintiff's witnesses have been examined and cross-examined, and before their testimony has been published, the defendant must plead. All pleadings subsequent to the libel are called simply allegations. The defendant must bring in an allegation of some kind if he wishes to examine any witnesses, and it will always consist of a statement of his evidence. What evidence it must contain will depend upon the nature of the defence. If the latter is negative, *i. e.,* consists merely in denying the plaintiff's case, the allegation will consist of positions and articles merely, setting forth such evidence as the defendant has in contradiction of the evidence stated in the libel. If the defence is affirmative, the allegation must contain an exception, and positions and articles to support it; *i. e.,* it must set forth sufficient evidence to establish the affirmative defence, the defendant having the burden of proof as to that. If the defendant has evidence also in contradiction of the plaintiff's case, he should set that forth; for he may avail himself of as many defences as he has, whether affirmative or negative, the common-law rule against duplicity having no place in the system.[1]

27. The defendant's allegation (commonly called a responsive allegation) being brought in and admitted, the same proceedings take place for proving it as in case of the libel, including personal answers from the plaintiff.

28. These proceedings being concluded, the plaintiff prepares and brings in his second allegation. This may consist, first, merely of evidence in rebuttal of contradictory evidence on the part of the defendant; or, secondly, of evidence contradictory of the defendant's affirmative defence; or, thirdly, of evidence to prove an affirmative replication on the part of the plaintiff; or, fourthly, it may contain two or all three of these elements. It cannot contain, without special leave, any evidence in support of the plaintiff's original case; for that should have been set forth in the libel. And the same rule holds in regard to all the allegations or pleadings of each party after the first; *i. e.,* he must set forth his evidence at the proper time, or lose the opportunity of doing so.[1]

29. The same proceedings take place for the proof of the plaintiff's second allegation as upon the previous pleadings; and this process of bringing in an allegation and proving it, by each party alternately, is continued until the case and defence respectively are exhausted.

30. It is said to be in the discretion of the court how long it will permit the allegations to continue;[2] but this cannot mean that the court will stop them before the parties have had an opportunity to develop fully their case and defence respectively.

31. As a matter of fact also, the allegations seldom extend beyond the third, *i. e.,* the second on the part of the plaintiff.[3] But this must not be taken as indicating that the plaintiff is entitled to the last allegation upon principle; for the defendant rather has that right. At least, if the plaintiff's second allegation contains the matter of a replication in the Roman sense, the defendant is entitled to set up a duplication if he has one, and even to set forth evidence in denial of the replication; otherwise, the plaintiff would be permitted to recover, in case the decision turned upon the replication, without giving the defendant any opportunity to be heard upon the decisive question in the case. Accordingly, it was a rule of the Roman law that the defendant was entitled to the last plea.[4] At common law either party is entitled to plead as long as he has anything to allege; but, as he cannot plead affirmatively without admitting the last pleading of his adversary to be true, there is no danger of abuse in that direction; while in the civil law either party may wish to prolong the pleadings for illegitimate purposes.

32. It is observable that, as the plaintiff alone is seeking relief, and as his relief must be founded upon the libel alone, the latter differs from all the subsequent pleadings in concluding with a prayer for the relief to which the plaintiff supposes himself entitled. This is called the conclusion of the libel, and the plaintiff is held to great strictness in framing it. As his proof cannot go beyond the allegations of evidence in the libel, so his relief cannot go beyond the conclusion. Any of the plaintiff's evidence, therefore, which does not support both the allegations and the conclusion of the libel, will go for nothing, however important it may be in itself.[1]

33. It has been seen that, at common law, all the facts alleged by either party, and not expressly denied by the other, are admitted on the face of the pleadings, while in the civil law every fact alleged must be proved, if any use would be made of it. Conversely, however, in the civil law each party is relieved, in a mode unknown to the common law, from either alleging or proving any facts which have already been alleged by the other side. By the common law a party is never bound by the allegations in his own pleadings, *i. e.,* they can never be used against him as admissions either in the same suit or in another suit;[2] but by the civil law a party is held to admit the truth of every fact which he alleges, the rule being *qui ponit fatetur;* and this admission is conclusive. In other words, all the allegations of each party are to be taken as true at the election of his adversary.[3] This rule originated with the introduction of positions and articles; and, as all evidence must be set forth in the pleadings before it can be proved, it is of extensive application. It makes it necessary, before alleging a fact, to consider carefully whether the controversy may take such a turn as to make it evidence against you.[1]

34. This difference in the two systems well illustrates the different theories upon which they are founded. The object of pleading at common law is not, as in the civil law, to give notice to the parties respectively and to the court of the facts intended to be proved, but to separate the law from the facts, and to narrow the latter down to a single issue, with a view to a trial by jury. Hence, the pleadings are regarded, not as statements by the respective parties of what they claim to be the truth of the case in point of evidence (and to which it would be reasonable to hold them), but as statements by their counsel of what they claim to be the legal effect of the evidence to be produced. To hold a party to the correctness of such statements would be to make the opinions of his counsel upon matters of law conclusive against him. Such a rule, however, if it existed at common law, would have but little application, as it would seldom happen that the alternate pleadings by which an issue in fact is developed would furnish material evidence upon the trial of that issue.

35. The parties having brought in all their allegations respectively, and all the witnesses on both sides having been examined and cross-examined, the testimony is next published; and, if either party then thinks any further steps necessary on his part before the hearing of the cause (19), they should be taken without delay. Before the cause can be brought to a hearing, however, the following formal proceedings must take place after publication: First, a term must be assigned to propound all things, *i. e.,* the judge must appoint a day upon which each party, if he has anything further to offer, shall bring it forward. When either party is ready for the hearing, if he desires to speed the cause, he should apply to the judge to assign such a term. On the day so appointed, if nothing further is propounded, the judge, on the application of either party, assigns a day to conclude the cause; on which day the judge declares the cause concluded, and assigns a day to hear sentence.

46. Having thus shown that equity derived its doctrines, as well as its powers, from its mode of giving relief, and that it borrowed the latter directly from the ecclesiastical courts, it remains to inquire to what extent the procedure generally of those courts was adopted in chancery. In form it cannot be said that it was adopted at all, that is, the ecclesiastical procedure was never made *as such* the procedure of the court of chancery. On the contrary, the procedure of the latter court was professedly built up, or rather left to grow up, as an independent system. Sometimes it followed the analogy of the ecclesiastical procedure, and sometimes that of the common-law procedure; but undoubtedly it derived most of its important characteristics from the former.

47. In particular, it followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses, and in requiring each party to submit to an examination under oath by his adversary. It ought, therefore, to have adopted the ecclesiastical system of pleading in all its essential features. To what extent it did so we shall see hereafter.

48. In what relates, however, to the formal mode of conducting the proceedings in a suit, chancery has followed the common law; and this has caused much misapprehension as to the origin of the system in other respects.

In the ecclesiastical practice, every step in a cause regularly takes place in open court, under the direction and supervision of the judge. The proceedings in court are for the most part oral, but the clerk takes minutes of them as they occur; and these minutes, when fully written out, make a complete history of the cause.[1] Each party is bound at his peril to be present in court during the progress of the cause; and hence neither is bound to give notice to the other of any step to be taken. Whenever an act is required to be done in writing, the writing has to be filed with the clerk, and, until so filed, the act is not considered as done. Hence, the clerk's files and his minutes constitute the sole evidence of the state of the cause, and of what has been done in it. And, as the judge is supposed to know whatever it is the duty of his clerk to know, all the proceedings in an action in legal contemplation remain in the breast of the judge, *i. e.,* he has judicial knowledge of them, and so requires no evidence from the parties on that subject.

At common law, on the other hand, the formal proceedings in an action are chiefly conducted out of court by the attorneys of the respective parties, pursuant to established rules. Each attorney is required, as a rule, to give notice in writing to the other of every step taken by him in the cause, or intended to be taken, as the case may be. When either intends to apply to the court for any purpose, he must give the other notice in writing of such intention, and of the time when the application will be made. The application is called a motion, and the decision of it is by an order formally drawn up in writing. All the acts of the court are by orders in writing, in which the court speaks directly, and not through its clerk. When papers are required to be filed with the clerk, it is generally only for permanent preservation, and after they have served their purpose. The clerk keeps no history of causes pending, and neither he nor the court is supposed to know (nor does commonly know in fact) what has been done in a particular cause, nor even that any such cause is pending, such knowledge being generally confined to the respective attorneys.[1] Therefore, every motion is decided wholly upon the evidence adduced on behalf of the respective parties.

In one system, therefore, the court is active, assuming the supervision and control of the proceedings in an action from beginning to end; in the other, it is passive, leaving the respective attorneys to conduct their proceedings in their own way, and on their own responsibility, making it the duty and interest of each to see that the other proceeds correctly, and subjecting each to the risk of having his proceedings set aside for irregularity, or treated by the other as nullities and disregarded. And these differences extend to the conduct of the pleadings. In both systems, the pleadings are in writing, but in the civil law, as has been seen, no pleading can be received or filed without the sanction and direction of the court, while at common law they are filed or served, without even the knowledge of the court: and, if a pleading is supposed to be bad, the adverse party cannot bring it before the court for the purpose of having it rejected or reformed; he can only raise the objection in the first instance by demurrer, and that is followed by a final judgment for or against the party demurring. It is true that the court, instead of giving judgment, may permit the defeated party to amend his pleading, or withdraw his demurrer, as the case may be, but it still leaves him to act upon his own responsibility, and at his own risk.

In all these particulars, chancery follows chiefly the common law;[1] and this fact will be found to have had an important influence upon the system of pleading in chancery.

49. In the ecclesiastical courts, causes are distinguished as plenary or summary. In what has hitherto been said of procedure in those courts, it has been assumed that the cause was plenary. The distinction was chiefly a technical one, a summary cause differing from a plenary one in little more than in having no *litis contestatio,* no term assigned to propound all things, no term to conclude, and no formal conclusion. This distinction never existed in chancery, for the reason that all causes there are summary. Hence, the ceremonies peculiar to plenary causes are unknown to chancery procedure.[1]

50. In the ecclesiastical courts, there is no distinction between matter of record and matter not of record; nor is there any use made of parchment. At common law, all the more important proceedings in an action (*e. g.,* writs, pleadings, verdict, and judgment) are engrossed upon parchment rolls, and constitute matters of record. In this respect chancery followed the common law, and there were special reasons for its doing so. For, in the first place, all writs issuing under the great seal were required to be upon parchment, and it was by means of such writs, as we have seen, that the chancellor exercised his whole jurisdiction. Again, chancery has a common-law side as well as an equity side, and the former is much more ancient than the latter; and, as a common-law court, it had a staff of clerks, known as the Six Clerks, who occupied an office together, and had charge of all its records. Therefore, when the equity jurisdiction arose, it was natural that the proceedings should be made matter of record; it may even have been deemed necessary to their validity.

51. In the ecclesiastical courts, all clerical duties were performed by or under the direction of one officer, who was known as the registrar of the court, and in his office all books and papers relating to the business of the court were kept. This office was adopted by the Court of Chancery, and the registrar has always been properly the clerk of that court. But the office of registrar having properly nothing to do with records, and the Six Clerks being already in charge of all the records of the court, and all writs being issued by them, the result was that the clerical duties of the court were divided between the registrar and the Six Clerks; the latter having charge of everything that went upon parchment, the former of everything else. It thus happened that the pleadings were filed in the Six Clerks' office. As to decrees, they were first drawn up and entered by the registrar in his book, but they were not complete for all purposes until they were enrolled in the Six Clerks' office.

52. On the common-law side of the court the Six Clerks not only filled the office of clerk of the court, but they were also the attorneys in all actions and proceedings prosecuted in that court, *i. e.,* each party to every action or proceeding was obliged to employ one of the Six Clerks as his attorney;[1] and, when the equity jurisdiction arose, they claimed and established the sole right to be attorneys also in all equity suits. Each Six Clerk, however, had ten subordinate clerks under him, by whom the business of the office was chiefly transacted; and in course of time these subordinate clerks, under the name of clerks in court, became the attorneys of the court, instead of the Six Clerks.[2] But as they confined themselves to their office, and only superintended the

formal proceedings in suits, another class of practitioners grew up, under the name of solicitors, who came to be the persons directly employed by clients in all suits in equity, the clerks in court being employed by the solicitors. Thus, until within a recent date, there were three classes of practitioners in equity; viz., solicitors, clerks in court, and barristers or counsel. There was nothing corresponding to this in the ecclesiastical courts where the practitioners were divided into proctors (*procurators*) and advocates, corresponding to attorneys and barristers at common law. Proctors and advocates (who practised indiscriminately in the ecclesiastical, admiralty, and prize courts) were wholly separated (as much so professionally as if they had been in another country), from the practitioners in the common-law courts, and in the Court of Chancery. There never was any such separation between the practitioners in the Court of Chancery, and in the common-law courts. The clerks in court, of course, confined themselves wholly to the Court of Chancery; but every solicitor, as a rule, was also an attorney at common law; and, until about the beginning of the present century, there was only a partial separation between the barristers practising in chancery, and those practising in the common-law courts. For these reasons, there has been a constant tendency to assimilate the procedure of common-law and equity, as well as to separate the latter from the system from which it took its origin.

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45.

COURTS OF CHANCERY IN THE AMERICAN COLONIES[1]

By Solon Dyke Wilson[2]

PRIOR to the Revolution courts of chancery had existed in some shape or other in every one of the thirteen colonies. An attempt will be made to give in the following pages a brief history of this tribunal in the days of our forefathers. In order to govern the affairs of Massachusetts colony it was necessary that a charter of incorporation should be obtained from the crown, in addition to the right of domain derived from the Plymouth Company by purchase. Charles I. finally conferred one very liberal in its terms. The freemen were to yearly choose a Governor, Deputy Governor, and eighteen Assistants; the general court was to meet quarterly, when freemen were to be admitted, officers chosen, and laws and orders not repugnant to the laws of England enacted.

The first Court of Assistants, composed of the Governor, Deputy Governor, and Assistants, was held at Charlestown August 23, 1630, rules of proceedings in all civil actions were established, and subordinate powers instituted for punishing offenders; it was agreed that the court should sit every third Thursday at the Governor's house.

The first General Court of the company was held at Boston in October this same year.

"Until 1639 this court seems to have exercised the whole power, both legislative and judicial, of the colony, and to have held jurisdiction in civil and criminal matters." For fifty-five years it exercised an extensive chancery jurisdiction as well.[1]

At the May Term, 1654, relief was prayed because of a mistake made in drawing up a bill of sale, and it was ordered that a "*firme*" deed be made to the rightful party.[2]

At the October term, 1665, an administrator petitioned to be allowed to redeem from mortgage a tract of land belonging to an estate in process of settlement. His request was granted.[3]

At the same session, in the matter of a charitable trust, a committee was appointed to inquire into the affairs of an educational institution and to report.[4] Ten years later an executor was ordered to specifically perform his testator's contract.[5]

The same term it was ordered that the lands belonging to Edmund Patch ("who did runne away with a married woman") be sequestrated and sold for the benefit of his family.[6]

At the June term, 1677, Clement Goss humbly begged this court to null an instrument which he was induced to sign by his wife, friends, and by a *wile.* The court so ordered.7

8 Margaret Thatcher petitioned in October, 1679, for relief, setting forth that she had paid the heirs of her deceased husband a large sum for their interest in his estate, which she feared would be detained from her, etc. The case was referred to the County Court for Suffolk, with power to compel a discovery.

Want of remedy at law is assigned in several cases as the ground of jurisdiction in equity.9

In May, 1685, it was enacted that: “Whereas it is found by experience that in many cases and controversies betwixt parties wherein there is matter of apparent equity, there hath been no way provided for relief against the rigour of the common law but by application to the general court, where, by reason of the weighty affairs of the country of more publick concernment, particular persons have been detained, to their no small trouble and charge, and also great expense occasioned to the publick by the long attendance of so many persons as that court consists of, to hear and determine personal causes brought before them; for ease and redress whereof it is ordered and enacted by this court, that the magistrates of each County Court1 within this jurisdiction being annually chosen by the freemen, be, and hereby are, authorized and empowered as a court of chancery, upon bill of complaint, or information exhibited to them, containing matters of apparent equity, to grant summons or process, as in other cases is usual, briefly specifying the matter of complaint, to require the defendant’s appearance at a day and place assigned by the court to make answer thereunto; and also to grant summons for witnesses in behalf of either party, to examine parties and witnesses by interrogations, upon oath, proper to the case, if the judges see cause to require it; and if any party, being legally summoned, shall refuse or neglect to make his appearance and answer, the case shall proceed to hearing and issue, as is provided in cases at common law; and upon a full hearing and consideration of what shall be pleaded and presented as evidence in any such case, the court to make their decree and determination according to the rule in equity. *Secundum equum et bonum,* and to grant execution thereon; *provided,* always, that either party, plaintiff or defendant, who shall find himself aggrieved at the determination of the said County Court shall have liberty to make his appeal to the magistrates of the next Court of Assistants, giving in security for prosecution and the reasons of his appeal to the officer of the said County Court, as the law provides in other cases; where the judges of the former court may have liberty to allege and show the grounds and reasons of their determination, but shall not vote nor judge in the said Court of Assistants; and the judgment or decree of the said Court of Assistants, shall be a full and final issue and determination of all such cases, without any after review or appeal; unless, upon application made by either party to the General Court, the said court shall see meet to order a second hearing of the case at the County Court, with liberty of appeal as aforesaid, or, in any arduous and difficult cases, to admit a hearing and determination by the general court; and that a suitable oath be drawn up and agreed upon, to be administered to those who shall be judges; and in all cases of this nature brought to the County Court, the party complaining, before his bill be filed and process granted,

shall give sufficient security, to the clerk of the court, to defray the necessary charges and attendance of the court."1

"It was the last judicial tribunal created by the Legislature under the first charter."2

The people of Massachusetts had long been reviewed by the home government with a jealous eye, they were accused of "extending their jurisdiction beyond the bounds of their patent, of evading the prerogative by coining money, of not allowing appeals to the King from their courts, and of obstructing the execution of the navigation and trade laws;"3 finally a "*quo warranto*" was issued, judgment was obtained in England and the charter abrogated.

After this the President or Governor and Council exercised chancery jurisdiction.4

December 19, 1686, Sir Edmund Andross arrived in Boston and the people were called upon to face the evils which attended with scarcely an exception, the sojourn of every royal Governor, that the history of this time refers to. He came as the Governor of the whole of New England, and at this time Plymouth colony, which continued weakly, became united to Massachusetts.5 Whatever the Governor's faults may have been, indolence was not one of them, for he immediately set about ordering the affairs of the Province with but little regard for the rights or feelings of those he came to govern. March 30, 1687, an act was passed for the establishment of courts of judicature and public justice. A court of chancery was created, with the amplest powers, "to be holden by the Governor, or by such person as he should appoint chancellor, to be assisted by five or more of the Council, and this court was to sit from time to time as the Governor might appoint;" from this court appeals lay to the King in council, if the matter in controversy exceeded £300.1

His power was but of short duration, however, for on the accession of William and Mary, the good people of Boston arose in their might, and with "force and arms" sent their Governor a prisoner back to England.

A new charter was conferred upon the colonists in 1691; it was less liberal in its terms than the old one. The Governor, Deputy Governor, and Secretary were to be appointed by the Crown, and they in turn appointed the judiciary. The Governor could summon, dissolve, and prorogue, the Deputies when he chose. Under the new charter the General Court met for the first time, June 28, 1692. "An act was passed which provided for a High Court of Chancery" to be kept by the Governor, or such other person as he should appoint chancellor, to be assisted by eight or more of the Council. From their decisions appeals lay to the King in council, and full equity powers were delegated to the court. By the same act "chancery powers were extended to all the courts of the Province so far as to chancer the penalties of bonds when in suits before them."2 The following year the constitution of the court was so far modified as to be held in Boston by three commissioners appointed by the Governor and Council, assisted by five masters in chancery. The court had the power of appointing its own register, and other necessary officers, and legal process was to be issued under the Province seal and to bear the *teste* of the three commissioners. The court held four terms in each year, but was to be always open to suitors.

The law did not, however, meet the approbation of the King, and no court appears to have been constituted under it. And in the act of 1699, re-establishing the courts of the Province, no provision is made for such a tribunal. By subsequent acts, limited chancery powers were delegated to the common law courts, such as chancering the penalties of bonds, granting conditional judgments in suits upon mortgages, and decreeing redemption of mortgaged estates upon the tender or performance of conditions within three years after entry made for the purposes of foreclosure. These were, substantially, all the provisions which related to the exercise of chancery powers by the courts under the Province charter. In 1701 Attorney-General Northey, in an opinion to Queen Anne, held that the General Court had no right to establish such a tribunal.[1]

The opinion of a great lawyer as to chancery jurisdiction in Massachusetts Bay, quoted by Governor Pownall whose term of office intervened between 1757-61, is as follows:—

"There is no court of chancery in the charter governments of New England, nor any court vested with power to determine cases in equity save only, that the justices of the inferior court and the justices of the superior court respectively have power to give relief, on mortgages, bonds, and other penalties contained in deeds. In all other chancery and equitable matters, both the crown and the subject are without redress. This introduced a practice of petitioning the legislative courts for relief, and prompted these courts to interpose their authority. These petitions became numerous—in order to give the greater dispatch to such business, the legislative courts transacted the same by orders or resolves, without the solemnity of passing acts for such purposes, and have further extended this power by resolves and orders beyond what a court of chancery ever attempted to decree, even to the suspending of public laws, which orders and resolves are not sent home for the royal assent."

"The jurisdiction mentioned by Governor Pownall was conferred by provincial statute."[1]

"Governor Bernard, in his answer on the 5th September, 1763, to the queries proposed by the Lords commissioners of trade and plantations said, it might have been made a question whether the Governor of this Province has not the power of chancellor delivered to him with the great seal as well as other royal Governors, but it is impracticable to set up such a claim now after a non-usage of seventy years, and after several Governors have in effect disclaimed it, by consenting to bills for establishing a court of chancery, which have been disallowed at home. A Court of Chancery is very much wanted here, many causes of consequence frequently happening in which no redress is to be had for want of a court of equity."[2] And so things continued until the breaking out of the war, when every thought save that of emancipation from the thraldom of the mother country was banished from every heart. Portsmouth and Dover, New Hampshire, were settled in 1623; and, although, it is said "that Exeter, a few years later (1638) formed a combination, chose rulers, and enacted laws in a public assembly," and Portsmouth and Dover did something of the kind as well,[3] it is certain no regular courts existed until the colony was united to Massachusetts in 1641.[4]

For the next thirty-eight years the laws of the latter colony prevailed largely in this. In 1679 this colony was made a royal Province with a President and Council, they constituted a court of record for administration of justice according to laws of England. So far as circumstances would permit, reserving a right of appeal to the King in council, for actions involving more than £50; they were among other things to issue writs within three months under the Province seal for calling an Assembly. "All laws were to be approved by the President and Council and then to remain in force till the King's pleasure should be known, for which purpose they should be sent to England by the first ships."[1]

"There can be no doubt that equity, as a great branch of the law of their native country, was brought over by the colonists and has always existed as a part of the common law in the broadest sense in New Hampshire." . . . "Under the first royal Governor, Robert Mason was appointed chancellor of the Province, and among the early records are to be found bills in equity which were heard and decided before him."[2]

In 1683 judgment was rendered against one Martin who had been treasurer during the previous administration, for moneys collected by him in his official capacity as treasurer; he petitioned Mason, as chancellor, setting forth that they had been disposed of according to the order of the late President and Council, and prayed that he be not obliged to bear the entire burden. A decree was issued ordering the surviving members of the Council, and the heirs of deceased members to each pay his respective proportion of the amount.[3]

In 1692 by "An act to provide courts of judicature," it was decided that "there shall be a Court of Chancery within this province, which said court shall have power to hear and determine all matters of equity, and shall be esteemed and accounted the High Court of Chancery of this province," . . . "and that the Governor and council shall constitute the said court."[4]

"A new organization of the courts was made by the legislative Assembly in 1699;"[5] but so far as chancery jurisdiction went, no material change was probably made, for an excellent authority has said: "It is not known that this law (referring to the enactment of 1692 in reference to a Court of Chancery) was ever repealed, and it is supposed that the Governor and Council, who composed the Court of Appeals, continued to exercise chancery powers till the Revolution."[6]

Roger Williams obtained a grant of land from the Indians and founded Providence, Rhode Island, in 1636. It was immediately ordained by the inhabitants, in town meeting, that "we do promise to subject ourselves in active or passive obedience to all such orders or agreements as shall be made for public good for the body, in an orderly way, by the major assent of the present inhabitants, masters of families, incorporated together into a town fellowship, and such others as they shall admit unto them only in civil things."[1]

Eight years after a charter was granted the Providence Plantation, which now consisted of four towns, Providence, Portsmouth, Newport, and Warwick, giving the

people full power and authority to rule themselves, “and such others as shall hereafter inhabit within any part of the said tract of land, by such a form of civil government, as by voluntary consent of all, or the greater part of them, they shall find most suitable to their estate and condition, and for that end to make and ordain such civil laws and constitutions, and to inflict such punishment upon transgressors; and for execution thereof so to place and displace officers of justice as they or the greatest part of them shall, by free consent, agree unto. Provided, nevertheless, that the said laws, constitution, and punishments for the civil government of the said plantations be conformable to the laws of England, so far as the nature and constitution of the place will admit.”2

The first Colonial Assembly met at Portsmouth in May, 1647. A few laws, general in their terms, were passed at this session. Through misrepresentation and fraud William Coddington, in April, 1651, was appointed Governor of Connecticut and Rhode Island for life. This operated to dissolve the charter government. The island towns submitted to Coddington, while those on the main-land continued to carry things on under the old laws. Williams went to England to obtain, if possible, a new charter; permission was finally given for the colony to act under the old charter until the contentions arising out of Coddington’s appointment could be settled. In a short time, however, his commission was revoked and the fears of the people were dispelled.

The charter subsequently granted by Charles II. empowered the erection of a government to consist of Governor and Council, and House of Assembly, and the enactment of any laws not repugnant to those of England. The early years of this colony were full of faction and turbulence, and although a *quo warranto* was issued against this charter, no hearing ever took place, and it remained in force until the constitution. There is no doubt that equitable rights were acted upon by the General Assembly, for this tribunal took cognizance of *all* matters which could not be brought within the narrow jurisdiction of the inferior courts.1

The earliest allusion we find to a Court of Chancery in the history of this colony is in the records of an assembly held in October, 1705. It is as follows: “Whereas, it hath been represented to this Assembly, the great benefit that it might be, to have a Court of Chancery erected and settled in this her Majesty’s colony; but this Assembly, having considered the rules and methods for the way and proceedings in such a court, with the rules and constitutions thereof being of great weight and concernment, and requires mature consideration for orderly settling thereof, which we conceive cannot at present at this Assembly be settled. Therefore, be it enacted by the honorable, the Governor, with the House of Magistrates and Representatives convened in general assembly, and it is hereby enacted by the authority of the same, That the General Assembly at all times convened in general assembly, shall be a Court of Chancery as *formerly it hath been,* until such time as a more proper Court of Chancery may be conveniently erected and settled.”2 Six years afterward the Assembly made an enactment which reads as follows: “Whereupon, notwithstanding a former act of this colony which hath constituted and empowered the Assembly to be a Court of Chancery, we judge that they had no power or authority to make any such law, by reason we cannot find any precedent that the legislators or Parliament of Great Britain, after they had passed an act or law, took upon themselves the executive power

or authority of constituting themselves a Court of Chancery, or any other court of judicature. Yet, notwithstanding, considering the power and authority of the General Assembly of this colony granted them, by, and in our royal charter, do we find that their power and authority is very large and copious as legislative, to make laws and constitute courts of judicature for the trial and decision of all matters and cases happening within this colony or government, as they shall judge proper, according to the constitution thereof, so as they be not repugnant, but as near as may be agreeable to the laws of England. Therefore, be it enacted by this present Assembly, and the authority thereof, and it is hereby enacted, that the act or law of this colony, which constitutes, authorizes, and empowers, the Assembly to be a Court of Chancery, shall be, and is hereby repealed, made null and void, and of none effect; and that no appeal from the Court of Tryals for the future, be granted, allowed, or brought before the Assembly of this Colony; . . . and also, that the Assembly of this Colony, according to, and by virtue of their power and authority afore recited, shall erect, set up, and establish, a regular Court of Chancery, within the government according to the methods and precedents of Great Britain, any act or acts, law or laws, in this government to the contrary hereof in anywise notwithstanding." It was provided furthermore, however, that the Assembly would sit as a Court of Appeals, from decisions rendered in a proper court of Chancery, if appeal was made by way of petition.[1] We have been unable to find any farther allusion to Courts of Chancery in this Colony for full thirty years. In 1741 a court, composed of five judges, was organized, with equity jurisdiction of matters that had previously been adjudicated by the General Assembly, and to also hear and determine appeals in personal actions from judgments of the superior court.[2] Three years later it was enacted that "Whereas, it is found by experience that the trials of causes by the said Court of Equity is inconvenient and a great grievance to the inhabitants of this colony," etc., etc., and the act of 1741 was repealed.[1]

Connecticut was first settled by emigrants from Massachusetts at Hartford, Weathersfield, and Windsor in 1635.

Three years later New Haven was founded by emigrants from London.

In accordance with the constitution adopted by the freemen of the three towns just referred to, in January, 1639, they again assembled at Hartford in April the same year. A Governor was appointed, and six prominent citizens chosen as magistrates; . . . representatives were elected, the first Assembly convened, and several laws passed.

For a year, New Haven had no constitution beyond a simple "covenant;" but increasing numbers made it necessary that laws should be enacted, so on the 4th of June, 1639, the freemen of the Colony convened in a large barn for that purpose. The proceedings opened with a sermon. "Upon full debate, with due and serious consideration it was agreed, concluded, and settled, as a fundamental law not to be disputed or questioned hereafter that the judicial laws of God as they were delivered by Moses and expounded in other parts of Scripture, so far as they are a fence to the moral law, and neither typical nor ceremonial, nor had reference to Canaan, shall be accounted of moral and binding equity and force, and as God shall help, shall be a constant direction for all proceedings here, and a general rule in all courts of justice

how to judge betwixt party and party, and how to punish offenders, till the same may be branched out into particulars hereafter."[2]

In due time laws more definite in their terms were found necessary, so early in 1642 still others were enacted.

"The texts of Scripture on which they were based were added to each law. . . . Up to this time (1643) the magistrates had possessed exclusive jurisdiction in hearing trials and in enforcing penalties, but now trials by jury were instituted."[3]

A court called the Court of Magistrates composed of "all the magistrates for the whole jurisdiction" was also erected this year. It had jurisdiction of "weighty and capital cases," and of all "appeals from subordinate plantation courts."[1] The various laws of the Colony were, by order of the General Court revised and digested, and from 1650 to 1686 remained the laws of the Province. They are known at the present day as the "Blue Laws" of Connecticut.[2] In 1660 a Connecticut colony sent an agent to England to obtain, if possible, a charter. In this he was finally successful. It was very liberal, conferring upon the inhabitants the right to govern themselves as they thought fit, and to enact any laws not repugnant to the laws of England. This charter covered much territory belonging to other colonies, in this case a part of Massachusetts, Rhode Island, the New Netherlands, and the whole of New Haven which, finally against its will, but principally by reason of its weakness, was, in 1664, absorbed by Connecticut.

Although we do not find any reference to the exercise of chancery jurisdiction by the courts of these colonies till 1686, when Andross assumed the government of New England, there is no doubt that their general courts acted when occasion required as courts of equity. In March, 1686, was enacted a law erecting a Court of Chancery for this colony "to be holden by the Governor, or such person as he shall appoint to be Chancellor, assisted by five or more of the Council, who in this court have the same power and authority as masters in chancery in England have or ought to have; which court shall sit at such times and places as the Governor shall from time to time appoint, provided always that any person may appeal from any sentence or decree made or given in this court, unto his Majesty in council when the matter in difference shall exceed the real value and sum of £300, sterling, as in case of appeal from the Governor and Council is provided."[3]

The General Assembly at Hartford, in May, 1724, appointed and empowered eight gentlemen "to hear and determine all matters of *errour* and *equity* that shall be brought by petition to the present General Assembly, and to cause their judgments to be executed effectually; any law, usage, or custom to the contrary notwithstanding."[1]

In 1676 Sir Edmund Andross granted an injunction to stay execution on a judgment at law at the court of New Castle upon security being given, "and all proceedings, writing, and proofs to be transmitted to New York for final determination in equity."[2]

The above must have been one of the few isolated cases, for we find twenty-four years later the Earl of Bellomont, the Governor, writing the Lords of Trade in these

words: "There is a great want of a Court of Chancery here, but nobody here understands it rightly. I delay appointing one till the judge and attorney-general's coming from England."[3] In 1701, he again wrote, as follows: "I am extremely importuned to erect a Court of Chancery, many people being liked to be ruined for want of one."[4] In February the same year the Lords of Trade directed him to erect such a tribunal.[5] In a letter from Lieutenant-Governor Naufau (the Governor having died), dated January 9, 1701, it was said, that the Court of Chancery was to be holden the first Thursday in August thereafter, and so monthly.[6] Nothing more of importance is to be found bearing upon the subject until the administration of Governor Hunter, which began in 1711. May 7th, that year, he wrote the Lords of Trade, setting forth the necessity of a Court of Chancery, and begging their directions. They replied June 9th, that under his commission he was empowered to establish such courts as he thought fit.[7] January 1, 1712, Hunter wrote as follows: "The country here, in general, groaned for a Court of Chancery which had been discontinued for some time before my arrival in these parts." . . . "I gave a public notification of that court being opened, and the House of Representatives, in their angry mood, resolved that the erecting of such a court without their consent was against law," etc.[1] The Governor claimed the sole right of acting as chancellor, by reason of having custody of the seal. The people, suspicious of the intentions of the home government, were solicitous lest their rights should not in some way be encroached upon. The fees of this court were exorbitant, causes were delayed, and great abuses arose in many directions, particularly in the manner of the collection of quitrents.[2]

"The administration of Governor Burnett, which began September 20, 1720, gradually became unpopular owing principally to decrees which he made in chancery contrary to law." . . . "The Assembly became disaffected to him." It resolved that the erecting or exercising a Court of Chancery in the Province without the consent of the Assembly was contrary to the laws of England, and subversive of the rights of the subjects.

It was also resolved that it would at its next session pass a law declaring all the decrees and proceedings of said court illegal, null, and void; and that it would take into consideration whether such a court be necessary or not, and in whom the jurisdiction ought to be vested. Mr. Burnett no sooner heard of their resolutions than he called the members before him and dissolved the Assembly.[3]

Governor Montgomery died July 1, 1731. The government devolved upon Rip Van Dam, the President of the Council. "He was opposed to Courts of Chancery, and refused to take the oath of chancellor notwithstanding instructions from the home government to do so, as no other court could enforce the collection of quit-rents, it will be seen that the people had good cause to side with him. Although Colonel William Cosby was immediately appointed Montgomery's successor, he did not arrive in this country for thirteen months. Van Dam had received the salary during the time he was in the chair." Cosby brought with him the King's order for an equal division of the salary, emoluments, and perquisites; Van Dam was willing to divide the salary, but not the emoluments and perquisites. He knew that Cosby, while in England, had received large amounts for pretended services. This the Governor refused to divide, although Van Dam demanded it, and refused to refund any portion

of his salary unless he did so.[1] Cosby brought suit against Van Dam before the justices of the Supreme Court as Barons of the Exchequer; he would not proceed at the common law, for he had good reason to expect a plea in set-off, as well as a verdict of a jury; neither could he proceed in a Court of Chancery, for, according to the doctrine of the court party, he was chancellor and would thus sit in judgment on his own case. He felt very safe in bringing suit in the Exchequer, as a majority of the judges were his personal friends.

Van Dam began suit at common law against the Governor. His lawyers took exception to the jurisdiction of the Court of Exchequer, this plea was overruled, Chief Justice Morris dissenting.[2] The people took up the cause of Van Dam, forming one party, while another was made up of the provincial officials and a few others. The press took up the matter, finally leading to the famous trial of Zenger, the proprietor of Zenger's *Journal,* for libel, his sheet being the principal organ of the popular party. Cosby subsequently dropped his proceedings against Van Dam, he never recovered anything from him.[3] In 1734 it was resolved by the House of Assembly that two well known lawyers, Messrs. Murray and Smith be heard in relation to the organization of courts of justice as numberless petitions had been presented deploring the condition of the judiciary. The former maintained in his address that no court of equity could be erected in any of the Colonies by act of the Crown. And the latter that it was of original jurisdiction, and that the Colony was entitled to the same as an essential branch of English liberty.[1]

Again in 1735, the Assembly resolved that the Court of Chancery, under the exercise of a Governor without consent of the General Assembly, "is contrary to law, unwarrantable, and of dangerous consequence to the liberties and properties of the people."[2] In 1756 Governor Hardy acted as chancellor.[3]

Although the animosity of the people with regard to this tribunal did not decrease during the remainder of New York's provincial history, the court continued to sit in a desultory way, but transacted very little business.

Charles II. granted to his brother, the Duke of York, March 12, 1663-4, an immense territory in North America.[4] The same year a portion of this domain, comprising within its bounds the whole of the present State of New Jersey, was conveyed to Lords Berkely and Cartaret.[5] They became rulers as well as owners of the country.[6]

The first constitution of the Province was signed by the proprietors February 10, 1664, and continued in force until 1676.

The government was to consist of a Governor and Council appointed by the proprietors and an Assembly chosen by the people. They were empowered to enact such laws as they saw fit, so long as they did not conflict with those of England, or the interests of the Lords Proprietors.

At the first meeting of the legislative body (1668), all the principal towns in the Province were represented.[7]

At the second session dissensions arose because the Council insisted on sitting alone, rather than with the Assembly, where they could easily be out-voted. One thing led to another until finally all kindly feelings between the proprietors and people were obliterated, and after a number of years of confusion and discontent Berkely, disgusted, sold out to Fenwick and Byllenge, two Quakers. They mortgaged their interest and the mortgagees arranged with Cartaret to divide the Province into East and West New Jersey. The latter was given a very liberal form of government by its possessors. In 1682 Cartaret's heirs sold their share (East New Jersey) to Penn and others; there were twenty-four proprietors in all. They were not allowed to govern it in peace, however, for soon they were obliged to surrender the government of the Colony to the Crown, retaining only the title to the soil. Shortly after, West New Jersey succumbed in like manner, and was obliged to accept the same terms. Fifteen years after, the colonies were reunited. In a letter from Lord Cornbury to the Lords of Trade, dated early in August, 1703, he said, after informing them of his having entered upon his duties as Governor of New Jersey: . . . "The first thing we proceeded upon, was to settle some courts, and in order to it, I asked the gentlemen of the Council what courts they had under their proprietary government; they said that their courts were never very regularly settled, but such as they were, it was under this regulation: first, they had a court for determining all causes under forty shillings, and that was by any one justice, and if either of the parties did not like the judgment of that justice he was at liberty to have a trial by jury, paying the charges of the first suit." . . . "The next court they had was a quarterly court, where the justices of the peace determined all causes under £10, and they had a court which they called the Court of Common Right, where *all causes both criminal and civil,* were heard and determined, and to this court there lay an appeal from the quarterly courts."

"This Court of Common Right consisted of the Governor and Council, and if any man thought himself aggrieved by the sentence of the Court of Common Right, then he might appeal to the Governor in Council. This was appealing from to the same persons, this being the account they gave me."1

The Court of Common Right had, of course, jurisdiction in chancery.

In another letter by the same nobleman to the Lords Commissioners, dated May 7, 1711, he said, among other things: "In both plantations I have been pelted with petitions for a Court of Chancery; and I have been made acquainted with some cases which very much require such a court, there being no relief at common law, I had ordered the Committee of both Councils to form a scheme for such a court, but to no purpose; the trust of the seals they say constitute a chancellor, and unless the Governor can part with the seals there can be no chancellor but himself. I have already more business than I can attend to, besides I am very ignorant in law matters, having never in my life been concerned in any one suit. So, I earnestly beg your lordships' directions as to that court."1 In the reply to this letter he was informed that under his commission he was empowered to erect, with the advice and consent of the Council, "such and so many courts of judicature and public justice as he and they shall think fit."2 And we find it recorded one year later that "there is no Court of Chancery in the Province."3

In 1676 the government of New York extended over the territory subsequently granted to William Penn, and as Governor Andross issued in that year an injunction to stay an execution,[4] we can well say that at that early day, chancery jurisdiction was exercised when occasion required in the Province, to which we shall now give our attention. Until 1684 the Council, when called upon, no doubt exercised equitable jurisdiction.[5] A bill was passed by the Assembly at Philadelphia, January 26th that year, erecting a Provincial Court, to consist of five judges, to go two circuits yearly.[6]

The next month it was enacted that "every court of justice shall be a court of *equity* as well as of law and that there should be 'a Provincial Court of quarter sessions' " . . . "to try all criminals and titles to lands, and to be a court of *equity,* and to decide all differences upon appeals from the County Courts."[7]

Penn commissioned the judges of this court six months afterward.

In 1686 the Council appointed judges for the next Provincial Court, making them judges of *equity* as well as of law.[1] It is evident that the people had not a very clear conception of the extent of the equitable powers of these courts, for in the following year the Assembly desired the Council to explain "how far the County Quarter Sessions may be judges of equity as well as law; and if after adjudgment at law, whether the same court hath power to resolve itself into a court of equity, and to mitigate, alter, or reverse the judgment."[2] The Council answered that the law erecting the court "doth supply and answer all occasions of appeal, and is a plain rule to proceed by," which answer could not have shed much light on the subject inquired about. An act was passed in 1690 providing, among other things, that the "County Courts *shall be Courts of Equity,* for the hearing and determining all causes cognizable in said court involving less than £10 sterling."[3]

In 1701 was passed an act "for establishing courts of judicature in this Province and counties annexed," the judges of the Common Pleas were given full power "to hear and decree all such matters and causes of equity as should come before them, wherein the proceeding shall be by bill and answer, with such other pleadings as are necessary in Chancery Courts and proper in these parts, with power also to the said justices to force obedience to their decrees in equity by imprisonment or sequestration of lands as the case may require."[4]

Two years after it was complained that, to the great oppression of the people, no courts of equity had been held in pursuance of this law. This same year, however, it was repealed by the Queen in council, and no other act providing for a Court of Equity was passed until 1710, when in an act for "establishing courts of judicature, it was provided that there shall be a Court of Equity held by the judges of the respective County Courts of Common Pleas, four times a year and at the respective places, and near the said times the said Courts of Common Pleas are held, in every county of this Province *observing as near as may be the rules and practice of the High Court of* Chancery in Breat Britain."[1] It was provided in this act that no cause should be determined in equity when there was a remedy at common law or by the laws of the Province, and that when matters of fact should arise on the hearing of any cause, the

court should first bring them to issue and trial before the Common Pleas, before proceeding to decree in equity.

This statute was abolished within three years on the ground that it would tend to make proceedings in equity very dilatory, and unnecessarily increase the business of the common law courts.

In 1715 an act was passed "for erecting a supreme or provincial court of law and equity in this Province," but this act was repealed in 1719. "The colonists had by the terms of their charter five years within which to transmit their laws for approval. And their custom was to enact laws and act under them as long as they decently could, and then send them to England well knowing that they would be repealed;" then they would make new laws as near like them as they dared which in time were sent to the old country, and annulled and so on.[2] That is why so long time elapsed between the organization and abolishment of the various courts having chancery jurisdiction that we have referred to.

Governor Keith entered upon his duties in 1717. June 8th, 1720, was read before the Council a resolution of the House of Representatives which ran as follows:—

"*Resolved,* That considering the present circumstances of this Province, this House is of opinion, that for the present the Governor be desired to open and hold a Court of Equity for this Province, with the assistance of such of his Council as he shall think fit, except such as have heard the same cause in any inferior court."

August 6th, 1720, it was resolved at a Council held at Philadelphia that the Governor might "safely comply with the desire of the representatives of the freemen of the Province," . . . "and that the holding of such a Court of Chancery in the manner aforesaid, may be of great service to the inhabitants of this colony, and appears agreeable to the practice which has been approved of in the neighboring governments."

The Governor, while regretting his want of experience in judicial affairs expressed a willingness to act in the capacity of chancellor, provided he received due assistance from his Council. "It was finally agreed that no decree should be made but by the Governor as chancellor, with the assistance of two or more of his six oldest counselors who might also be employed as masters in chancery.[1] August 10, 1720, appeared the Governor's proclamation; it recited that[2] Courts of Chancery or Equity, though absolutely necessary in the administration of justice—for mitigating in many cases, the rigor of the laws whose judgments are tied down to fixed and unalterable rules, and for opening a way to the right and equity of a cause, for which the law cannot in all cases make sufficient provision, have, notwithstanding, been too seldom regularly held in this Province in such manner as the aggrieved subjects might obtain the relief which by such courts ought to be granted," declared that the Governor with the assistance of the Council "proposed to hold a Court of Chancery or equity on the 25th of that month, from which date the said court will be and remain always open for the relief of the subject to hear and determine all such matters arising within this Province aforesaid as are cognizable before any Court of Chancery according to the

laws and constitutions of that part of Great Britain called England." The thanks of the student are due William Henry Rawle, Esq., of Philadelphia, for causing a search to be made for records shedding light upon the subject, among the archives of that State, for it resulted in the finding of the registrar's book of Governor Keith's Court of Chancery, and he is also under great obligations to the Law Academy, of Philadelphia, for printing the same as an appendix to the very able essay upon "Equity in Pennsylvania," delivered by Mr. Rawle before that body February 11, 1868. One can here find a complete record of the doings of that tribunal.

Keith was superseded by Patrick Gordon in 1726. "Certain rules for the better regulation of this court and the speedier dispatch of business" were drawn up at this time.1 But for some years its business had been falling off. A spirit of discontent had begun to manifest itself, at the over-reachings of the provincial officials, for naturally enough the people were averse to being held amenable to courts of extensive jurisdiction composed entirely of persons in the proprietaries' interest. While they did not object to the Court of Chancery as a tribunal, they did hold that the Assembly alone had the power to establish it.

The House of Representatives resolved, January 22d, 1735-6, "That whereas sundry petitions from a considerable number of the inhabitants of the respective counties of Philadelphia, Bucks, and Chester have been presented to this House and read, complaining that the holding a Court of Chancery as it is now used in this Province is contrary to our charter of privileges and may be attended with divers inconveniences; that, therefore, a message be sent to the Governor requesting him that he will be pleased to inform this house how the said Court of Chancery is constituted." This resolution was laid before the Governor and Council the next day; the Governor ordered that transcripts of the enactments of the 8th of June and the 6th of August be sent down to the House for their information. The Council got up a vindication of the court to which the representatives replied, saying among other things, that no mere vote could erect a court of equity (referring to the resolutions of June 8th, 1720), and that it could be done only by act of Assembly.2 The Governor continued to act as chancellor for a few months, when he died. No successor has ever attempted to exercise chancery powers.

Delaware was incorporated into the domain of the Duke of York in 1663, and was governed by the laws of New York until 1682, when it passed into the hands of Penn and became subject to the laws of the Province of Pennsylvania.

The charter of this colony provided that all laws should be enacted by the proprietary "by and with the advice, consent, and approbation of the freemen of the Province, or of their delegates and deputies," so long as they did not interfere with the fundamental rights of the people and were consistent with the common law of England. As in all the provinces the General Assembly consisted of two branches, the Upper House, composed of the Council, elected by the proprietary, and the Lower House of Delegates elected by the people. The former was a marked aristocratic body.1 "Under the proprietary government the chancellor of the Province was sometimes constituted by a formal commission from the Lord Proprietor," but most usually, as it would seem, by a delivery of the great seals by the Lord Proprietor in person only, or in the

presence of the Council. The Governor for the time being was, in several instances, by the same commission, also constituted chancellor and keeper of the great seal of the Province.[2]

"The first provincial Governor, by his commission bearing date on the 15th of April, 1637, was constituted Governor, Lieutenant-General, Chief Captain and Commander, as well by sea as by land, and also *Chancellor,* Chief Justice, and Chief Magistrate within the Province."[3]

It was enacted in 1639 that all matters and causes whatsoever determinable in the High Court of Chancery in England shall, or may be finally heard and determined within the province by and before the chancellor of this province and Council of State for the time being. The Court of Chancery hereby erected, to have the same form of proceedings as the Court of Chancery in England. When acting as chancellor the Governor had authority to call in the assistance of the Council for their advice "upon all occasions as he shall see cause."[4] In Maryland, prior to the Revolution, the Governor sat alone as chancellor, from whose decision, by act of Assembly, an appeal lay to the Governor and Council sitting as a Court of Appeals. Defeated suitors could also appeal from the highest Colonial Court of Appeals to the King in council. In a case in the Maryland Court of Chancery, upon a petition by the defendant praying an appeal to the King, the prayer was, on the 1st of March, 1738, rejected. "The said prayer being" (as it was said) "contrary to his Majesty's instructions, to grant an appeal to his Majesty from any other court, but from the Court of Appeals, which is the supreme court of this province, to which court he may appeal, and from thence to his Majesty, if he think fit."[1] "But, although for some time after the settlement of the country, the Governor could do no act as chancellor, but as a court, sitting with his assistants," it is said in a petition in the case of Nicholas Painter and wife against Samuel Lane in chancery, addressed to the Lord Proprietor in June, 1681, "that the Court of Chancery is, and ought to be always, open as to the proceedings therein; but your lordship having not yet empowered your chancellor as chief justice of your said court to answer petitions or make orders touching the proceedings, as is used in England, without a full court of four at least, your petitioners are therefore necessitated to apply themselves to your lordship, and to humbly pray that your lordship would please to order that the defendant may put in his answer by a certain day," etc., "which was accordingly ordered by the Lord Proprietor himself."[2]

"But it appears that William Holland was, by a commission from the Lord Proprietor, under his great seal at arms, bearing date on the 27th of February, 1719, attested by his Governor, constituted chancellor of the province, with full power to do, perform, hear, and determine all such matters and things as to the office of chancellor of right belonged or appertained. After which the chancellor of Maryland always sat as sole judge, without assistants; and his court was thenceforward, in all respects, as accessible for all persons as the Chancery Court of England."

"During the short time that the government of the Province was taken immediately into the hands of the King, it does not appear how the chancellor was appointed, although it seems to have been most usual to constitute the same person, both Governor and chancellor, as in the case of John Hart, who was both. Yet it was not

always done, for it appears that different persons were sometimes appointed to fill each office; but however that might have been, it is certain that the two offices were always considered as being entirely separate and distinct in their nature."[1]

"It appears that Robert Eden, the last provincial Governor of Maryland, . . . was commissioned, with the approbation of the King by the Proprietor, which commission he produced to the Provincial Council, who thereupon administered to him the oaths appointed to be taken by the Governor. Immediately after which his predecessor, Horatio Sharpe, delivered to him the great seal of the Province, whereupon the oath of chancellor was administered to him, by the members of the Council then present; all of which was entered of record in the book of the Council proceedings."[2]

"Before the Revolution the Lord Proprietor was the owner, in his individual and private capacity, of all the land and territory in the province. He sold or gave it away at pleasure. Not long after the settlement of the Province was commenced, a land office was established, through which any person might obtain a title for any vacant land on complying with the established conditions and regulations. As the settlement extended and the sales of land were multiplied, numerous controversies arose as to the formality and correctness of the incipient and original titles thus obtained from the proprietary."

"For the purpose of determining these controversies, a judge of the land office was appointed about the year 1680, and the chancellor of the Province was charged with the determination of those matters, either as judge or as assistant of the judge of the land office."[3]

For years after the settlement of Virginia, all causes were adjudicated by the Governor and Council sitting as a General Court, so called because it attended to all kinds of business from all parts of the colony. This court sat originally twice a year at Jamestown, and subsequently every three months. It was never commissioned, but grew up out of the necessities of the people.[1]

This was the case up to the time of the sitting of the first House of Burgesses in July, 1619. Causes had grown so numerous, however, that it was now necessary to erect courts of inferior jurisdiction. So it was enacted that there should be monthly courts to have jurisdiction of all suits where the amount in controversy did not exceed the value of one hundred pounds of tobacco.[2] This court consisted of eight or ten gentlemen receiving their commissions from the Governor.[3]

The jurisdiction of these courts was enlarged from time to time, and in March, 1642, it was enacted that they should be called county courts.[4]

In November, 1645, it was enacted that on account of the great distance of many settlements from Jamestown that the county courts should have jurisdiction of all causes in law and equity.[5] Two years later (November, 1647,) a law was passed allowing appeals to the Assembly in all cases where the sum involved exceeded £10 or sixteen hundred pounds of tobacco, to settle new points of law, or when it appeared to the Assembly that the judgment of the inferior court was questionable.[6]

There was no material change in the jurisdiction of the various inferior courts of this colony as regards chancery matters for the next hundred years, so far as can be ascertained from existing records. There is no doubt, however, that the General Court exercised an extensive chancery jurisdiction, both original and appellate, especially during the last fifty years of Virginia's colonial existence, for we find that a law was passed in March, 1745, appointing the first five days of every session, for hearing and determining suits and appeals in Chancery.7

Rules in chancery were enacted in October, 1748.8 Between 1650 and 1660 emigrants began to remove from Virginia and settle in the northeastern portion of what was then the Province of Carolina, now North Carolina.1

In 1663 Sir William Berkely, Governor of Virginia, visited the Province and appointed Wm. Drummond Governor.2 In 1665, the first Assembly sat at Albemarle. . . . There was at this time no town in the settlements, and for many years the Legislatures convened in private houses.3

In 1667 Drummond was succeeded by one Stevens who brought with him liberal instructions from the lords proprietors. He was to act by and with the advice and consent of a council of twelve, one-half his appointees, the others elected by the Lower House of Assembly. The earliest recorded legislation was effected in 1669. In 1670 the cumbrous constitution drawn up by Shaftesbury and John Locke was promulgated, and the people were expected to unanimously indorse the most impracticable scheme of government ever proposed in our entire colonial history. It is scarcely necessary to say, that although many years elapsed before it was formally set aside, its effect was directly opposite to that which had been fondly hoped. Its provisions were opposed at every turn, for they were drawn up without any regard for the actual needs of the inhabitants of this very sparsely settled Province. For sixty-one years longer the proprietary government continued, but with little satisfaction to Governors or governed. The people were poor, the revenues small and uncertain, and it was but natural that the settlers on lonely plantations should object to paying tribute to nobles wealthy and powerful in the old country. Despairing of acquiring riches, all the owners save Cartaret finally sold out to the Crown in 1731, when the Province was divided into two portions, namely North and South Carolina.

In the early days of this colony the Court of Chancery "was composed of the Governors and deputies of the lords proprietors, *ex officio*."4 There still exist the records of a few cases that were "decided on principles recognized in the English Courts of Chancery,"1 thus showing that no one was denied relief even in the remotest period of the colonial history.2 It was enacted in 1715 that every member of the Council be "required to swear that as a judge in a court at chancery he will do what is just and right between those who might come before him as suitors in that court." It was also provided that "if the Governor should be a party to any suit before that court, any four members of the court might hear and decide the cause without the presence of the Governor."3

During the first four years (from 1670 to 1674) of the history of South Carolina the Governor and Council sat as a court weekly; cognizance was taken of complaints and

petitions, and causes of almost every nature were heard and decided.[4] In 1674 the first Assembly met. The Upper and Lower Houses took the name of the Parliament, as in the northern portion of the Colony the Governor and Council exercised, from the first, chancery jurisdiction.[5]

In the year 1719 the people remonstrated with the proprietors against retaining Nicholas Trott (their willing tool), who was not only sole judge of the Courts of Common Pleas, and King's Bench, but also of the Court of Vice Admiralty, and at the same time, as a member of the Council, one of the judges of the Court of Chancery. He was, however, too useful a man to be displaced, and so the remonstrances of the people were disregarded.[6]

In 1721 was passed "an act for establishing a Court of Chancery empowering the Governor of the Province for the time being and the majority of the honorable members of his majesty's Council from time to time subsisting, to hold a Court of Chancery, and to have, exercise, and use the same jurisdiction, power, and authority in granting and issuing forth all original and remedial writs and other process whatsoever, and in hearing, adjudicating, and determining all causes and suits in equity in as full and ample manner as any chancellor or court or courts of chancery can, may, or ought to do."[1]

It does not appear from the records that there were any assistant judges prior to 1736. A single chief justice had presided over the courts in Charlestown, which were then, and for thirty-three years after, the only ones held in the Province.[2]

It is evident that there arose some question as to courts with equity powers in this colony, for we find that Rider and Strange, as attorney and solicitor generals, gave their opinion, in 1738, that the Colonial Assembly could establish, if they saw fit, a Court of Exchequer.[3]

The Governor and Council exercised chancery jurisdiction as well after the Colony became a royal Province as before and so continued to act down to the Revolution.[4]

The first charter of Georgia constituted twenty-one persons, a body corporate by the name and style of "The Trustees for establishing the Colony of Georgia in America." They were empowered to make constitutions, laws, and ordinances for the government of their Province,[5] and it was further provided that at the expiration of twenty-one years, that the form of government that should then be thought best should be adopted, in which all officers, civil and military, should be nominated and appointed by the King.[6] Before embarking, officers for the new town were appointed, namely, three bailiffs, a recorder, two constables, two tithing men and eight conservators of the peace.[7] They also organized a court of judicature, in which might be heard "all manner of crimes, offenses, pleas, processes, plaints, actions, matters, causes, and things whatever arising or happening within the Province of Georgia." It was called the Town Court, and was opened July 7, 1733.[8]

"This court was supreme, blending in one tribunal the several powers usually lodged in common pleas, *chancery,* probate, *nisi prius,* sheriffs, coroners, and exchequer, and

all committed to men unlearned in the principles of law and unversed in the usages of courts." There were no lawyers in the Province for years; every suitor tried his own case. As settlements increased, new town courts were organized, but they gave but little satisfaction. Their officers seem to have been guilty of all sorts of misdeeds, "making false imprisonments, wrongfully discharging grand juries, threatening petit juries, blasphemy, irreverence, drunkenness, obstructing the course of law, and other equally grave and heinous offenses." In 1752 the Province was surrendered to the Crown and passed under the control of the "Board of Trade and Plantations." The royal Governor "had the same powers as the Lord High Chancellor of England."[1] The Council was appointed by the King, who also filled all vacancies. "They also had a judicial character, and in this aspect sat with the Governor in the *Court of Chancery*."[2]

The writer has done his best with the material at his command. While he has had no difficulty in obtaining information, so far as some of the colonies were concerned, he has been able to find but little on turning his attention to others, notably the southernmost. He is aware that no adequate history of this court can be written without consulting the original archives of each colony; yet he feels that the facts contained in this paper will be of some interest to those who are at all curious as to the early judicial history of our country.

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46.

THE ADMINISTRATION OF EQUITY THROUGH COMMON LAW FORMS IN PENNSYLVANIA.[1]

By Sidney George Fisher[2]

EQUITY and its administration have been favourite topics with law reformers. Whether the distinction between equity and law is a sound and essential one, whether equity can be administered by the same court that administers law, and whether equity can be absorbed into the common law and be administered by common law forms have been the great questions. In the solution of the last question the American State of Pennsylvania has had a long practical experience. Her system, which is correctly described as the administration of equity through common law forms, has now been in existence for more than one hundred and fifty years. No other commonwealth in the world has tried the experiment in so thorough a manner or on such an extensive scale. It is therefore fair to say, that the exact value of the system, what it can and what it cannot do for the conduct of litigation, ought to be found in the experience of Pennsylvania.

The subject naturally divides itself into three parts. *First,* the various unsuccessful attempts, from the founding of the Colony in 1681 until the year 1836, to obtain courts with the usual Chancery powers. *Second,* as a consequence of these failures, the growth during the same period, of the administration of equity through common law forms. *Third,* the period from 1836 to the present time, during which the Courts have gradually obtained from the legislature nearly all the ordinary powers of Chancery.

William Penn obtained his charter for Pennsylvania in 1681, and by its terms could have at once erected a Court of Equity.[1] He did not do so. Apparently he was not an admirer of such courts; for he describes the Indians as not 'perplexed by Chancery suits,' and in accordance with his Quaker belief he made arrangements for having appointed by every County Court 'three peacemakers,' who acted as arbitrators to prevent law-suits.[2]

But the General Assembly, which was created by Penn as the legislative body of the Colony, was of a different mind. In 1684 it made two provisions for introducing equity. The first made the County Courts courts of equity as well as of law. The second created a Provincial Court, which was to be a court for appeals from the County Courts, and was also to try all cases, both in law and in equity, not triable in the County Courts.[3] Both of these provisions were repealed by the English Government in 1793. The first was re-enacted by the General Assembly the same year that it was repealed. But it is believed that very little business was transacted under either of them. It is also probable that any equity that was administered at this time was not the technical and scientific equity of lawyers, but a sort of natural equity,

consisting largely of the amendment of judgments at law which were considered too harsh. The judges had great discretionary powers, and were usually laymen. In fact there were very few trained lawyers in the Colony.4

After this there were four more futile attempts to establish equity. They are chiefly interesting as showing the relations of the Colony to the mother country in the matter of the repeal of laws.

The first of these attempts was in 1690. The General Assembly limited the jurisdiction of the County Courts by enacting that they should hear equity cases only when they were under the value of ten pounds. The English Government repealed this Act in 1693. It was re-enacted the same year and re-enacted again in 1700; but apparently it produced no results.1

In 1701 an Act remodelling the courts of the Colony, and apparently repealing all prior regulations in regard to equity, gave equity powers to the Courts of Common Pleas, and an appeal in equity cases to the Supreme Court. Nothing came of this Act and it was repealed by the home government in 1705.2

In 1710 the General Assembly made another attempt. A Court of Equity was to be held by the Common Pleas judges four times a year in every county. Appeals could be taken to the Supreme Court, and questions of fact were to be settled by a reference to Common Pleas. This was repealed in 1713.3

In 1715, a 'Supreme or Provincial Court of Law and Equity' was established. This was likewise repealed in 1719.4

These were all failures. But in 1720, at the suggestion of Governor Keith, a separate Court of Equity was provided. It lasted sixteen years, and was not interfered with by the home government. It is to be observed that the other attempts were all law courts with an equity side. But this court, founded in 1720, was the first and only separate Court of Equity Pennsylvania has ever had. Considerable business was transacted by it. But unfortunately for the court's existence the Governor was its Chancellor, and the colonists were so jealous of any power exercised by the King of England, or his representative the Governor, that in 1736 they brought to an end the only real Court of Chancery they ever possessed.5

For the next hundred years—that is to say, until the final grant of equity powers in 1836,—the lovers of Chancery met with even less success. By the Constitution of 1776 they got for the law courts the powers of equity so far as related to perpetuation of testimony, obtaining evidence outside of the State, and the care of the persons and estates of the insane. The Legislature was at the same time allowed to grant such other Chancery powers as might be found necessary. But no other powers were granted, except a method of supplying lost deeds and writings, and a proceeding in the nature of a bill of discovery against garnishees in foreign attachment. The Constitution of 1790 mended matters by giving somewhat larger discretionary powers to the Legislature. But that conservative assembly exercised them only to the extent of letting the courts appoint and dismiss trustees, compel them to account, compel

answers on oath in certain cases of execution, and when the vendor of lands had died, complete the contract of sale.[1] The inconvenience of this meagre grant was a little alleviated by the Legislature's appointing a 'Committee of Grievances,' which in cases of great hardship gave liberal relief.[2]

Throughout the whole early history of Pennsylvania, it appears that there was always a party which wanted Courts of Chancery, and sometimes succeeded in getting them. This party was hindered in the colonial times by the British Government continually repealing the Colony's laws. They had an equally troublesome obstacle in the endless feuds between the colonists and their successive Governors.[3] These quarrels were so bitter and hard-fought that law-making and the execution of the laws were often forgotten. 'If we have lived free from open rapine,' said one of the Governors, ' 'tis more owing to the honesty of the people than any public provision made against it!'[4] Before and immediately after the Revolution the same party was thwarted by the jealousy which the people felt for any exercise of unusual power. And in later years they were opposed in the Legislature and throughout the State by another party. This new party took the ground that Chancery Courts were contrivances of the Devil to defeat justice, and that Pennsylvania had a system of equity of her own, which was complete in itself, and would in time reform the world.

So, with the exception of the sixteen years from 1620 to 1636, the Courts of Pennsylvania were, for over a hundred and fifty years, left in this predicament—that, in an enlightened community whose trade and commerce were growing every day, they were obliged to administer justice without the aid of a Court of Equity. It is not surprising that they struck out into a new path and did something unheard of in the annals of Anglo-Saxon jurisprudence. If their action was a piece of judicial audacity, it was authorized and justified by the circumstances.[1]

The precise time at which the courts began to administer equity through common law forms is not known. Some say it was done from the beginning.[2] The first reported case[3] on the subject was decided in 1768. It was an action of debt on a bond, and the defendant offered to prove failure[4] of consideration. The court admitted the evidence, saying, 'there being no Court of Chancery in this province, there is a necessity, in order to prevent a failure of justice, to let the defendants in, under the plea of payment, to prove mistake, &c.' The Chief Justice added, that he had known this as the constant practice of the province for thirty-nine years. In 1783 the case of *Kennedy* v. *Fury*[5] decided that a cestui qui trust of land could bring ejectment in his own name, the court observing that otherwise 'he would be without remedy against an obstinate trustee.' These decisions show very clearly how in certain plain cases, and to prevent intolerable hardship, the courts deliberately usurped the necessary powers.

The case of *Wharton* v. *Morris* (1785) displays a further development.[1] After reciting the lack of Chancery and the resulting grievous inconvenience, Chief Justice McKean says, 'This defect of jurisdiction has necessarily obliged the court, upon such occasions, to refer the question to the jury under an equitable and conscientious interpretation of the agreement of the parties.' He then goes on to inform the jury of the equities of the case. In the colonial times the equity thus charged to the jury was not technical. It was the so-called natural justice, named by Austin the '*arbitrium* of

the judge.' It is still almost the only rule of legal decision among the Turks and Arabs. Haroun-al-Raschid excelled in it. But in an advanced stage of civilization it is impossible. Its existence in Pennsylvania is very apparent in the leading case of *Pollard* v. *Shafer* (1787).[2] The Chief Justice there says, 'A Court of Chancery judges of every case according to the peculiar circumstances attending it, and is bound not to suffer an act of injustice to prevail.' Equity, as a system in itself, with settled and unchanging rules, was apparently neither studied nor appreciated.[3]

The dangers of charging equity to the jury were often felt. 'Before the Revolution,' said Mr. William Rawle, 'when the bench was rarely graced by professional characters, juries were almost the same as Chancellors.'[4] Chief Justice Gibson said in *Lighty* v. *Short,*[5] 'The greatest practical evil of the doctrine is, that it subjects the contract to the control of a jury, prone to forget that to cut a man loose from his contract from motives of humanity is the rankest injustice.' In his eulogium on Chief Justice Tilghman, Binney calls it, 'a spurious equity compounded of the temper of the judge and of the feelings of the jury, with nothing but a strong infusion of integrity to prevent it becoming as much the bane of personal security as it was the bane of science.'[6] After the Revolution efforts were continually made—notably by Chief Justice Tilghman—to get rid of some of the evils of having the science of equity change with every new jury. The technical doctrines of the English Chancery were studied, and natural equity disappeared. In its reformed condition charging equity to the jury is still the law of Pennsylvania. The judge is the Chancellor, and the jury assist him by deciding on the weight of evidence and finding the facts. The judge may withdraw the case from the jury if satisfied that the testimony, even if believed, is not sufficient to establish the equity. If the jury disregard the equity laid down by the judge, the same remedy exists as when they disregard the law.[1]

The next characteristic to be observed in the Pennsylvania system, is the rule which allows the defendant, in an action-at-law, to plead an equitable defence. This he may do by offering it in evidence (with notice) under the pleas of payment, non-assumpsit, or performance, which have become equitable pleas in Pennsylvania. If his defence does not properly come under one of these pleas he can set it up specially.[2] This method of working equity through common law forms was probably adopted at a very early date. The case of *Swift* v. *Hawkins* cited above, and decided in 1768, is an instance of an equitable defence admitted under the plea of payment. The court speaks of the custom as one of long existence. It is probable that this method and that of charging the equity to the jury, were the first contrivances for obviating the lack of Chancery powers. Allowing the defendant to set up an equitable defence was soon extended by allowing the plaintiff to rebut it.[3] By such means many opportunities were given in actions-at-law for the consideration of the principles of equity.

The next advance was to allow the plaintiff to begin proceedings by setting out in his declaration a purely equitable right, making the declaration somewhat resemble a bill in equity.[1] This practice was apparently not introduced until a rather late period, when the advancing civilization of the State had made the position of plaintiffs unbearable; for they could make no use of an equity except to rebut one used by the defendant. The first case was in 1791.[2] The plaintiff sued in debt on a bond, but at the trial was unable to make *profert* because the bond had been lost. A juror was withdrawn by

consent and the case went over. The plaintiff then took a rule on the defendant to show cause why the declaration should not be amended by striking out the *profert* and averring the loss of the instrument. The rule was made absolute, and the plaintiff allowed to amend. The court gave the old reason, that there was no Chancery, and there would be a failure of justice unless some such arrangement were made. This decision was followed by similar ones, until it became a settled rule, that when the common law forms were inadequate, a declaration might be framed setting out the equity of the plaintiff and suited to the circumstances of the case.3 It is very curious that, in 1789, only two years before this Pennsylvania case, Lord Kenyon made the same decision in England. It was the case of *Read* v. *Brookman.*4 Austin cites it as a rare instance of liberal-mindedness in a common-law judge, and also as showing the absurdity of the distinction between law and equity.5 Unlike the Pennsylvania case it remained solitary and did not become one of the starting points of a new system in England; but was cited in *Commonwealth* v. *Coates* and helped to develop the Pennsylvania system.

The equitable rights of the plaintiff received a further extension by the turning of certain well-known common law actions into equitable ones. Thus ejectment became an equitable action, and the plaintiff without a special declaration could recover on a purely equitable title. The exact date of this innovation is unknown; but in the first reported case (1811) it is spoken of as an old custom.1 The action of replevin was changed in the same way, and made to apply to every case of disputed title to goods.2 The writ of *estrepment* with the aid of a little tinkering supplied the place of an injunction to restrain waste on land.3 The foreclosing of mortgages was provided for by statute.4 When a judgment-at-law was obtained unfairly, instead of resorting to a bill in equity, a rule was taken to show cause why the judgment should not be opened and the party complaining let into a defence on the merits.5 The assignee of a right of action was always treated as the real plaintiff.6 To complete the system, equitable rights in land were made subject to the lien of a judgment.7 And finally, the Orphans Court, which may be described in a general way as a court having control of everything relating to decedents' estates, has always been, so far as its jurisdiction extends, a court with full equity powers.8

Such were the methods by which the Courts of Pennsylvania tried to solve the problem that was forced upon them. They dug channels in the barriers of the common law, and through them they attempted to make the waters of equity flow. They succeeded to this extent, that in most law trials, equitable doctrines applicable to the case could be considered. But when it came to remedies, and the practical execution of the doctrines so considered, they signally failed. It is easy enough for a law court to say that it will hear equitable arguments and frame its judgments accordingly. But for carrying out those judgments, the common law method of execution offers no adequate substitute for the equitable proceedings of injunction, specific performance, *quia timet,* and discovery. It is in methods of administration that equity excels the common law, as much as, if not more than, in doctrine. The Pennsylvania law courts were daring enough to usurp the doctrine, but all their ingenuity could not obtain for them the practical remedies. Of course in many cases where equitable principles were applied, the common law method of damages and execution was enough; and if the defendant set up an equity which defeated the plaintiff, that ended the matter. But

whenever specific performance was necessary, the only way of enforcing the equity (except in the cases of ejectment and replevin already mentioned) was by conditional damages. Thus in *Clyde* v. *Clyde* (1791), the plaintiff's right to a watercourse was disturbed by the defendant. The judge charged the jury to award large damages, and the plaintiff's attorney agreed to release them when the defendant should give a secure grant of the watercourse.[1]

The sum of the whole matter is, that the courts contrived, by special declarations, pleas, &c., to bring up for consideration in law trials, the doctrines of equity; and they succeeded in partly administering those doctrines, in some cases by the ordinary common law methods, in others by conditional damages, and in others by such actions as ejectment, replevin, *estrepment,* rule to open judgment, &c., which they themselves invented or the Legislature invented for them. Here they stopped. They squeezed equity part way into the common law; but it would not go all the way. The whole subject of preventive justice was left outside. They never found a common law substitute for injunctions, bills *quia timet,* or discovery. Without these the administration of justice would in modern times be at a standstill.

Pennsylvania was not the first place where equity was administered through common law forms. The idea is said to be as old as the Year Books; and here and there in the common law isolated instances of it can be found. The law of bailments is in great part equitable; so is the action of *assumpsit* for money had and received; and the doctrines of relief from the penalty of a bond, of contribution among sureties, of discharge of the surety, by giving time to the principal, are all instances of equity administered at common law. There are also certain old and almost obsolete actions, which accomplish very much the same result as a bill in equity. The writ of *audita querela* prevents the improper enforcement of a judgment, the writ of *estrepment* prevents waste, *warrantia chartae* prevents a suit for land by any action in which the defendant cannot call on his warrantor, *curia claudenda* compels the owner of land to enclose it, *ne injusti vexes* prevents unfair distraint.[1]

These and many other examples were often cited by Pennsylvania lawyers to show that the good old common law was equal to every emergency and all the principles of equity could be administered in it.[2] Laussat in his famous essay developed this point ingeniously. He proposed to revive the ancient writs, and if the courts were not bold enough to strip them of their technical absurdities, to persuade the Legislature to do it. In all cases which could not be covered by these writs or by the methods already in vogue, he suggested that the writ of *scire facias* be used.[3] He argued, that as there was no act, from the performance of which a party could not be called upon to show cause why he should not be enjoined, and as the writ allowed of the joining of all parties interested, there was no reason why writs of *scire facias* should not become complete substitutes for bills in equity. As a substitute for bills of account he offered to reform the old common law action of account render.

But neither the Legislature nor the courts followed these suggestions. The Pennsylvania system remained as it was, partly successful, yet unable to supply the needs of an active commercial state. Still there were those who loved it, and, when it was called a 'bungling substitute' or an 'hybridous monster without the virtues of

either parent,' their wrath was kindled. Said Chief Justice Black in *Finley* v. *Aitken,*[4] 'I think it not an ignorant prejudice, but high political wisdom, which caused our ancestors to refuse a Court of Chancery any place among their judicial institutions. . . . The administration of law blended and mixed with equity principles was a happy conception. It was no "bungling substitute," but a most admirable improvement of both legal and Chancery practice. . . . It is to be fervently hoped that we will not now extinguish the light by which the world has been walking.'

To this day there are good lawyers in the State who maintain that the Act of 1836, giving equity power to the courts, was unnecessary. It could have been dispensed with, they say, if the judges had only been a little more pliant and ingenious. Certainly it must be admitted, that, if we could have done without it, our State would stand alone in the juridical honour of having demonstrated that the distinction between law and equity is an absurdity. But the fact is otherwise. The people tried to do without equity, and after many attempts and more than a hundred years of consideration found that they could not. There is of course always the chance that the majority may be wrong. But the majority in this case agreed with all the other majorities which have had to decide the same question.

Writers on jurisprudence tell us that our distinction between law and equity is illogical and unnecessary; judged by scientific principles it should not exist; that wherever equity appears, whether in Rome or in England, it is merely an historical accident; it is unknown in France, and would be unknown to us, if it were not for certain peculiar circumstances attending the infancy of our system. But on the other hand, it must be admitted that law, though in part composed of logical reasoning, is also a thing of growth, influenced by custom and individual opinions. If it has taken for itself a certain method of formation, it is in vain that you ignore or try to eradicate that method. The experience of Pennsylvania is a proof that equity, though unscientific, is in our law necessary and vital. It may make an unreasonable distinction; but still it is a form which the law has assumed, and to try to cut it out or join it to something else, is very much like attempting similar improvements on the human body. The modern codes, which turn all forms of action into one, have not been able to abolish the distinction. No code has ever enacted an abridgment of equity's principles; but, on the contrary, they are always adopted entire. It baffled the astuteness of the Pennsylvania judges to find a substitute for the preventive remedies of equity. The codes have met with no better success, and have taken injunctions, *quia timet* and the rest, with changed names perhaps, but without diminishing or adding aught in substance.[1] The great Mansfield thought he could amalgamate law and equity; and men not so great as he have had the same dream. But they are all alike in failure. Pennsylvania's attempt shows how far the distinction is meaningless and how far it is to be respected. The doctrines can be combined with legal forms, but not the remedies.

In 1830 the Legislature appointed a commission of three to revise the whole civil law of the State. These three men deserved well of the Commonwealth, and the eight reports they submitted to the Legislature remain as an everlasting monument to their skill. In no respect did they show themselves to better advantage than when they came to the vexed question of courts of equity. They were able lawyers and knew exactly what the Pennsylvania system was worth; and they had made up their minds that it

was not equal to supplying the wants of the people. But being wise in their generation, they were careful to heap on it lavish praises, to call it a combination of all that was good; at the same time they thoroughly analyzed it, and quietly suggested that full Chancery powers be given the law courts in the following cases:—

(1) trustees, (2) trusts, (3) control of private corporations, unincorporated societies and partnerships, (4) discovery of facts material to any case, (5) interpleader, (6) injunction, (7) specific performance.

This included nearly the whole jurisdiction of Chancery, and was a severe commentary on the Pennsylvania system. The Legislature could swallow only part of it. In 1836 they gave to the Courts of Philadelphia alone all the equity jurisdiction suggested by the commissioners. To the rest of the State they gave jurisdiction only in the first three cases above mentioned.

But the ice was broken. In 1840 Philadelphia got Chancery power in cases of fraud, accident, mistake and account; and the rest of the State in cases of account. In 1844 Allegheny county got the same jurisdiction as Philadelphia. In 1845 Philadelphia was given equity power in dower and partition. And so it went on from one point to another until in 1857 the equity jurisdiction was made the same throughout the State. Since then and up to the present time there have been other, but less important, grants. In one or two of them Philadelphia has shown that she still possesses her ancient and superior influence with the Legislature.1

This legislative grant does not interfere with the administration of equity through common law forms.2 That system continues to exist, and is used whenever the occasion requires it. It has served and still serves a useful purpose. It was the result of hard necessity, and under the circumstances that attended the early days of the State no better arrangement could have been made. If it has failed of complete success it is a failure in attempting great things.

[1]This essay appeared under the title “Ueberblick über die Geschichte der franzosischen, normannischen, und englischen Rechtsquellen,” in Prof. Dr. Franz von Holtzendorff’s “Encyclopadie der Rechtswissenschaft,” 3d ed., 1877, pp. 229-267, Part II., § 4 (Leipzig: Duncker & Humblot); in the 4th edition (1882, pp. 277-317) and the 5th edition (1890, pp. 303-347) the article was reprinted, but in the 6th edition (1904), it was omitted. The author has revised, enlarged, and recast it for the present volume of Essays, omitting the portions dealing with French and Norman sources.

The translation is by Professor Ernst Freund, of the Editorial Committee for these Essays.

An English translation by W. Hastie was published at Edinburgh in 1888, under the title “The Sources of the Law of England,” without indication of the precise edition on which it was founded.

[2]Professor of Legal History in the University of Berlin, since 1873. Privatdozent in the University of Lemberg (Lvov), 1865; assistant professor in the same, 1866;

professor in the same, 1868; professor in the University of Prague, 1870; in the University of Strassburg, 1872; member of the Prussian Royal Academy of Sciences; one of the Editorial Commission for the Monumenta Germaniae Historica.

Other Publications: Zeugen und Inquisitionsbeweis der Karolingischen Zeit, 1866; Das Anglo-normannische Erbfolgesystem, 1869; Die Entstehung der Schwurgerichte, 1872; Zur Rechtsgeschichte der Römischen und Germanischen Urkunde, 1880; Deutsche Rechtsgeschichte, 1887-92, 2d ed. of Vol. I., 1906; Grundzüge der Deutschen Rechtsgeschichte, 1901, 3d ed. 1908; and many separate articles, most of which are collected in Forschungen zur Geschichte des Deutschen und Französischen Rechts, 1894.

[1]Linguistic and legal history distinguish East and West Teutons. The former include the Gothic-Vandal nations and the Scandinavian (North Teutonic) peoples. West Teutons are the Germans including the Frisians and the emigrated tribes out of which the Anglo-Saxon people arose (Ingvaeonian Saxons, Angles, and the West Teutonic Jutes who are regarded as the ancestors of the Kentians).

[2]In legal historical writings the word witenagemot (concilium sapientum) has become the technical term for these assemblies. It is found in the Saxon chronicle, but nowhere in the Anglo-Saxon laws.

[1]Wergild is a sum of money payable as penalty for homicide.

[2]The Textus Roffensis, written about 1120, and going back for Kentish sources to an edition originating about 1020. See Liebermann, Notes on the Textus Roffensis, 1898 (reprinted from “Archaeologia Cantiana”).

[1]Leges Henrici, c. 70, 1.

[2]It is unfortunately impossible to extricate them as such from Alfred’s laws.

[1]As to the date see Liebermann, Wulfstan und Cnut, in the Archiv für das Studium der neueren Sprachen und Literaturen, 103, p. 53.

[1]Liebermann, Die angelsächsische Verordnung über die Dunsaete, in the Archiv für das Studium der neueren Sprachen und Literaturen, 102, p. 267 sqq.

[1]Liebermann, Zum angelsächsischen Krönungseid, in the Archiv für das Studium der neueren Sprachen und Literaturen, 109, p. 375.

[2]Liebermann, Die Abfassungszeit von “Rectitudines singularum personarum,” in the Archiv für das Studium der neueren Sprachen und Literaturen, 109, p. 73 sqq.

[3]Liebermann in the Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, germanistische Abteilung, V., 207.

[1]Vinogradoff, Folkland, in the English Historical Review, 1893, viii. 1.

[2]Liebermann, Quadripartitus, ein englisches Rechtsbuch von 1114, 1892.

[1]In a manuscript of Holkham Ulpianus de edendo is appended. It does not belong to the Quadripartitus.

[2]Liebermann, Ueber das englische Rechtsbuch Leges Henrici, 1901, p. 57 sq.

[1]Liebermann, Instituta Cnuti, Transactions of the R. Histor. Soc. N. S. vii. (1893), p. 77-107.

[2]Liebermann, Consiliatio Cnuti, eine Uebertragung angelsächsischen Gesetze aus dem zwölften Jahrhundert, 1893.

[3]Liebermann, Ueber die Leges Eduardi Confessoris, 1896.

[1]Liebermann designates the longer text in his edition as Edw. Conf. retractatus. The retractator is not the author of the older text.

[2]Liebermann, Ueber Pseudo-Cnut's Constitutiones de foresta, 1894. Also Konrad Maurer in Kölbing's Englische Studien, xvii. 57 sq.

[1]John E. Matzke, Lois de Guillaume (Collection de textes pour servir à l'histoire), Paris, 1899; Liebermann, Ueber die Leis Willelme, Archiv für das Studium der neueren Sprachen, etc., 106, p. 113 sqq.

[1]So designated by Liebermann, Eine anglo-normannische Uebersetzung des 12. Jahrhunderts von Articuli Willelmi, Leges Edwardi und Genealogia Normannorum, in Gröber's Zeitschrift fur romanische Philologie, 1895, p. 77 sqq.

[2]Liebermann proposes to call this compilation "Leges Anglorum Londiniis saeculo XIII ineunte collectae. Liebermann, Ueber die Leges Anglorum, 1894.

[1]The jury of inquest originated in the Frankish mode of proofs per inquisitionem as we find it in the Karolingian Empire.

[1]An exhaustive commentary on this document, the constitutional significance of which is often overrated, is given by William Sharp MacKechnie, Magna Charta, Commentary on the Great Charter of King John, 1905.

[1]Maitland, Select Pleas of the Crown, i, Introduction, p. 10.

[1]Coroners were county officers (custodes placitorum coronae) placed beside the sheriff and charged to look after the administration of criminal justice and the perquisites and revenues resulting therefrom to the king. See Gross, Early History of the Office of the Coroner, New York, 1892.

[2]1. La Court Baron, a treatise in Anglo-French language of the thirteenth century; 2. De placitis et curiis tenendis, by John of Oxford; 3. Modus tenendi curias, collected

and edited about 1307, by Sir John de Longueville; 4. Curia de visu franciplegii of 1342.

[1]See Pollock, The First Book of Jurisprudence, 1896, p. 274, sqq., Pike, An Action at Law in the Reign of Edward III, the Report and Record (in Harvard Law Review, viii. 266), and the Introductions by Maitland in the Year Books edited by him.

[1]Gundermann, Englisches Privatrecht, 1864, p. 61.

[2]The author of the title would surely not have said tempore regis Henrici secundi, if Henry II had then been living. Perhaps the oldest designation of the treatise contained the words "leges Anglicanae." This supposition seems to be supported by the words of the prologue (leges namque Anglicanae), and by Roger of Hoveden ii. 215, who is speaking of "leges quas Anglicanas vocamus," and probably refers to Glanvill's treatise. It is to be hoped that Leadam's edition will set this matter clear.

[3]Glanvill's authorship is doubted, so by Pollock & Maitland, History of English Law, i. 142, who surmise that Hubert Walter, Glanvill's relative and secretary, wrote the book.

[4]Maitland, Glanvill revised, Harvard Law Review, vi. 1.

[1]The passages borrowed from Azo are given synoptically by Maitland: Select Passages from Bracton and Azo, 1894 (Selden Society, vol. viii).

[1]In Liber 1, c. 4, at the end of the last but one line after the word "femmes" a line has been omitted, which the most recent editor fails to notice.

[1]Edgar III. 2, 1: If the law of the land be too strict, let him seek relief of the king.

[1]Maitland, English Law and the Renaissance, 1901.

[2]H. Brunner, The Share of the German Law in the Development of the Universities, 1896, p. 15.

[1]Translator's note: See Bulletin of American Library Association, 1907, p. 94, where the total is placed at about 14,500.

[1]A list of the various editions, prepared by Charles C. Soule, has been printed in the publisher's circular entitled "Legal Bibliography" (Boston).

[1]This essay was first published in the Political Science Quarterly, vol. iv, pp. 496-518, 628-647 (1889).

[2]A biographical notice of this author is prefixed to Essay No. 1, in volume i of this Collection.

[3]Charles Elton, *English Historical Review,* 1889, p. 155.

[1]*Contemporary Review,* vol. xxxi (1877-78), p. 824, Mr. Freeman on Mr. Froude.

[1]The History of the Common Law of England, written by a learned hand (1713). There are many later editions.

[2]History of the English Law (4 vols., 1783-87). Originally the work was brought down to the end of Mary's reign; in 1814 a fifth volume dealing with Elizabeth's reign was added. An edition published in 1869 cannot be recommended.

[1]George Crabb, A History of English Law (1829). George Spence, in the first volume of his Equitable Jurisdiction of the Court of Chancery (2 vols., 1846), has given a learned and valuable account of the development of the common law, perhaps the best yet given. In 1882-83, Ernest Glasson published his Histoire du Droit et des Institutions de l'Angleterre; but this does not go very far below the surface. Heinrich Brunner in Holtzendorff's Encyklopädie has published a most useful sketch of the French, Norman and English materials for legal history; the part relating to England has been translated into English by W. Hastie (Edinburgh, 1888); this translation I have not seen.

[1]James Fitzjames Stephen, History of the Criminal Law (3 vols., 1883); Luke Owen Pike, History of Crime (2 vols., 1873).

[2]Kenelm Edward Digby, Introduction to the History of the Law of Real Property (1875).

[3]Melville Madison Bigelow, History of Procedure in England (1880).

[4]O. W. Holmes, Jr., The Common Law (1882). The History of Assumpsit, by J. B. Ames (*Harvard Law Review,* April, May, 1888), is a masterly dissertation on some of the central ideas. In many articles in magazines, American and English, one may see a freer and therefore truer handling of particular themes of legal history than would have been possible twenty years ago; and the best text writers, though their purpose is primarily dogmatical, have felt the necessity of testing such history as they have to introduce instead of simply copying what Coke or Blackstone said.

[1]Yes, but by no means all of it is in print. The nation was attacked with one of its periodical fits of parsimony, and the consequence is that there exist volumes upon volumes of transcripts made by Palgrave or under his eye. Very possibly the commissioners were for a while extravagant, still it was hardly wise to stop a great work when the cost of transcription was already incurred. However, these transcripts will become useful some day.

[2]Some of the coincidences are very striking: thus "fines" were abolished in 1834; in 1835 the earliest fines were printed.

[1]To any one who proposes to investigate the English public records the following books will be of use: C. P. Cooper, An Account of the Public Records (2 vols., 1832); F. S. Thomas, Handbook to the Public Records (1853); Richard Sims, A Manual for

the Genealogist (1856); Walter Rye, Records and Record Searching (1888). The Annual Reports of the Deputy Keeper of the Public Records are also very useful.

[1]Some of the dooms, forgotten for many centuries, were printed by William Lambard in his Archaionomia (1568). An improved and enlarged edition of this book was published by Abraham Whelock (Cambridge, 1644). A yet ampler collection was issued in 1721 by David Wilkins, Leges Anglo-Saxonicae Ecclesiasticae et Civiles. In 1840 these works were superseded by that of Richard Price and Benjamin Thorpe, Ancient Laws and Institutes of England, published for the Record commissioners both in folio and in octavo; the second volume contains ecclesiastical documents; a translation of the Anglo-Saxon text is given. Meanwhile Reinhold Schmid, then of Jena and afterwards of Bern, had published the first part of a new edition. Die Gesetze der Angelsachsen, Erster Theil. In 1858, having the commissioners' work before him, instead of finishing his original book he published what is now the standing edition of all the dooms, Die Gesetze der Angelsachsen (Leipzig, 1858), an excellent edition equipped with a German translation of the Anglo-Saxon text and a glossary which amounts to a digest. Yet another edition has for some time been promised by F. Liebermann. The manuscripts are so numerous and in some cases so modern and corrupt, and the study of the Anglo-Saxon tongue and of the foreign documents parallel to our dooms is making such rapid progress, that in all probability no edition published for some time to come will be final.

[1]The standing collection is (or until lately was) the great work of John Mitchell Kemble, Codex Diplomaticus Aevi Saxonici (6 vols., 1839-48), published for the English Historical society, with excellent introductions, a work not now easily to be bought. Kemble marks with an asterisk the documents that he does not accept as genuine. Benjamin Thorpe's Diplomatarium Aevi Saxonici (1865), is a small collection of much less importance. Walter de Gray Birch, under the title Cartularium Saxonicum, is publishing a collection which will contain all Kemble's documents and more also and which will be based on a new examination of the MSS.; two volumes of this work are already completed John Earle's Handbook to the Land Charters and other Saxonic documents (1888), is a most useful work, containing many typical charters which are critically discussed chiefly from the standpoints of philology and the diplomatic art. For close study the following are invaluable: Bond's Facsimiles of Ancient Charters in the British Museum (4 vols., 1873-78; photographs of about 120 documents), and the photozincographed Facsimiles of Anglo-Saxon Manuscripts, edited by W. Basevi Sanders, 3 vols.

[1]Some of the legal points in these documents are discussed by Brunner, Zur Rechtsgeschichte der romischen und germanischen Urkunde (1880). Kemble's introductions are still of the highest value.

[2]The classical collection of the Councils has been David Wilkins, Concilia (1737, 4 vols.). The first volume goes far beyond the end of this period, goes as far as 1265. For the time before 870 this is superseded by vol. iii of Councils and Ecclesiastical Documents relating to Great Britain and Ireland, by Arthur West Haddan and William Stubbs (Oxford, 1869-73); a yet unfinished work, the first volume of which refers to the British, Cornish, Welsh, Irish and Scottish churches. This collection contains,

besides the Councils, many other ecclesiastical documents and what seems to be the best part of the penitential literature. Canons and penitentials are also to be found in vol. ii of the Ancient Laws and Institutes, but it is said that they were not very discriminately edited. The history of penitentials seems to be an intricately tangled skein.

[1]In the following remarks I rely partly upon Brunner, partly upon Ernest Joseph Tardif, who is engaged upon editing the Norman Coutumiers.

[2]Thomas Stapleton, Magni Rotuli Scaccarii Normanniae (2 vols., 1840-44). A fragment of the roll of 1184 was published by Leopold Delisle, Magni Rotuli Scaccarii Normanniae Fragmentum (Caen, 1851).

[3]These are most accessible in Leopold Victor Delisle's Recueil de Jugements de l'Exchiquier de Normandie au XIIIe siècle (Paris, 1864). A collection of judgments delivered in the "Assises" between 1234 and 1237 (Assisiae Normanniae will be found in Warnkönig's Französische Staats- und Rechtsgeschichte, vol. ii, pp. 48-64).

[4]The former has lately been edited by Tardif under the title, Le très ancien Coutumier de Normandie (Rouen, 1881); the latter may be found in A. J. Marnier's Établissements et Coutumes, Assises et Arrêts de l'Exchiquier de Normandie (Paris, 1839).

[1]This was first printed in 1483; there have been many subsequent editions. The Latin text can be found in Johann Peter Ludewig, Reliquiae Manuscriptorum (Frankfort and Leipzig), vol. vii; the French in Bourdot de Richebourg, Coutumier Général, vol. iv. For some time past a new edition of the Latin Summa by Tardif has been advertised as in the press. The authorship of the work has been discussed by Tardif in a pamphlet entitled Les Auteurs presumés du Grand Coutumier de Normandie (Paris, 1885).

[2]From this and other sources, some very important documents are printed by way of appendix to M. M. Bigelow's History of Procedure (London, 1880); as to their date, see Brunner, *Zeitschrift der Saviany Stiftung,* ii, 202. Tardif, in his edition of the Très ancien Coutumier, p. 95, has given a list of unprinted cartularies.

[1]The "Leges" will be found in the Record Commissioners' Ancient Laws, and in Schmid's Gesetze. The best version of the Conqueror's ordinances, together with the charters of Henry I and Stephen and the various assizes of Henry II, is in Stubbs's Select Charters, which book now becomes indispensable. An earlier collection of the laws of this age, which is still useful, is Henry Spelman's Codex Legum Veterum, published from Spelman's posthumous papers by David Wilkins in his Leges Anglo-Saxonicae. Some points about the "Leges" are discussed by Stubbs in the Introduction to vol ii of his edition of Roger Hoveden (Rolls series) and by Freeman in his Norman Conquest, vol. v, app. note kk.

[1]Liebermann's article on the date of the Leges Henrici is in *Forschungen zur deutschen Geschichte,* Bd. xvi; his book on the Dialogus de Scaccario, mentioned

below, has some critical remarks on the Leges Edwardi. The lost legislation of Henry II may be partially reconstructed by means of Glanvill and Bracton. There is yet room for a great deal of work on the assizes and "leges." We have reason to believe that there once existed an important law book of Henry I's day, but it is not now forthcoming; what is known about it will be found in Cooper's Account of the Public Records (1832), ii, 412. For the strange history of "the bilingual code" reference should be made to the famous article in the *Quarterly Review,* No. 67 (June, 1826), p. 248, in which Palgrave exposed the Ingulfine forgery, and two articles by Riley in the *Archæological Journal* (1862), vol. xix.

[2]The treatise was printed by Tottel without date about 1554; later editions were published in 1604, 1673, 1780; an English translation by Beames in 1812. It will be found also in the official edition of Acts of Parliament of Scotland, vol. i, where it is collated with the Scottish law book Regiam Majestatem. It will also be found in David Houard's Traités sur les Coutumes Anglo-Normandes (1776), and in Georg Phillips' Englische Reichs- und Rechtsgeschichte (1827-28). An ancient French translation of it, not yet printed, exists in Mus. Brit. MS. Lands, 467. A new edition in the Rolls series by Travers Twiss is advertised. The evidence as to Glanvill's authorship will be briefly canvassed in the Dictionary of National Biography, *s. v.* Glanvill.

[1]The Dialogue, which was at one time cited as the work of "Gervasius Tilburiensis," was appended by Thomas Madox to his beautiful History of the Exchequer (1st ed. in one vol., 1711; 2d ed. in two vols., 1769), one of the greatest historical works of the last century. It will also be found in the Select Charters. It is the subject of an essay by Felix Liebermann, Einleitung in den Dialogus de Scaccario (Göttingen, 1875).

[1]Lanfranc's juristic exploits are chronicled in the Liber Papiensis, Monumenta Germaniae, Leges, iv, pp. xcvi, 402, 404, 566. It is not absolutely certain that this Lanfranc is our Lanfranc. The Pavian law school, which was engaged in reducing the ancient Leges Longobardorum, a body of law very similar to our Anglo-Saxon dooms, into rational order, would have afforded an excellent training for the future minister of the Norman Conqueror; and the close resemblance of some of our writs and pleadings to the Lombard formulas has before now been remarked.

[2]Carl Friedrich Christian Wenck, Magister Vacarius (Leipzig, 1820), gives an elaborate account of Vacarius's work (the title of which was Liber ex universo enucleato jure exceptus et pauperibus praesertim destinatus), together with many passages from it. One of the few MSS. is in the library of Worcester Cathedral.

[3]Stubbs, Lectures on Mediæval and Modern History, p. 303.

[1]As a starting-point the investigator might take Savigny, Geschichte des romischen Rechts im Mittelalter, Kap. 36, and E. Caillemer, Le Droit Civil dans les Provinces Anglo-Normandes, Mémoires de l'Académie Nationale de Caen (1883), p. 157. Caillemer gives what remains of the treatise of William Longchamp, and will put a student on the track of what is known about "Pseudo-Ulpianus," Ricardus Anglicus,

who is identified with Richard le Poor, bishop of Salisbury and Durham, and William of Drogheda. The lectures of Stubbs on the history of Canon law in England, Lectures on Mediæval and Modern History (1886), Lects. 13, 14, are of great interest. The old learning as to the history of Roman law in England is found in Selden's Dissertation suffixed to Fleta (more of this below); see also Thomas Edward Scrutton, The Influence of Roman Law on the Law of England (Cambridge, 1885).

[2]Few aids would be more grateful to the historian of law or even to the historian of England than a "Codex Diplomaticus Normannici Aevi." As it is, the documents must be sought for in the Monasticon and the cartularies and annals of various religious houses. Some of these have been published in the Rolls series; those of Abingdon. Malmesbury, Gloucester, Ramsey and St. Albans (Mat. Par. Chron. Maj. vol. vi) may be mentioned. A useful selection for this and later times is given by Thomas Madox, Formulare Anglicanum (1702), with good remarks on matters diplomatic; another small selection of early charters has just been edited by J. Horace Round for the Pipe Roll society. Stubbs, Select Charters, gives the municipal charters of this time.

[3]Domesday, or the Exchequer Domesday, as it is sometimes called, was published by royal command in 1783 in two volumes; in 1811 a volume of indexes appeared; in 1816 the work was completed by a supplementary volume containing (*a*) the Exon Domesday, a survey of the south-western counties, the exact relation of which to the Exchequer Domesday is disputed, (*b*) the Inquisitio Eliensis, containing the returns relating to the possessions of the church of Ely, and two later documents, *viz.* (*c*) the Winton Domesday, a survey of Winchester in the time of Henry I, and (*d*) the Boldon Book, a survey of the Palatinate of Durham in 1183. Since then (1861-63) the Exchequer Domesday has been "facsimiled" by photozincography; the part relating to each county can be bought separately. The Inquisitio Comitatus Cantabrigiensis, published by N. E. S. A. Hamilton in 1876, contains the returns made by the jurors of Cambridgeshire to the Domesday inquest.

[1]Among the works relating to Domesday may be mentioned the following: Henry Ellis, A General Introduction to Domesday Book (Rec. Com., 2 vols., 1833); Samuel Heywood, A Dissertation upon the Distinctions in Society and Ranks of the People under the Anglo-Saxon Governments (1818); James F. Morgan, England under the Norman Occupation (1858); several works of Robert William Eyton, A Key to Domesday [Dorset], Domesday Studies [Somerset] (2 vols., 1880), Domesday Studies [Stafford] (1881); appendixes to vol. v. of Freeman's Norman's Conquest; Domesday Studies (1888), a volume of essays by various writers edited by P. Edward Dove (a second volume of this work is promised).

[2]The Pipe Rolls of 31 Henry I, 2, 3, 4 Henry II, 1 Richard I and 3 John (this last from the Chancellor's antigraph) were edited for the Record commissioners by Joseph Hunter. The Pipe Roll society has now taken these documents in hand and published the rolls for 5-12 Henry II.

[1]The Liber Niger Scaccarii was edited by Thomas Hearne (2 vols., 1728).

[2]Melville Madison Bigelow, in his Placita Anglo-Normannica (London, 1879), has collected most of what has been discovered touching litigation between 1066 and 1189. For a newly found case, see F. Liebermann, Ungedruckte anglo-normannische Geschichtsquellen (Strassburg, 1879), pp. 251-256; for Norman cases of great value and their connection with English law, Brunner's Entstehung der Schwurgerichte (Berlin, 1871). As to early plea rolls and early fines, reference may be made to the Selden society's Select Pleas of the Crown, vol. 1 (1887), Introduction; since that introduction was written five more copies of fines of Henry II's day have been found in Camb. Univ. Libr. MS. Ee. iii, 60.

[1]The laws must be sought primarily in editions of the Statute Book, in particular in the Statutes of the Realm, published for the Record commissioners, the first volume of which work (1810) contains the Charters of Liberties besides the earliest statutes. Stubbs' Select Charters is invaluable for this period, especially as giving the documents relating to the revolutionary time which preceded the Barons' War. Blackstone, The Great Charter (1759), is a learned and useful work. It should be remembered that the text of the earliest statutes is not in all respects very well fixed, *e. g.* it is possible to raise doubts as to the contents of the statute of Merton. There is yet room for work in this quarter. Also it should be noticed that editions of the statutes, including the commissioners' edition, contain Statuta Incerti Temporis. In lawyers' manuscripts these were found interpolated between the Statuta Vetera, which end with Edward II, and the Statuta Nova, which begin with Edward III, like the Apocrypha between the two Testaments; hence they came to be regarded as statutes of the last year of Edward II. Some of them are certainly older, and some of them were certainly never issued by any legislator, but are merely lawyer's notes; in the Year Books their statutory character is disputed; "apocryphal statutes" seems the best name for them. To make a critical edition of them would be a good deed. Perhaps the most interesting is the Prerogativa Regis, apparently some lawyer's notes about the king's prerogatives. Coke's Second Institute is the classical commentary on the early statutes.

[1]We are still behindhand in the work of exploiting the Plea Rolls. In 1811 the Record commissioners published the Placitorum Abbreviatio, a collection of extracts and abstracts extending from Richard I to the death of Edward II, made by Arthur Agard and others in the reign of Elizabeth. Valuable as this book is, it can only be regarded as a stopgap; our wants are not those of Elizabeth's day. In 1835 Palgrave edited for the commissioners a few of the rolls of Richard I and John under the title Rotuli Curiae Regis; the residue of Richard's rolls are to be published by the Pipe Roll society; the earliest rolls are not the most interesting. The present writer has edited Pleas of the Crown for the County of Gloucester (1884), the criminal part of an Eyre Roll of 1221; Bracton's Note Book (3 vols., 1887), near two thousand cases of Henry III's reign; and, for the Selden society, Select Pleas of the Crown (vol. i, 1887), a selection of criminal cases from the period 1200-1225. In 1818 the Record commissioners published a large volume of Placita de Quo Warranto, mostly from Edward I's reign, which is full of precious information about feudal justice. But only a beginning has been made; in particular the very valuable Rolls of Exchequer Memoranda must be brought to light; their general character may be gathered from

the few extracts printed at the beginning of Maynard's Year Book of Edward II (1678).

[2]Some of the fines of Richard's and John's reigns were edited for the commissioners by Joseph Hunter (2 vols., 1835-44); the residue are to be published by the Pipe Roll society. The fines of a little later date are far more valuable and show elaborate family settlements; but they are unprinted.

[1]Published for the Record commissioners are the Close Rolls, 1204-1224, edited by T. D. Hardy (2 vols., 1833-44); the Patent Rolls, 1201-1216, by Hardy, with a learned Introduction (1 vol., 1835); the Oblate and Fine Rolls of John's reign, by Hardy (1 vol., 1835); Excerpts from the Fine Rolls, 1216-1272, by Charles Roberts (2 vols., 1835-36); the Charter Rolls, 1199-1216, by Hardy (1 vol., 1837). The Rolls of Parliament (6 vols. and Index) were officially published in the last century, but at least so far as the first period (Edward I, II, III) is concerned, this edition leaves much to be desired. Many materials for the illustration of parliamentary business have since come to light, and vast numbers of early Petitions to Parliament still remain unprinted. Of the Hundred Rolls hereafter.

[2]An edition of Bracton was published in 1569 and reprinted in 1640; a new edition has been given in the Rolls series by Travers Twiss (6 vols., 1878-83); the editor however was hardly alive to the difficulty of his task and failed to observe that the very numerous MSS. present the work in several different stages of composition. A more adequate edition is much wanted. It should show what Bracton borrowed from Azo, and also, when this is important, what he declined to borrow from Azo; it should give all the cases cited by Bracton which are not already printed in the Note Book, or such of them as can yet be found on the rolls; it should settle the pedigree of the MSS., distinguish the author's original work from his afterthoughts and from the glosses by later hands, some of which glosses (never yet printed) are of great interest. Five years of hard work might give us a really good edition. The Note Book alluded to above was brought to light by Paul Vinogradoff in 1884 and has since been published (1887).

Bracton's relation to Azo is the subject of an excellent tract by Karl Güterbock, Henricus de Bracton und sein Verhaltniss zum römischen Rechte (Berlin, 1862), translated by Brinton Coxe (Philadelphia, 1866).

[1]Fleta was printed in 1647 and again in 1685; these editions are faulty but are accompanied by a learned dissertation coming from Selden. Part of Fleta was edited anonymously by Sir Thomas Clark in 1735. An admirable edition of Britton has been published by Francis Morgan Nichols (2 vols., Oxford, 1865). Britton was first printed by Redman (without date) and was again printed in 1640; a translation of part of it was published in 1762 by Robert Kelham. Britton and Fleta are also to be found in Houard's Traités sur les Coutumes Anglo-Normandes.

[1]"Fet assavoir" appears at the end of the editions of Fleta. The two Henghams appear in Selden's edition of Fortescue's De Laudibus (1616). Some of the minor tracts seem never to have been printed.

[2]A poor version of the French text of the Mirror was issued in 1642, an English translation of it by William Hughes in 1642, 1768 and 1840. A critical edition of this curious book would be of great value.

[1]Thus a Cambridge MS. Kk, v, 33, gives a very early Registrum Brevium in which we may read how a number of writs were invented by William Raleigh. The earliest Register known to me is in Mus. Brit. MS. Cotton. Julius D. II.

[2]Happily the Year Books of Edward I remained unprinted until very lately; the consequence is that we have a good edition of them. Between 1863 and 1879 Alfred J. Horwood edited for the Rolls series five volumes containing cases from the years 20, 21, 22, 30, 31, 32, 33, 35 Edw. I. Before his death he had begun work on the Year Books of a later age, and the inference might be drawn that he was unable to find any more reports of Edward I's reign. But he seems to have nowhere stated that this was so, and a cursory inspection of the manuscripts induces the belief that they have not yet been exhausted.

[1]The Boldon Book was published as an appendix to the official edition of Domesday, vol. iv, and again by the Surtees society; the Glastonbury Inquisitions were printed for the Roxburghe club; an abstract of the Burton Cartulary for the Salt society; the Black Book of Peterborough for the Camden society at the end of the Chronicon Petroburgense; the Domesday of St. Paul's and the Worcester Register (both with valuable introductions by William Hale Hale) and the Battle Cartulary for the Camden society; the Gloucester and Ramsey Cartularies are in the Rolls series. The Hundred Rolls were published by the Record commissioners (2 vols., 1812-18). The publications of the Camden society are often in the market.

[2]The Selden society's volume for 1888, Select Pleas in Manorial and other Seignorial Courts, gives extracts from some typical rolls of the thirteenth century and may serve to stimulate a desire for further information.

[1]There are several little treatises on the practice of manorial courts. Some of these in their final shape belong to the next period and are represented by the Modus tenendi Curiam Baronis, two editions by R. Pynson (n.d.—1516-20?); Modus tenendi unum Hundredum, Redman (1539); Modus tenendi Curiam Baronis, Berthelet (1544); The Maner of kepynge a Courte Baron, Elisabeth Pykeringe (1542?); The Maner of kepynge a Court Baron, Robert Toye (1546). But beside these there is a quite early set of precedents which seems never to have been printed. It generally begins "Ici poet home trover suffysaument . . . tut le cours de court de baron." It is found in several MSS., *e. g.* Mus. Brit. Egerton, 656; Add. 5762; Lands, 467.

[2]One of these tracts (in an English version) got printed very early without date or printer's name. "Boke of husbandry. Here begy*n*neth a treatyse of husbandry whiche mayster Groshede so*m*tyme byssshop of Lyncoln made and translated it out of Frensshe into Englysshe. . . . The 1. chapitre. The fader in his olde age sayth to his sone lyve wysely. . . . Here endeth the boke of husbandry and of plantynge and graffynge of trees and vines." One of the tracts was published by Louis Lacour; Traité inédit d'économie rurale composé en Angleterre, Paris, 1856. These seem at present

the only printed representatives of this "Walter of Henley literature;" but it appears in many manuscripts. For information on this subject I am indebted to my friend Dr. William Cunningham, the author of The Growth of English Industry and Commerce, who proposes, I believe, to reprint in the second edition of his book the rare tract ascribed to Bishop Grostete of Lincoln. Some other of these tracts are, I hear, to be edited for the Royal Historical society.

[1]Thomas Madox's Firma Burgi (1726) is a vast mine of facts, and many will be found in The History of Boroughs, by Henry Alworth Mereweather and Archibald John Stephens (3 vols., 1835). For London, Henry Thomas Riley's Monumenta Gildhallae Londoniensis (Rolls series, 3 vols. in 4, 1859-62) is the great book. A custumal of Ipswich is printed by Travers Twiss in vol. ii of the Black Book of the Admiralty (Rolls series, 1873). A considerable number of other municipal custumals belonging to this and the next period are known to exist in manuscript. A little about the law merchant will be found in the Selden society's vol. ii, where some pleas in the court of the Fair of St. Ives are given. A great deal about the legal treatment of merchants and mercantile affairs is collected by Georg Schanz, Englische Handelspolitik (2 vols., Leipzig, 1881).

[1]It is said that the rolls of the Court of Common Pleas for Henry VIII's reign consist of 102,566 skins of parchment.

[1]The Proceedings and Ordinances of the Privy Council from 1386 to 1542 were edited for the Record commissioners by Nicholas Harris Nicolas (7 vols., 1834-37). There are two well-known monographs, Francis Palgrave, Essay upon The Original Authority of the King's Council (1834) and A. V. Dicey, Essay on the Privy Council (2d ed., 1887). The Calendars of the Proceedings in Chancery in the Reign of Elizabeth, as published by the commissioners (3 vols., 1827-32), contain some specimens of earlier proceedings beginning in the reign of Richard II. A calendar of proceedings in Chancery beginning with Richard's reign is in the press. Spence's Equitable Jurisdiction, mentioned above, affords much that is of historical value. But quite new ground was broken by L. O. Pike's essay on Common Law and Conscience in the Ancient Court of Chancery, *Law Quarterly Review.* I, 443, and by O. W. Holmes' daring paper on Early English Equity, *ibid.* 162. The suggestions thus made must be followed up; and it is believed that the materials for a history of the beginnings of equity are to be found at the Record office in great abundance. It is high time that they should be used. As to the Star Chamber, considering how important, how picturesque a part it played in English history, it is surprising that no very serious attempt should have been made to master the great mass of documents relating to it.

[1]Early editions of Littleton's Tenures are numerous and some of them are precious; an edition by T. E. Tomlins, 1841, is probably the best. Any one who has heard of Coke upon Littleton has probably also heard of the fine edition of that book made by Francis Hargrave and Charles Butler; their notes, especially Butler's, are of real value even for the mediæval period. The Novae Narrationes were printed by Pynson without date and were published again in 1561; both the Old Tenures and the Old Natura Brevium were printed by Pynson.

[2]Fortescue's most famous work De Laudibus Legum Angliae was edited with important notes by Selden in 1616, and has since been edited by A. Amos. His writings will be found in the first volume of a luxurious book printed for private circulation by Lord Clermont, Sir John Fortescue and his Descendants. His tract on The Governance of England has been beautifully edited with an elaborate apparatus by Charles Plummer (1885).

[1]As I have reason to believe that the difficulty of reading legal MSS. is greatly exaggerated by those who have made no experiment, I may be allowed to say that any one who knows some law and some Latin will find that the difficulty disappears in a few weeks. Of course I am not denying that from time to time problems may arise which only an experienced or perhaps a specially gifted eye can solve, but as a general rule our legal records from the beginning of the thirteenth century downwards are written with mechanical regularity; during the thirteenth century the writing is often beautiful; usually if one cannot read them this is because one does not know law enough, not because the characters are ill-formed or obscure.

[1]This essay was first published in the Law Quarterly Review, vol. xxii, pp. 266-284 (1906), and has been revised by the author for this Collection; it will form a chapter in vol. ii. of the author's History of English Law, to appear in 1908.

[2]Lecturer in St. John's College, Oxford. A biographical note of this author is prefixed to Essay 9, in volume I of this Collection.

[1]See Y. B. 1, 2 Ed. II (S. S.), xxx, and 3 Ed. II (S. S.), xvi-xxi for a MS., described by Selden in his Dissertatio ad Fletam which is now lost; and Y. B. 17, 18 Ed. III (R. S.), xix for a MS. used by Fitzherbert, which has also disappeared.

[1]Y. B. 20, 21 Ed. I (R. S.), xv.

[2]Y. B. 2, 3 Ed. II (S. S.), ix, x.

[3]Ibid. x.

[4]Ibid. xiv.

[5]Y. B. 2, 3 Ed. II (S. S.), xiv.

[6]Y. B. 1, 2 Ed. II (S. S.), xc; 3 Ed. II (S. S.), xii, xxxii-xli.

[7]Y. B. 3 Ed. II (S. S.), xli.

[1]Y. B. 12, 13 Ed. III, xix; cp. 11, 12 Ed. III, x-xviii, 13, 14 Ed. III, xvii-xxi, xxiv, 17 Ed. III, xxx, xxxi.

[2]20, 21 Ed. I (R. S.), xviii; 13, 14 Ed. III (R. S.), xxv; 16 Ed. III, (R. S.), i, xxi. "It is probable that in the multiplication of copies by hand, for the use of the profession, various remarks originally made in the margin became incorporated in the text. . . . It is difficult to account otherwise for the occasional interpolation of a query, with the

answer *Credo quod non,* and for various observations, complimentary or otherwise, or statements of law by particular persons."

[3]Hale, Hist. Comm. Law, 201, says that he saw the entire years and terms of Richard II's reign in MS.; there are a few cases in Fitzherbert, Jenkins, Keilway and Benloe; these have been collected by Bellewe, Reeves, H. E. L. ii. 487, Cooper, Public Records, ii. 392, 393.

[4]On this subject see Soule, Year-Book Bibliography, Harv. Law Rev. xiv. 557 seqq.

[1]Soule, 563, 564.

[2]Soule, 561.

[3]Ibid., 564, 565. At p. 562 Mr. Soule says, "It would seem that while the printers issued separate years and even supplied separate sheets to complete imperfect years, the booksellers and lawyers bound together after 1550, and probably even before that time, these separate pamphlets in chronological order, by reigns, with very much the same arrangement followed in the 1679 edition. But there was no uniformity of editions or imprints—every owner making his own combinations as he happened to get hold of different editions of the several years."

[1]Soule, 565.

[1]Pike, The Manuscripts of the Year Books, The Green Bag, xii. 534.

[2]See passages from Tottell's editions of Magna Carta, and the Quadragesms cited by Soule, 563, 564, 568.

[3]Soule, 568.

[4]Y. B. 1, 2 Ed. II (S. S.), xxi-xxviii.

[5]Ibid. xxi.

[6]Ibid. xxviii; to the same effect Mr. Pike, The Green Bag, xii. 535.

[7]Born 1602, died 1690.

[1]Cooper, Public Records, ii. 390, 391.

[2]Mr. Pike, Harv. Law Rev. vii. 266, says: "The report was intended for the use of the legal profession. . . . It was designed to show general principles of law, pleading or practice. . . . The record, on the other hand, was drawn up for the purpose of preserving an exact account of the proceedings in the particular case *in perpetuam rei memoriam,* but only in the form allowed by the court. The report contains not only the reasons eventually accepted, but often the reasons or arguments which preceded each, and the reasons or arguments for which other pleadings were disallowed."

[1]Y. B. 13, 14 Ed. III (R. S.), xvi, xvii; the idea seems to have been anticipated by Blackstone, see Comm. i. 71.

[2]Y. B. 1, 2 Ed. II (S. S.), xxxi.

[3]Ibid. xvii.

[4]Co. Rep. iii, Pref.

[5]Works, v. 86; in 1617 Bacon persuaded James I "to revive the ancient custom" by appointing two reporters, "to attende our Courts at Westminster," at a salary of £100 a year, Rymer, Foedera, xvii. 27, 28.

[6]Comm. i. 71, 72. Blackstone adds or invents the information that the reports were made by the prothonotaries.

[1]Y. B. 30, 31 Ed. I (R. S.), xxiii, xxiv.

[2]Y. B. 14, 15 Ed. III (R. S.), xv; 18 Ed. III, lxxx, lxxxi.

[3]Y. B. 1, 2 Ed. II (S. S.), xi-xiv.

[4]Ibid. xii. Mr. Pike, The Green Bag, xii, 535, says. "No Year Books or copies of them have been found among the records of any of the courts. Some of the manuscripts are still in private hands; and those which are in public libraries can usually be traced to a particular donor or vendor."

[5]22 L. Quart. Rev. 268.

[6]Y. B. 21 Ed. IV, Mich. pl. 4.

[7]Y. B. 2, 3 Ed. II (S. S.), xv, xvi.

[1]Y. B. 1, 2 Ed. II (S. S.), xiii.

[2]Y. B. 3 Ed. II (S. S.), lxxii-xciii for specimens of the reporter's work compared with the record. A good instance of divergent reports will be found in Y. B. 3 Ed. II (S. S.), cases 21 A & B, pp. 186-8. Perhaps a little polish was expected; R. Farewell and J. Dyer tell us, in their dedication of Dyer's reports to the students of the law, that the Chief Justice "wanted time and leisure to polish and beautifie the said cases with more large arguments which he had a full purpose to have done."

[3]Y. B. 3 Ed. II (S. S.), xii.

[4]Y. B. 2, 3 Ed. II (S. S.), xiv; 3 Ed. II (S. S.), xiv.

[1]Novae Narrationes, ff. 71-73 b; and see an extract from the Brevia Placitata cited Y. B. 2, 3 Ed. II (S. S.), xiv, n. 1.

[2]Y. B. 1, 2 Ed. II (S. S.), xiv.

[3]Bracton's Note Book, i. 25.

[4]Professor Maitland (Y. B. 3 Ed. II [S. S.], xxi) says that one of the MSS. of Edward II's Y. BB. contains many records with a precise reference to the roll; Mr. Pike says that one MS. of the Y. BB. (Add. MS., no. 16560, in the British Museum) for the first 120 folios contains copies of records; the rest of the 323 folios of which the MS. consists is taken up by reports, Y. B. 11, 12 Ed. III (R. S.), xv; sometimes what look like copies of records appear in the Y. BB., e. g. 11, 12 Ed. III (R. S.), 210, 13, 14 Ed. III, 306, 17 Ed. III, 324, Longo Quinto, pp. 20, 97, 98, 4 Ed. IV, Mich. pl. 25—a precedent of a recognizance; perhaps there was sometimes an attempt to combine the two sources of information. Cf. Y. B. 34 Hy. VI, Mich. pl. 42, where the reporter refers at the conclusion of the case to "Roll 28 of the Easter Term of 33 Henry VI."

[1]22 L. Quart. Rev. 272, n. 1; cp. Y. B. 3 Ed. II (S. S.), lxix, lxx.

[2]Y. B. 1, 2 Ed. II (S. S.), xv.

[3]22 L. Quart. Rev. 267.

[4]Y. B. 2, 3 Ed. II (S. S.), xi; and cp. Y. B. 30, 31 Ed. I (R. S.), 1.

[5]Y. B. 14, 15 Ed. III (R. S.), xv.

[1]Y. B. 20, 21 Ed. I (R. S.), xviii, it is said that the MS. was clearly written from dictation, and that the scribe did not understand what he was writing; see Y. B. 13, 14 Ed. III (R. S.), xxi for an account of a MS. in which Y. BB. of Ed. II have got in among Y. BB. of Ed. III; and cp. Plowden's Rep. Pref. for the manner in which his reports were borrowed, and so incorrectly copied that he resolved to publish them himself.

[1]Y. B. 32, 33 Ed. I (R. S.), 32.

[2]Y. B. 3 Ed. II (S. S.), x, "A little acquaintance with the manuscripts that we have been transcribing would be enough to show that the justices could not have treated them in the way which a modern judge can treat a modern law report. Those manuscripts differ in every conceivable way. Every citation would begin a new dispute."

[3]Y. B. 20, 21 Ed. I (R. S.), 358 (not followed), 438 (distinguished); 21, 22 Ed. I (R. S.), 280, 340 (authenticity questioned), 242, 406; 30, 31 Ed. I (R. S.), 178; 32, 33 Ed. I (R. S.), 28, 146, 300; 33-35 Ed. I (R. S.), 24; 3 Ed. II (S. S.), 34, 60, 199. Sometimes the citation of cases by the judges takes the form of reminiscences, cp. Y. B. 16 Ed. III (R. S.), ii. 6, "When you and I were apprentices," said Sharshulle, "and Sir W. de Herle and Sir J. Stonore were serjeants, you saw Sir J. come to the bar," etc.

[4]Y. B. 18, 19 Ed. III (R. S.), 378.

[1]Co. Rep. iii, Pref.

[2]There are a few cases in Dyer from the 4th, 6th, 19th, and 24th years of Henry VIII. His reports therefore just overlap the latest Year Books. The style of the later Y. BB. is very similar to the style in which these earlier cases in Dyer are reported.

[3]Y. B. 13, 14 Ed. III (R. S.).

[4]Dict. Nat. Biog.; Dugdale, Orig. Jurid. 58, 247, 257.

[1]Dict. Nat. Biog.; Foss, Judges, v. 167-169.

[2]Bracton's Note Book; i. 117-121.

[3]Dict. Nat. Biog.; Foss, Judges, v. 359-361.

[4]H. E. L., iii. 814.

[5]A selection of the more recent cases contained in Broke was published in 1578, under the title, "Ascuns novell cases de les Ans et Temps le Roy Henry VIII, Edward VI et la Roygne Mary escriti en la Graunde Abridgement;" this selection was republished in 1587, 1604, and 1605; it was translated in 1651 by J. March, and the French and English text was republished in 1873.

[1]22 L. Quart. Rev. 380.

[2]The Encyclopædia of English Law.

[1]Y. B. 3 Ed. II (S. S.), 196; something of the Countess of Albemarle will be found in Red Book of the Exchequer (R. S.), iii, cccxii-cccxv, 1014-1023.

[1]Y. B. 21, 22 Ed. I (R. S.), 272.

[2]Y. B. 12, 13 Ed. III (R. S.), 236. ["Parning" was really Parvyng; see Mr. Pike's introduction to Y. B. 18 Ed. III.]

[3]Y. B. 11, 12 Ed. III (R. S.), 370; cp. 3 Ed. II (S. S.), 112, 113.

[1]Y. B. 17, 18 Ed. III (R. S.), 618.

[2]Y. B. 35 Hy. VI, Mich. pl. 33, p. 29. Prisot C. J. says "Un carue de terre est grand en ascun pais que n'est en auter pais; et uncore, mesque un soit moins que un auter, chescun per luy est un carue, car un plough puit arrer plus terre en l'an en escun pais que en auter pais."

[3]Y. B. 33-35 Ed. I (R. S.), 120; 38 Hy. VI, Pasch. pl. 13.

[4]Longo Quinto, p. 54, "Car ne purromus arguer matters en ley per cause del fine del terme."

[5]Y. B. 43 Ed. III, Pasch. pl. 43, cited Y. B. 30, 31 Ed. I (R. S.), xxxi.

[1]Y. B. 20, 21 Ed. I (R. S.), 436; cp. 11, 12 Ed. III (R. S.), 312.

[2]Y. B. 32, 33 Ed. I (R. S.), 72.

[3]Ibid. 400.

[4]Y. B. 14, 15 Ed. III (R. S.), 114; cp. 11, 12 Ed. III (R. S.), 442.

[5]Y. B. 21 Ed. IV, Mich. pl. 6 (p. 47).

[1]Y. B. 2 Hy. VI, Mich. pl. 3. An apprentice had put a case to the court, and then, "Martin l'un des justices mettra le cas a les Serjeants a le barre et demanda que semble a eux seroit fait en ce cas."

[2]See e. g. Y. B. 34 Hy. VI, Mich. pl. 13, "Quod fuit concessum per omnes justitiarios et per plusors Sergeants al barre."

[3]21, 22 Ed. I (R. S.), 218.

[4]30, 31 Ed. I (R. S.), 106.

[5]Y. B. 3 Ed. II (S. S.), 160.

[6]14 Ed. III (R. S.), 214, 216 (22 L. Quart. Rev. 280, n. 3).

[7]Y. B. 21, 22 Ed. I (R. S.), 446.

[8]Y. B. 2, 3 Ed. II (S. S.), xv, xvi; 30, 31 Ed. I (R. S.), 234; 14 Hy. IV, Hil. pl. 37; 33 Hy. VI, Trin. pl. 26.

[9]Y. B. 32, 33 Ed. I (R. S.), 446; 33-35 Ed. I (R. S.), 6, 20.

[1]Y. B. 3 Ed. II (S. S.), 47, 169, 195.

[2]Y. B. 33-35 Ed. I (R. S.), 348.

[3]Y. B. 16 Ed. III (R. S.), ii, 446; cp. ibid. 480, 482.

[4]Y. B. 18, 19 Ed. III (R. S.), 446, 448, and cp. ibid. 436.

[5]Y. B. 17, 18 Ed. III (R. S.), 350.

[6]Y. B. 8 Ed. IV, Pasch. pl. 11, "Il avera [remedie] et issint poies dire s jeo enfeoffe un home en trust etc., s'il ne voit faire ma volunte jeo n'avera remedy per vous, car il est ma folie d'enfeoffer tiel person que ne voit faire ma volunté etc.; mez il avera remedie en cest courte car *Deus est procurator fatuorum:"* for other scenes between judge and counsel cp. Y. BB. 11 Hy. IV, Trin. pl. 49, and 5 Hy. V, Hil. pl. 11.

[7]Y. B. 1, 2 Ed. II (S. S.), 64.

[8]Y. B. 33-35 Ed. I (R. S.), 326.

[9]Y. B. 16 Ed. III (R. S.), i, 242.

[1]Y. B. 31, 32 Ed. I (R. S.), 192.

[2]Y. B. 2, 3 Ed. II (S. S.), 200.

[3]Y. B. 14 Hy. IV, Hil. pl. 37.

[4]Y. B. 2 Hy. IV, Mich. pl. 48.

[5]Y. B. 19 Hy. VI, Pasch. pl. 5, "Mettons que sl un home veut defouler votre femme, vous justifierez de luy battre en defence de votre tres cher compagnon, *et subridebat."*

[6]Y. B. 4 Ed. IV, Hil. pl. 3, "En l'Exchequer Chambre devant touts les Justices le matiere fuit reherce que fuit perentre le Roy et Sir John Paston, et la fuit le novel Tresorer que fuit fait meme cel terme id est Sir Walter Blount que fuit Tresorer de Calice ii ou iii ans ore passes."

[7]Y. B. 4 Ed. IV, Pasch. pl. 40.

[8]e. g. Y. B. 21 Ed. IV, Mich. pl. 6 (p. 47), "Ad alium diem plusiors des Serjeants argueront mes jeo ne fue a lour arguments."

[9]e. g. Y. BB. 12, 13 Ed. III (R. S.), 74; 17, 18 Ed. III (R. S.), 204; 38 Hy. VI, Pasch. pl. 9; Y. B. 18, 19 Ed. III (R. S.), 32.

[1]This essay was first printed in the Harvard Law Review, vol. XV, pp. 1-24, 109-117 (1901), and is reprinted in part.

[2]A biographical notice of this author is prefixed to Essay No. 20, in volume I of this Collection.

[3]The list includes Aleyn, J. Bridgman, Carter, Goldbolt, Gouldsborough, Hetley, Hutton, Keble, Lane, Latch, Ley, March, Noy, Owen, Popham, Saville, Siderfin, Tothill, Winch, in addition to Anderson, New Benloe, Brownlow, Bulstrode, Calthrop, Carey, Choyce Cases in Chancery, the twelfth and thirteenth parts of Coke, Clayton, Croke, Jenkins, W. Jones, Leonard, Littleton, Mavnard's Year Books of Edward I. and Edward II., the first Modern, Moore, Palmer, Rolle, Saunders, Style, Vaughan and Yelverton. The first group comprises many of the most worthless of all the reports, and few names in the list carry much weight.

[1]2 Ld. Raymond 1072.

[1]Cro. Eliz. 313.

[2]Page 148.

[3]Page 593.

[4]Fitzgibbon 24, 25; Fortescue 77.

[5]1 Siderfin 109; 1 Levinz 4.

[1]As in his note on equity in Eyston *v.* Studd, ii. 465.

[2]5 Mod. viii.

[1]Hob. 300; Bulst. preface; 10 B. & C. 275.

[1]8 Rep. 4 a.

[2]See Sugden on Powers 23, n.

[3]5 Rep. 45 b; see 1 Salk. 53, and Will. 569.

[4]See Jones on Bailments 41, as to Southcote's case, 4 Rep. 83 b, and 1 Inst. 89 a; Stephen's Hist. Crim. Law, ii. 205.

[1]5 Rep. 117 a; Co. Litt. 212 b; see Foakes *v.* Beer, 9 App. Cas. 605.

[2]19 Ch. Div. 399.

[3]See also 17 Pick. 9.

[1]For a detailed examination of Coke's reports see Wallace's scholarly work on The Reporters, 165 *et seq.*

[1]Coke's work affords abundant examples of the verbose and pedantic judicial utterances of early times. On the other hand, Chief Justice Crewe's remarks on the honors of De Vere (W. Jones, 101) is one of the rare specimens of stately eloquence: "I have labored to make a covenant with myself that affection may not press upon judgment; for I suppose that there is no man that hath any apprehension of gentry and nobleness but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or a twine thread to uphold it. And yet Time has his revolutions; there must be an end of all temporal things,—*finis rerum;* an end of names and dignities and whatsoever is terrene; and why not of De Vere? For where is Bohun? Where is Mowbray? Where is Mortimer? Nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of De Vere stand so long as it pleaseth God." The judges were particularly sententious in their use of analogy, as where Hobart contrasts the common and statute law by saying that "the statute is like a tyrant; where he comes he makes all things void; but the common law is like a nursing father, and makes void only that part where the fault is and leaves the rest." Biblical citations and analogies abound. One of the most curious instances of scriptural allusion is Lord Ellesmere's

reference to the dissenting opinion of his two dissenting brethren in the case of the Post-nati: “The apostle Thomas doubted of the resurrection of the Lord Jesus Christ when all the rest of the apostles did firmly believe it; but this his doubting confirmed in the whole church the faith of the resurrection. The two learned and worthy judges who have doubted in this case, as they bear his name, so I doubt not but their doubting hath given occasion to cleare the doubt in others, and so to confirme in both the kingdomes, both for the present and the future, the truth of the judgment in this case.” There is every evidence that these legal luminaries were devoid of a sense of humor. It has been suggested that Shakespeare derived part of the humorous colloquy between the grave-diggers in Hamlet from Chief Justice Dyer’s serious discourse in Hales *v.* Petit, Plowden 262. Sir Thomas Bromley’s diverting argument in Sharington *v.* Stratton, Plowden 303, upon the distinction between brotherly love and mere acquaintance as a sufficient consideration to raise a use in land, is a good specimen of the exhaustive ingenuity with which discussions were pursued at the bar. See, also, in the same volume, the report of the agreement between counsel, in the case of Clere *v.* Brook, 442, as to the basis of the preference of males to females in the law of descent. On rare occasions a reporter is moved to display his wit. “One Mr. Guye Faux, of the parish of Leathley, a cavalier, had a cause heard about a plunder upon Monday this week after dinner, and was well in court, and damages a hundred pounds awarded, and he was found dead next morning, upon the conceit of it, as was supposed.” (Clayton’s Assize Cases 116.)

[1]One is struck by the interminable arguments. Plowden speaks of cases having “hung in argument eight, ten, and twelve terms.” Considering the wide range of the arguments, the consumption of time must have been enormous. For instance, the case of Stowell *v.* Zouche, in Plowden, was argued twice in the Common Bench and then twice in the Exchequer Chamber before all the judges. Calvin’s case, in Coke, was argued first at the King’s Bench bar by counsel and then in the Exchequer Chamber, first by counsel and then by all the judges; it was afterward twice argued by counsel and then upon four successive days at the next term by all the judges, and thereafter, at another term, by all the judges on four successive days. It was not until Mansfield’s time that this habit of reargument was suppressed.

Jury service in early times was plainly no sinecure. “And for that a certain box of preserved barbaries, and sugar called sugar candy, and sweet roots called liquorish” was found on one of the jurors in the consultation room he was fined twenty shillings (Plowden 518). “The judge did put back the jury twice because they offered their verdict contrary to their evidence, as he held, and set a hundred pounds fine upon one of the jury who had departed from his companions; but after, upon examination, it was taken off again, for that it did appear it was only by reason of the crowd and some of his fellows were always with him.” (Clayton’s Assize Cases 31.) The case of King *v.* Buckenham, Keble, 751, illustrates the severity with which early courts protected their dignity.

It is apparent from an entry in Birks *v.* Tippetts, 1 Saunders, 33 b, that certain professional characteristics do not change materially from century to century: “Twisden, Justice, interrupted Saunders, and said to him, ‘What makes you labor so? The court is of your opinion and the matter is clear.’ ”

[1]For instance, pages 266 to 298 of W. Jones's reports contain "notes taken at a justice seat in the forest at Windsor," forming a quaint record of litigation between Lord Lovelace, Sir Charles Howard, and others, in the time of Charles I., concerning their "deeres and dogges."

[1]It has always been the custom among English judges to deliver their opinions orally. Among the civilians I believe written opinions are the rule.

[1]This work is a sort of index to the vast mass of documents brought to light by the commission. In almost all cases, however, the printed volume gives the names of the parties, together with the purpose of the bill and a description of the property. The forms of equity pleading are illustrated by examples of bills and petitions in various reigns. The record consists of the bill, and after written answers were introduced, the answers and further pleadings, together with occasional reports of the examinations of defendants, copies of the decrees entered and of the writs issued.

[2]Lest it be thought that these records deal only with legal antiquities, it may be well to note the case (No. 23) of the poor herring hawker of Scarborough, who travelled up into Huntingdonshire and was there assaulted by his local rivals because he sold his merchandise below their rates.

[3]These cases were taken from the chancellor's note-books, which are said to record more than a thousand cases. It is to be hoped that we may one day have them in print.

[1]Peere Williams gives several special cases from the King's Bench. The distinction between common law and chancery is not strictly observed in many of the earlier reports. There are occasional chancery cases in the common law reports of Ventris, Salkeld, Fortescue, Comyns, Fitzgibbon, Strange, Kelynge, Ridgeway, W. Blackstone, Kenyon and others.

[2]West (1736-39).

[1]The decisions rendered by Lord Redesdale (1802-06) and by Lord St. Leonards (1834-35; 1841-46) as lord chancellors of Ireland, although not strictly binding on English courts, have always been cited with such deference that they have come to partake of the nature of authoritative precedents. Lord Redesdale is reported by Scholaes and Lefroy; Lord St. Leonards in iv.-ix. Irish Equity Reports, and by Messrs. Lloyd, Goold, Drury, Warren, Jones and Latouche.

[1]This list originally appeared as an Appendix to "Law and Politics in the Middle Ages" (New York, 1898, 2d ed., 1907; Henry Holt & Co.), to accompany the chapter reprinted as Essay No. 2, in Vol. I of the present Collection.

[2]A biographical note of this author is prefixed to Essay No. 2, Vol. I.

[1]These references have been omitted, in view of the lists given in Essays No. 22 and 23.—Eds.

[1]See the preceding note.—Eds.

[1]The ensuing list is intended to supplement the original one by the citation of such new editions or continuations as have appeared since the original list was published, and by the addition of such treatises as afford most useful bibliographical help in the various fields. As many of the more recent undertakings are limited by national political lines, the classification of them here is more conveniently made by countries, instead of according to the more primitive legal stocks.

[1]This list first appeared as an Appendix to the article reprinted as Essay No. 13 in Vol. I of this collection; it has been revised by the author.

[2]A biographical note of this author is prefixed to Essay No. 13, in Vol. I of this collection.

[This list does not profess to cover the editions of Colonial statutes, for which see the Catalogue of the Charlemagne Tower Collection, cited herein. A few additional titles of articles will also be found in the list of references prefixed to Part III of Vol. I of the present collection of essays. The present list does not confine itself strictly to the Colonial period.—Eds.]

[1]These extracts are taken from "Statutes of the Realm." Introduction.

[2]The Sub-Commissioners. authors of the Introduction, were Alexander Luders, Thomas Edlyne Tomlins, John France, and William Elias Taunton.

[3]MS. Harl. No. 249.

[1]Dewe's Journ. 345.

[2]Dewe's Journ. 469, 473.

[3]Dewe's Journ. 553.

[4]Dewe's Journ. 622.

[5]See the following articles in Bacon's Works, viz. Epistle Dedicatory to Queen Elizabeth, prefixed to Elements of the Law;—Proposal for amending the Laws of England, to King James;—Offer to the King of a Digest: 4to Edit. vol. ii. pa. 326, 546, 547, &c.

[6]See Lords' Journals, i. 144. ii. 661. iii. 81. and preface to Coke's Fourth Report.

[7]Lords' Journ., ii. 661.

[8]Vol. ii. 4to. 547.

[1]MS. Harl. No. 244.

[2]Vol. ii. pa. 346.

[3]Miscell. xvii. p. 279.

[1]Commons' Journal. vi. 427.

[2]Commons' Journ. vii. 58, 74, 249, 250.

[3]Commons' Journ. vii. 304.

[4]Commons' Journal, viii. 631.

[1]MS. Cott. Titus B. V. p. 269.

[1]See page xxvi, n. 12, Statutes of the Realm.

[2]Vesp. F. IX. pa. 279.

[3]Miscell. Vol. 94. No. 4572. Plut. 19 C. pa. 82.

[1]2 Inst. 525; and see also the Prince's Case 8 Rep. 13, throughout. The creation by Edward III. of his eldest son to be Duke of Cornwall, was by the King's letters patent, dated at Westminster 17th March, in the 11th year of his reign, and therein recited to be "de coi assensu & consilio Prelatoz, Comitu, Baronu, & alioz de consilio nro in psenti pliamento nro apud Westm die Lune px post festu sci mathie Apli px pterito convocato, existenciu." The Parliament roll of that year is not now known to exist; but the letters patent are inrolled on the Charter roll of that year, m. 28. nu. 60: other letters patent relating to the Duchy and its rights, dated at Westminster, 18th March in the same year, are entered on the same charter roll m. 26. nu. 53: and others dated at the Tower of London, 3 January in the same year, m. i. nu. i. of the same roll. These letters patent are briefly recited in Rot. Parl. 5 H. IV. nu. 22, and fully in Rot. Parl. 38 Hen. VI. nu. 29.—For other antient grants relating to the Duchy, see Rot. Cart. 11 Edw. III, m. 7. nu. 14: m. 1. nu. 1: and 16 Edw. III. m. 1. nu. 1.

[2]4 Inst. 50; and see also Co. Litt. 98 a. b; and the Year Book 7 Hen. VII. 14, 15, 16.

[3]On the trial of the Earl of Macclesfield in 1725, before the House of Lords, on an impeachment for extortion in his office, of Chancellor, the entry in Rot. Parl. 11 Hen. IV. nu. 28. of the Petition of the Commons, "that no Chancellor, Judge, &c. should take any Gift or Brocage for doing their office," to which the King's Answer, "Le Roi le veut" is subjoined, was produced in evidence on the part of the managers of the impeachment, as a statute, or public Act of Parliament, although not entered on the Statute Roll; and it was also urged in argument, as "common learning," that the Parliament Roll was the voucher to the statute roll. See State Trials, Vol. VI, 760. the Earl of Macclesfield's Case; and 3 Inst. 146, 224, 225, where this entry is printed at length, and considered by Lord Coke as an act of Parliament. See also the argument on the jurisdiction of Chancery annexed to Vol. I. of Reports of cases in Chancery, where the necessity and propriety of consulting the petition and answer, or the entry thereof on the Parliament roll, as the warrant for the statute roll, is much insisted on, upon the authority of Sir Francis Bacon, and other eminent lawyers; with reference to the statute 4 Hen. IV. cap. 22. In Rot. Parl. 10 Hen. VI. nu. 20. is a petition of the

commons, for settling the payment of the fees and salaries of the King's Justices, Serjeants, and Attorney, to which is subjoined the King's answer, "Fiat prout petitur:" In the oldest abridgements of the statutes, title 'Justices,' this is abridged as an act of 10 Hen. VI. and called 'Statutum per se;' and the abridgement is copied into Rastall's collection, and it is there noted that "this is not in the printed book of statutes:" The whole is inserted in Cay's edition of the statutes, as Stat. 2 of 10 Hen. VI. It is observable also, that the Statute 25 Edw. III. 'pro hiis qui nati sunt in partibus transmarinis' pa. 310 of the statutes in this volume, is in the old abridgements called 'Statutum per se:' and that in those abridgements, Title 'Excommengement,' reference is made to an Instrument cited in the earlier editions as of 9 Ed. III and in later editions, as of 8 Edw. III. called 'Ordinatio per se' whereby writs were ordained for excommunicating disturbers of the peace of the church and the realm. In the later editions, it is alleged that such writs were framed on a statute 5 Edw. III. st. 2. c. i: Rastall in the early editions of his collection, quoting these abridgements, adds, "But I cannot find anie of these statutes." See further Rot. Parl. 35 Edw. I: 5 Edw. II: 14 Edw. II. nu. 5, 33: 5 Edw. III. nu. 3, 5, 6: 6 Edw. III. P. 2 nu. 3: 14 Edw. III. P. 2: 20 Edw. III. nu. 11, 45: 25 Edw. III. nu. 10, 16: 28 Edw. III. nu. 13: 36 Edw. III. nu. 35: 38 Edw. III. nu. 9: 40 Edw. III. nu. 8: 42 Edw. III. nu. 9: 46 Edw. III. nu. 13, 43: 2 Ric. II. nu. 62: 3 Ric. II. nu. 39: 6 Ric. II. nu. 53: 8 Ric. II. nu. 31: 20 Ric. II. nu. 29: 5 Hen. IV. nu. 22, 24, 41: 8 Hen. IV. nu. 36: 11 Hen. IV. nu. 23, 63: 6 Hen. V. nu. 27: 8 Hen. VI. nu. 27: 9 Hen. VI. nu. 24: 33 Hen. VI. nu. 43: 38 Hen. VI. nu. 29: and very many other articles, all of which appear to have the same qualities as those of 2 Hen. IV. nu. 28, and 10 Hen. VI. nu. 20. above particularly noticed. See also the instances quoted post, p. xxxvii, note 4. In the old reported statutes from 3 Edw. I. to 1 Jac. I. MS. Harl no. 244 mentioned in p. xxvii of this introduction, the instrument intituled Articuli de Moneta, usually ascribed to 20 Edw. I. is considered as a proclamation not as a statute; and this and some other incidents classed among the antient statutes are reported therein as fit to be repealed, on account of the uncertainty of their validity as statutes.

[1]For a statement of the difficulties upon the terms Concilium, &c. as descriptive of Parliament in the early records, according to the doctrine laid down in the Prince's case, 8 Rep. 20, 2 Inst. 267, and elsewhere, see Prynne's plea for the Lords and House of Peers, sect. 2, and Prynne, 1st part of an historical collection of the ancient Parliaments of England; Lord Hale's treatise of the Jurisdiction of the Lord's House of Parliament, Hargrave's edit. chap. III; and Luders, Tract. iv. published in 1810.

[2]See Pa. xxxvii, and note 4 there.

[3]Hale, H. C. L. ch. I. ad fin. And in the Prince's case 8 Rep. 20 b. it is said, upon the alleged authority of 7 Hen. VII. 14 a, b, and 34 Edw. III. 12, "multa sunt statut, que scribunt, domin Rex statuit; si tamer Rotulo Parliamentario intrentur et semp' ut act' Parliament' approbentur, intendetur hæc authoritat Parliamenti fuisse."

[4]See Co. Litt. 159 b. and the note thereon in the last edition: and 4 Inst. 25.

[5]In the British Museum are two copies, donation manuscripts. No. 4489 and 5668, of a manuscript treatise entitled 'Expenditionis Billarum Antiquitas,' drawn up

apparently by Elsyng, who was Deputy Clerk of the Parliaments in 1620, and for several years afterwards. See also MSS. Harl. 305, 4273, 6585. This work professes to give an historical account of the ancient mode of passing bills in Parliament: it appears from internal evidence to have been written between 1628 and 1640, and to have been designed as a second part of the treatise on parliaments. It is vouched throughout by reference to original petitions and rolls of Parliament, from 4 Edw. III. the earliest known to the writer to exist, to 27 Hen. IV. In this treatise, the form and validity of ordinances, as distinguished from statutes, are stated much at length; and amongst other things it is asserted that an ordinance cannot make new or permanent laws, nor repeal any statute, but that temporary provisions, consistent with the law in force, may be made by way of ordinance; and that an ordinance may be repealed by a subsequent ordinance without statute, see Rot. Parl. 21 Edw. III. nu. 13, 47, 52; 22 Edw. III. nu. 20, 21; 37 Edw. III. P. 1. nu. 37, 38, 39; 45 Edw. III. nu. 24, 25, 37, 40; that the King did forbear to grant those petitions which demanded novel ley, when he had no intent to make a statute. See also Rot. Parl. 22 Edw. III. nu. 30, that the laws had and used in times past could not be changed without making thereon a new statute: and see Rot. Parl. 11 Hen. IV. nu. 63, 13 Hen. IV. nu. 49, that ordinances of Parliament which introduced novel ley were not of any force. In the Parliament 37 Edw. III. it was precisely demanded by the Chancellor, whether the matters then agreed on, being new and not before known or used, should be granted by way of ordinance or statute, and that of ordinance was preferred by the Parliament, for the purpose that if any thing were to be amended, it might be amended at the next Parliament: The ordinance was accordingly entered on the back of the Parliament Roll, and was termed an ordinance in the subsequent Parliament. It is very remarkable, however, that this ordinance is also entered on the Statute Roll, and has always been received as a statute of this year; that penalties inflicted by former statutes were repealed by it; and that words of enactment for statute are expressly used therein. See Rot. Parl. 37 Edw. III. Part 1. nu. 38, 39: 38 Edw. III. nu. 11: 1 Ric. II. nu. 15: Rot. Stat. 37 Edw. III. n. 5, 6: 38 Edw. III. m. 6 d: Chapters 16 and 19 of the statute 37 Edw. III.; and Chapter 2 of stat. 38 Edw. III. Stat. 1. as printed in pages 378, 382, 383 of the statutes in this volume: and further, Rot. Parl. 38 Edw. III. nu. 9, and the ordinances there recited, which were entered on the Statute Roll, and are printed as a statute of that year in all editions, and in page 385 of this volume. See also Prynne’s Irenarchus Redivivus, p. 27, &c. in which, contrary to Lord Coke’s authority, 4 Inst. 25, he lays it down that ordinances and acts of Parliament were one and the same.

In Clarendon’s History of the Rebellion sub. an. 1641-2, vol. I, Part II, page 431 (8° Edit. Oxford 1707) it is stated that “An ordinance for settling the militia was agreed on by both Houses, and sent to the King for his approbation.”—The form of the ordinance follows: It is entitled, “An ordinance of both Houses of Parliament for the ordering of the militia.” &c.—After a short preamble the formal words are, “It is ordained by the King the Lords and Commons now in Parliament assembled, That,” &c.—In the first answer which the King sent, he said, “that to avoid all future doubts and questions, he desired it might be digested into an act of Parliament rather than an ordinance; so that all his subjects might thereby particularly know, both what they were to do and what they were to suffer for their neglect.” pa. 437, 8.—Afterwards the King in answer to a petition presented by the Commons says, “For the Militia . . .

we never denied the thing . . . we only denied the way. You ask it by way of ordinance . . . we tell you we would have the thing done . . . but desire a bill, the only good old way of imposing on our subjects. We are extremely unsatisfied what an ordinance is, but well satisfied that without our consent it is nothing nor binding.” pa. 70.—A bill was afterwards prepared by the King’s order, and submitted to both Houses, who made several alterations in it.—In the King’s message, refusing the royal assent to the bill so altered, his Majesty told them “he was pleased they had declined the unwarrantable course of their ordinance, to the which he was confident his good subjects would never have yielded their consent, and chosen that only right way of imposing upon the People.” pa. 503. In the King’s declaration in answer to that made by the two Houses, whereby they assumed the power of the militia, “He said it was true that he had, out of tenderness of the Constitution of the Kingdom, and care of the law, which he was bound to defend, and being most assured of the unjustifiableness of the pretended ordinance, invited and desired both Houses of Parliament to settle whatsoever should be fit of that nature by act of Parliament.” pa. 524.

[1]Lord Hale, H. C. L. ch. I, says this roll “begins with Magna Carta and ends with Edw. III.” This is erroneous; for though part of the roll antecedent to 6 Edw. 1. may have been lost at the time of Lord Hale, there is no reason to conclude that it ever began with Magna Carta: Magna Carta and Carta de Foresta are not entered on this roll prior to 25 Edw. I. and they are accordingly printed as statutes of that year in this collection. There are not wanting authorities which seem to consider the Great Charter, as possessing the validity of a statute from the 1st or the 9th of Hen. III.; before the confirmation of it by the statute of Marlborough, 52 Hen. III. It is so considered by Coke in 2 Inst. 65, 1 Inst. 43a, 81a; in the Prince’s case, 8 Rep. 19; and elsewhere: by Hale H. C. L. ch. 1; and by Blackstone in his introduction to the charters, 4to. pa. xl. 8vo. pa. lxi.: It is also expressly called a statute by Littleton, sect. 108; but this may be referable to its subsequent confirmation by Parliament. Hale’s idea may probably have arisen from supposing it to be on the Statute Roll before 6 Edw. 1. And Coke and Blackstone founded their opinions chiefly upon two judicial decisions cited from Fitzherbert’s Abridgement; (part 2, fo. 120 b. tit. Mordaunc. pl. 23, and Part 1, fo. 188 a. tit. Briefe pl. 881;) the one as of 5 Hen. III. and the other as of 21 Hen. III.; to which may be added another of 23 Hen. III. Fitz. abr. Part 1, fo. 90 a. tit. Assise. pl. 436. These, if of those years respectively, certainly prove that the Great Charter was then considered as the law of the land, but not, absolutely, that it was previously of parliamentary enactment. In the instances of 5 Hen. III. and 23 Hen. III, the phrase “lestatut de Magna Carta” is merely used incidentally by Fitzherbert stating the points adjudged; and there is some ground to think also that the former decision was possibly of a much later period; see the Year Books 38 Hen. VI. 18 and 39 Hen. VI. 19: In the instance of 21 Hen. III. the Great Charter is referred to, not as a parliamentary Act, but as a grant, ‘concessum’ being the word used to denote its authority; which construction, the preamble of the Articuli super Cartas, Stat. 28 Edw. I., and the beginning of chapter 1 of that statute, confirm; though in the Confirmatio Cartarum, Stat. 25 Edw. I. c. 1. which passed during the absence of the King from the realm, it is recited of the two charters “les queles furent faites p comun assent de tut le Roiaume.”—In an admiralty record, quoted by Prynne (Animad. 120) as of 23 Hen. VI., the laws of Oleron are recognized by the term “Statutum.”

[1]No notice is taken, at the present day, on the introllment of Acts in chancery, of any commission by which Acts are passed; it is believed that no instance of the entry of any such commission on that inrollment has occurred since the time of Charles I. See in appendix F. subjoined to the introduction, vol. I. Statutes of the Realm, a further account of these inrollments, and a copy of the earliest commission for giving the royal assent.

[1]The following minute respecting the mode of framing statutes is extracted from the treatise intituled, 'Expeditionis Billarum Antiquitas' quoted in page xxxii, Statutes of the Realm, vol. I, Note 5.

The statute was made by the King and a council of judges and others, who were called to assist herein.—"the usual time for making a statute was after the end of every Parliament; and after the Parliament Roll was engrossed, except on some extraordinary occasions." "The statute was drawn out of the petition and answer, and penned in the form of a law, into several chapters, or articles, as they were originally termed."—"The Statute being thus drawn up into divers heads or articles, now called chapters, it was shown to the King; and upon his Majesty's approbation thereof, it was engrossed (sometimes with a preamble to it, and a clause of 'Observari Volumus' at the conclusion, and sometimes without any preamble at all,) and then by Writs sent into every County to be proclaimed." See Rot. Parl. 14 Edw. III. nu. 7: 15 Edw. III. nu. 42: 17 Edw. III. nu. 19, 23: 18 Edw. III. nu. 12, 23, 24: 22 Edw. III. nu. 4, 30: 25 Edw. III. m. 5. nu. 12, 13; m. 4. nu. 43: 27 Edw. III, nu. 42; 28 Edw. III. nu. 16: 37 Edw. III. nu. 39: 1 Ric. II. nu. 56: 2 Ric. II. nu. 28: 3 Ric. II. nu. 46, 50: 6 Ric. II. nu. 34, 7 Ric. II. nu, 40: 2 Hen. IV. nu. 21: 7 & 8 Hen. IV. nu. 31, 37, 48, 60, 65: 13 Hen. IV. nu. 17: 2 Hen. V. P. 1 nu. 22: 8 Hen. V. nu. XVI: 9 Hen. IV. nu. 17: 2 Hen. VI. nu. 46: 10 Hen. VI. nu. 17: 15 Hen. VI. nu. 33: Hale H. C. L. ch. 1 and 3 Keble's Rep. 587.

"Many inconveniences happened to the subject by the antient form, in framing and publishing of the Statutes, viz. sometimes no statute hath been made, though agreed on; many things have been omitted; many things have been added in the Statute; a Statute hath been made, to which the Commons did not assent, and even to which neither Lords nor Commons assented." See 1 Hale P. C. 394; 3 Inst. 40, 41; 12 Rep. 57; Rot. Parl. 18 Edw. III. nu. 32-39: 3 Ric. II. nu. 38: 6 Ric. II. nu. 53.

"Les ditz coes prierent a nre fr le Roy, q les bosoignes faites & affaires en cest plement soient enactez & engrossez devant le deptir des Justices tantcome ils les aient en leur memoire; a quoi leur feust responduz q le Clerk du plement ferroit son devoir pur enacter & engrosser la substance du plement p advis des Justices, & puis le monstrer au Roy & as frs en plement pur savoir leur advis."—Rot. Parl. 2 Hen. IV. nu. 21.

As to the inrolling of the statute in Chancery, See Rot. Claus. 12 Edw. II. m. 22 d. where the proceeding is thus explicitly stated. "Le Roi voet & gaunt . . . q tutes les choses desusescrites soient enroullez en roulle de parlement, & de illoesqs envoie en sa Chauncellerie, & illuesqs enroullez, & de illusqes per bref de son gant seal envoiez a les places del Escheker & de lun Baunk & del autre, od comandement de enrouller

les illoeqs & a tenir les & a garder en la fourme avantdite."

And in conformity with this proceeding, statutes made in England and required to be proclaimed and observed in Ireland, were sent to the Chancellor there, to be inrolled in the Chancery of that Kingdom, and thence exemplified and sent to the courts of justice, &c.—See Stat. 12 Edw. II. and the writs at the end thereof, page 179, of the statutes in this volume and for other instances illustrative of thus inrolling statutes in chancery in England and Ireland, See appendix E. subjoined to the introduction, Statutes of the Realm, vol. I.

The distinction between such bills as were common and such as were particular, or in the more modern phrase public Acts and private Acts, with respect to the practice of inrolling them, was thus certified by Kirkby of the rolls, 33 Hen. VI. "Sir, le cours del parlemt est tiel . . . si ascun bill, soit pticuler, ou aut bill q soit primermt delivr a les comus, et sil passe eux, ils usent endosser le bill en tiel forme; cest assavoir, 'soit baiff as seigniors;' et si le Roy et les seigniors agreent a m le bill, et ne voilloit alt ne changer le bill, adonq ilz ne usent endosser le bill, mes est baiff al Clerk de Parlement pour ce enrolle; et si ce soit un come bill, il serra enrolle et enacte; mes si soit un pticuler bill, il ne serra enrolle, mes sera file sur le filac et est assez bie; mes si la pty veut suir pur letr pour estre le mieux seur, il purroit estre enroulle."—Year Book 33 Hen. VI. 17: Fitzh. Abr. tit. Parliament pl. 1: Bro. Abr. tit. Parliament & Statutes pl. 4. See also Rot. Claus. 6 Hen. VI. nu. 11, for the proceedings towards the inrollment of a particular bill or private Act.

In the 14th year of James I. Lord Hobart speaking of a private Act then under consideration said, "That very bill is filed with the rest of the bills, and the King's assent unto it, and labelled with the rest, whereunto the Great Seal is set, as the course is in private Acts, which are not inrolled without special suit, as general Acts are; for general Acts are always inrolled by the Clerk of the Parliament, and delivered over into Chancery, which inrollment in the Chancery makes them the Original Record (as it was resolved in John Stubb's Case); but in private Acts the very body of the first bill filed and sealed as aforesaid, and remaining with the clerk of the Parliament, is the original record." Hob. 109. The following account, given also in the reign of James I. by Bowyer and Elsyng, in the written objections which they made to Pulton's having access to and printing the original records of Acts in the Tower (See Chap. I. Sect. II. pa. XXVIII. of the introduction, vol. I, Statutes of the Realm,) appears to be more accurate with respect to private Acts than that of Lord Hobart; and agrees with that given by Kirkby in 33 Hen. VI. "At the end of every session of Parliament, all the public acts are ingrossed into one great Roll by Bowyer, as clerk of the Parliament; and the same roll, being by him subscribed, he delivereth into the chapel of the Rolls; which is thereupon there received, and placed among the records of the Chancery, being the highest record of the Kingdom, without any other Warrant than his Hand: Which Acts or Statutes so by him transcribed, do bind his Majesty's Subjects of all Degrees for ever. If any Private Act be at any time to be certified into the Chancery, a writ of Certiorari is directed to Bowyer, who thereupon doth certify the same under his hand; which accordingly is received, without any allowance or warrant of any other Person, and is thereby made a record, and bindeth the party whom it concerneth, and all others." MS. Cott. Titus B. V. pa. 69. See further Hale H. C. L. ch. I., 3 Keb.

Rep. 587; Dewes's Journals of Parliament, 1 Eliz. pa.; and the instances in Appendix E, and F. subjoined to the introduction, vol. I, Statutes of the Realm.

All the statutes passed in each session are now classed in three distinct series: the first series contains the public-general Acts, such as in their nature are public and general, which are certified into chancery, and printed by the King's printer for general circulation: The second series contains Acts respecting particular places and persons: of these the Road Acts, Canal Acts, and all others by which felonies are created, penalties inflicted, or tolls imposed, have a clause annexed to each "That the Act shall be deemed and taken to be a Public Act, and shall be judicially taken notice of as such by all Judges, Justices and others, without being specially pleaded." Other local or personal Acts which are not required to have this public clause annexed have each a clause inserted, at the suit of the parties, "that the Act shall be printed by the King's Printer, and that a copy thereof, so printed, shall be admitted as evidence thereof by all Judges, Justices, and others." All the Acts of this second series are printed together in one collection. The third series contains such local and personal Acts as are without either of the above clauses, and are therefore not printed. See reports of the committee of the House of Commons on the promulgation of the statutes, in 1796 and 1801; and resolution of the House of Commons 7 May 1801; and 18, 22, and 24 March 1803.

[1]See Hale H. C. L. ch. 1, and 3 Keb. Rep. 588. That the royal assent given to a petition did not of itself constitute a statute; see Rot. Parl. 14, E. III. nu. 7: 15 E. III. nu. 42: 17 E. III. nu. 48: 18 E. III. nu. 33, 39: 25 E. III. nu. 12, 13: 37 E. III. nu. 39: 1 Ric. II. nu. 15: 2 Hen. IV. nu. 114: 7, 8 Hen. IV. nu. 60, 66: 13 Hen. IV. nu. 49: 23 Hen. VI. nu. 18, 19: see also Statutes of the Realm, vol. I, pp. xxxi, n. 4; xxxii, n. 5; xxxv, n. 5.

[2]The contents of this volume were printed in 1661, by W. Ryley, a clerk in the Record office in the Tower, with an appendix of additional matter, under the title of Placita Parliamentaria. The original manuscript volume is referred to in Rot. Par. 6 Ric. II. P. 2. m. 26. as an authentic book of inrollment, as follows: "D'Exemplific Tykford. Rx Omibz ad quos, &c. saltm. Inspexim tenorem cujusdam pcepti dni E. quondam regis angl fit Regis Henr pgenitoris nri, in quodam libro de pliamentis ejusdem dni E. anno regni sui vicesimo irrotulati in hec verba." Then follows verbatim the Article 'De Abbati de Mermonster,' entered in fo. 36 of the Vetus Codex, and printed in page 102 of Ryley's Placita Parliamentaria.

[3]The journals of the House of Lords commence in I. Hen. VIII.: But of the years 4, 5, 14 & 15, 21, 22, 23, 24, 26 and 27 Hen. VIII., and of the first two sessions in 1 Mary, the journals have not been preserved. In the printed editions therefore, the journals for those years are supplied by copies of, and extracts from, what are there termed the Parliament Rolls, being the inrollments in chancery mentioned above. The Journals of the House of Commons commence in 1 Edw. VI.; But until the beginning of the reign of Elizabeth they contain merely short notes of the several readings of the respective bills before the House, with a few occasional entries only of other proceedings. See further Appendix F, vol. I, Statutes of the Realm.

[1]XII., 593 of the first edition; III. 579 of the Paris edition 1723.

[2]MS. Harl. No. 5326 and others.

[3]Statutes of the Realm, vol. I, p. 37.

[4]Ib. p. 123.

[5]See Rot. Pat. 43 Hen. III. m. 10; 48 Hen. III. m. 2, d; 53 Hen. III. m. 25, d.

[1]Lib. Custum. London; MSS. Harl. No. 79, 3824; MS. Reg. 20 A. VIII. in Mus. Brit.

[2]See note at the end of Stat. Westm. 2, pa. 95 of the Statutes of the Realm.

[3]Rot. Parl. 36 Edw. III. m. 1. In this year was made the statute (36 E. III. c. 15) that all pleadings in the courts shall be in English.

[4]Rot. Parl. 37 Edw. III. nu. 1: 38 Edw. III. nu. 1.

[5]Rot. Parl. 5 Ric. II. nu. 1, 2.

[6]Petitions in Parl. 10 Ric. II. in Turr. Lond.

[1]Rot. Parl. 17 Ric. II. nu. 11.

[2]Rot. Parl. 1 Hen. IV. nu. 14.

[3]Rot. Parl. 1 Hen. IV. nu. 53, 56.

[4]Rot. Parl. 6 Hen. IV. nu. 20.

[5]See particularly Rot. Parl. 2 Hen. V. nu. 22.

[6]See Stat. 18 Hen. VI. c. 18, 19, as to soldiers, and compare those chapters with the petitions in the Parliament Roll of that year, nu. 62, 63, and with the Writ of Proclamation upon the Close Roll, 18 H. VI. m. 3, 6. The statute is in French, but the petition is in English, and is accordingly so recited in the Proclamation Writ.

[1]Petyt Manuscript nu. 8 in the Inner Temple Library; and MS. Hatton 10 No. 4135, in the Bodleian Library. The first of these ends with the statutes of 3 Hen. VII. in French, apparently as from some Statute Roll; or copy thereof. In the latter, which ends with 11 Hen. VII. the statutes of the third year are in French; but those of the fourth and all the following years are in English. The old printed editions of the statutes 1 and 3 Hen. VII. in English, appear to be taken entirely from a Statute Roll; while in the modern editions, some parts of the statutes are manifestly taken from the original acts, or from a Parliament Roll or Inrollment in Chancery.

[2]See 2 Inst. 485, as to the two chapters of Stat. Westm. 2, which are in French, although the body of the statute is in Latin. Barrington in his Comments on the Statutum de Scaccario, remarks that when the interests of the clergy are particularly

concerned, the statute is in Latin: But on examination, the correctness of this remark may be doubted. See also N. Bacon's Treatise on Government, Part I. Cap. 56 (pa. 101. 4to Edit. 1760).

[1]See Luder's Essay on the use of the French Language, in our Ancient Laws and Acts of State; Tract. VI. 1810; where it is suggested that many of the Latin statutes were first made in French, and from thence translated into Latin.

[2]See the entries of Stat. Glouc. 6 Edw. I. in Register A. preserved in the Chapter House Westminster.

[3]See 4 Inst. 26, 28: the Case of Heresy, 12 Rep. 58: 2 Inst. 526: 3 Inst. 41: Hale on Parl. 36: Arg. 1. Ch. Rep. 51, 53. Copies of parliamentary proceedings, or Acts of state, though not statutes, were occasionally proclaimed and published. See the Roll of the Ordinances of the Staple 27 E. III.—Sometimes the knights, citizens, and burgesses were simply charged upon their return into the country to shew and publish to the people the matters agreed on in Parliament. Rot. Parl. 37 E. III. nu. 38.—Sometimes copies were delivered to them of such matters 'pur ent notifier en soun pavs.' Rot. Parl. 9 Hen. IV. nu. 27.

[1]The last Proclamation Writ entered on the Statute Rolls, is at the end of Stat. 7 Hen. V. ad 1419. Lord Coke, 2 Inst. 526 says the writ continued to issue till the Reign of Henry VII. In printed editions of the statutes, a Proclamation Writ is prefixed to the statutes of 19 Hen. VII.

[2]See Commons' Journals vol. viii, 11th January 1661-2, when it was resolved that a message should be sent to the Lords, requesting "that the original rolls of Acts of Parliament be kept in the office, and not delivered to the printer, but that true copies be delivered to him from the roll, fairly written and carefully examined and attested."

[1]See Irish Acts 12 Edw. IV. c. 2.: 14 Hen. VII. c. I.: 28 Hen. VIII. c. 2. sec. 4: (for the succession of the King and Queen Anne: the clause for proclamation of which is copied from the English Act 25 Hen. VIII. c. 22): 33 Hen. VIII. c. 1. sec. 2. (enacting that the King and his successors, kings of England, should be always kings of Ireland); 14 and 15 Car. II. c. 18 sec. 12.

[2]By Stat. 41 Geo. 3 (U. K.) c. 90 sec. 9 it is expressly provided, that the copy of the statutes of England and Great Britain printed by the King's printer, shall be evidence in Ireland, and that the copy of the statutes in Ireland, printed by the King's printer, shall be evidence in Great Britain, of the statutes respectively passed, previous to the union between Great Britain and Ireland.

[1]This essay forms part of Chapters II and III of "The King's Peace; a Historical Sketch of the English Law Courts," 1895, pp. 68-72, 77-85 (London: Swan Sonnenschein & Co.). The earlier history of the Curia Regis, up to the period of Henry II, is dealt with in Mrs. Green's Essay (*ante,* Vol. I, No. 4).

[2]1835-1904. B. A. Trinity College, Cambridge; Barrister of the Inner Temple, 1858; Queen's Counsel, 1874; Bencher of the Inner Temple, 1877; Master of the

Library, 1897.

Other Publications: Side Lights on the Stuarts; The Interregnum; King Edward and New Winchelsea (The Edification of a Mediæval Town); A Prisoner of War; Introduction to the Records of the Inner Temple; and various articles in learned periodicals.

[3]Hall's *Antiquities of the Exchequer.*

[1]Foss' *Judges,* vol. ii. p. 4.

[1]*Selden Society,* vol. 3, p. xviii. Foss' *Judges,* vol. ii. p. 160.

[2]*Selden Society,* vol. 3, p. 79.

[3]Dugdale's *Chronica Series,* fol. 11.

[4]28 Edward I., ad 1300.

[1]47 Henry III. *Coram Rege Rolls de tempore Ph. Bassett Justiciarii Angliae;* Madox, vol. i. p. 100.

[2]Stubbs' *Constitutional History,* vol. i. p. 503.

[1]Stephen's *History of the Criminal Law,* vol. i. p. 99.

[1]Foss' *Judges,* vol. ii. p. 155.

[1]28 Edward I.

[2]Dugdale, *Chronica Series,* fol. 32.

[1]*Institutes,* vol. iv. p. 78.

[2]"Trial of Regicides," *State Trials,* vol. v. p. 993.

[3]Foss' *Judges,* vol. iii. p. 22.

[4]*Ibid.,* p. 195.

[1]*Ibid.,* vol. iv. pp. 21, 134.

[2]*Ibid.,* p. 190.

[3]*Ibid.,* p. 226.

[4]*Ibid.,* p. 390.

[5]Foss' *Judges,* vol. iii. p. 22.

[6]*Ibid.,* p. 23.

[7]25 Edward III.

[8]24 Edward III.

[9]1 Edward IV. c. 2. Reeve's *History,* vol. iii. p. 9.

[1]This essay forms chapters I-IV, vol. I, Part Second, pp. 321-351, of "The Equitable Jurisdiction of the Court of Chancery," 1846 (London: V. & R. Stevens and G. Norton).

[2]1787-1850. Glasgow University. M. A. 1805; Barrister of the Inner Temple, 1811, Bencher, 1835, and Reader, 1845.

Other Publications: Origin of the English Laws and Institutions, 1812; Origin of the Laws and Political Institutions of Modern Europe, 1826; Code Napoleon Translated, 1826; Reform of the Court of Chancery, 1830.

[3]*Int. al.* Lord Coke, 10 Rep. 108 a. "The perfection of reason," ib. 3 Rep. 13 b. So Celsus, Dig. i. l. 1, pr. says. "Jus est ars boni et æqui."

[4]"Non possunt omnes articuli singillatim, aut legibus, aut senatus consultis comprehendi; sed cum in aliqua causa, sententia eorum manifesta est, is, qui jurisdictioni præest, ad *similia* procedere, atque ita jus dicere debet," Dig. i. 3. 12. But when *new* cases arose, according to the language of the Jurisconsults of later times. "De his quæ primo constituuntur, aut interpretatione aut constitutione optimi *Principis,* certius statuendum est." ibid. *l.* 1 & 11.

[5]Bracton, who wrote whilst the Common Law was yet being formed (*non scripta*), adopting the maxim which he found in the Roman law, "In omnibus, maxime tamen in jure, *Æquitas* spectanda est," Dig. L. 17. 90, lays down, that the Common Law Courts might be guided *by equity,* even in questions of strict law; *lib.* 2, c. 7. fol. 23 b; *lib.* 4, fol. 186; and see Co. Litt. 24 b; 6 Co. 50 b; 1 Bla. Comm. 61, 62; ibid. 3. 429; and I Eden, 194; Judgment of Sir T. Clarke, M. R., in *Burgess* v. *Wheate.* See Additional Note to chapter I, p. 326, Spence, Equitable Jurisdiction of the Court of Chancery.

[1]The Year Books, or authorized reports of judicial decisions, commence in the reign of Edw. I. Bracton records the decisions of time of Hen. III.

[2]See Hunt's argument for the Bishops' right, 145-8. Parkes' Hist. C. Chan. p. 236. Professor Millar, in his *Historical View of English Government* (Book ii. c. vii.) observes, that "Law and Equity are in continual progression, and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is by length of time converted into an old rule. A great part of what is now strict law," adds the Professor, "was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."

[3]"Juris scrupulositate nimia que subtilitate." Dig. xxviii. 3. 12; et. v. *supra.*

[4]The subject of *fidei commissa,* or Trusts, will be separately considered.

[1]It has been matter of dispute in modern times whether Hadrian ever issued such an Edict,—see the notes to Milman's Gibbon, viii. p. 20; but, *in fact,* this compilation of Prætorian law, which was made in his time, and no other, continued to be of authority down to the time of Justinian.

[2]Spence, Equitable Jurisdiction of the Court of Chancery, p. 77.

[3]Cod. Just. i. 14. 1; ibid. i. 14. 9; *supra,* p. 77.

[4]See Gaius, quoted Milman's Gibbon, viii. p. 23. The Emperors before this time frequently sat to hear causes referred from the inferior tribunals, (Sueton. Domit. c. viii.); particularly where the *rigor* of the law required to be tempered by equity, *ex bono et æquo,* (Sueton. Claud. c. xiv.); taking to them assessors, or sitting in consistory, Dion. Cass. Tiberius, lib. lvii. et v. *supra.*

[5]This, as we shall presently see, was in the reign of Edw. III.

[1]"Bona fides quæ in contractibus exigitur *æquitatem summam* desiderat." (Dig. xvi. 3. 31; xix. 2. 24; xix. 1. 50;) "Omnia quæ contra bonam fidem fiunt veniunt in empti actionem," (Dig. xix. 1. 1, 2,) "Nihil magis bonæ fidei congruit, quam id præstari quod inter contrahentes actum est; quod si nihil convenit, tunc ea præstabuntur quæ *naturaliter* insunt hujus judicii potestate," (xix. 1. 11, 1, *et seq.*). Natural reason was an acknowledged principle of decision in questions bonæ fidei (ib. v. 3. 36, 5); but it was considered, that from the very nature of a sale, the buyer and seller should be at liberty to circumvent each other as to price, "In pretio emptionis et venditionis, naturaliter licere contrahentibus se circumvenire, Pomponius ait," Dig. iv. 4. 16, § 4.

[2]Dig. xviii. 5. 3.

[3]Dig. xix. 1. 11, 5.

[4]Dig. xxi. 1. 1, 2.

[5]Dig. xix. 1. 6, 9.

[6]"Quum iter excipere deberem, fundum liberum *per errorem* tradidi, incerti condicam ut iter mihi concedatur," Dig. xii. 6. 22, § 1, &c. This remedy was not adopted by the framers of our Common Law.

[7]Voet. in Pandect. i. p. 193 a. § 3.

[8]Dig. xix. 1. 25; xvi. 1. 29, pr. and § 28 & 46. tit. 2. 54, 1, &c.

[9]"Quæ dolo malo facta esse dicentur, si de his rebus *alio actio non erit,* et justa causa esse videbitur, judicium dabo, ait Prætor," Dig. iv. 3. 1, pr.; Cod. Just. ii. 21, 2;

Dig. xix. 5. 5, 3. It was sufficient that the remedy were doubtful, Dig. iv. 3. 7, 3; et v. Heinec. in Pandect. § 459-462. This extraordinary remedy was given against the heir if the succession had derived any benefit from it. Dig. iv. 3. 26.

[1]According to Labeo, if a *restitutio in integrum* would afford complete redress, it was to be resorted to, and not an action. Dig. iv. 3. 1, 6.

[2]"Magis mixtum *imperium* quam jurisdictio dominatur," Voet. in Pandect. tom. i. p. 178.

[3]"Sub hoc titulo, plurifariam Prætor hominibus vel lapsis vel circumscriptis subvenit, sive metu. sive calliditate, sive ætate, sive absentia inciderunt in captionem, sive per status mutationem aut justum errorem," Dig. iv. 1. 1 & 2. Voet. gives the following description of this jurisdiction. "Est enim remedium extraordinarium, quo Prætor vi sui officii et Jurisdictionis, naturalem secutus æquitatem, homines læsos aut circumventos ex justa causa in pristinum statum reponit, perinde ac si nullum negotium damnosum gestum esset. Magis *mixtum imperium* quam Jurisdictio dominatur, unde soli majores, et non municipales magistratus, restitutionis faciendæ potestate gaudent; multo que minus Pedanei Judices, proprie dicti, omni carentes jurisdictione," Voet. i. p. 178; and see Dr. Phillimore's Preface to Burn's Ecclesiastical Law, p. xiii.

[1]After the Court of Chancery had become established, and its jurisdiction in the correction and extension of the law had become reduced to settled and well understood principles, many of its doctrines were adopted by the Courts of Law, and now form part of the Common Law; but the text refers to the Common Law as it stood when the Court of Chancery rose into existence.

[2]The exercise of this prerogative by any general regulations, affecting the *law itself,* was excluded; that required the assent of the Great Council; v. *supra,* p. 226.

[3]So it will be remembered, though the writs for the election of representatives to Parliament issued from and were *returned* to the Chancery, the Commons in their House established the right of determining as to the validity of the returns; see Lord Campbell's Lives, Lord Ellesmere, ii. p. 221; Lord Shaftesbury, iii. p. 314.

[4]*Supra,* p. 240.

[1]See The Obsolete Jurisdiction of the Court of Chancery, Spence, Equitable Jurisdiction of the Court of Chancery.

[2]V. *supra,* p. 73.

[3]Hallam, Mid. Ages, iii. 208.

[4]Of the Great Council, v. *supra,* p. 263, *et seq.* The term "Parliament" is first met with, 42 Henry III. Report of Lords' Comm. 1823, p. 99.

[1]See Lords' Report, 1823, p. 169. 174, &c.

[3]Sir M. Hale—Hallam, Mid. A. iii. 213; Palgr. Council, p. 20. In the reign of Edward II. we find “Responsiones factæ coram Rege *et magno concilio in parliamento* Regis,” Rot. Parl. i. p. 289. The Lords in their Report, p. 268, conclude that the council which gave the answers to petitions, was the *select* council.

[2]Reeves, i. p. 62.

[4]Lords’ Report, 1823, p. 297.

[5]Palgr. Counc. p. 64. temp. Edward III. Rot. Parl. 9 Henry IV. p. 613; Lords’ Report, 1823, p. 360.

[6]Co Litt. 304, a & b.

[7]V. *int. al.* Stat. of the R. i. 109, 20 Edward I. and Report of Committee of the Lords, 1820, ed. 1823, p. 174, p. 451.

[8]See Palgr. Council, p. 20.

[9]See the Treatise of the Masters, written temp. Eliz., Harg. Law Tracts, 1, p. 298. The Queen’s Council and the Attorney and Solicitor-general appear also to have been members, *ib.* Indeed down to the time of Charles I. it was considered as inconsistent with the duties of the Attorney-general, who was called by writ to attend the House of Lords, that he should be a member of the House of Commons, Clarendon, Rebell. i. 210, ed. 1721.

[1]Report of the Lords’ Committee, 1823, p. 317. 451. Though a little beside the subject, it tends to show how high was considered the honor of serving the king, in *any* capacity, that he could find persons who did not blush to serve the office of *Maris-callus Meretricium* in Hospitio Regis. temp. Edward II. Lord Lytt. Henry II. iii. 353.

[2]Hardy, Introd. to C. R. p. xxvi.

[3]Sir H. Nicholas, Pref. to the proceedings of the Privy Council, p. iii.

[4]Reeves, vol. ii. 415; 4 Inst. 61; The stat. 31 Edward III. st. i. c. 12, notices these several chambers of council.

[1]Hardy, Introd. to Close Rolls, p. xxvi. Sir H. Nicholas, Privy Council, Pref. p. xxx. Seton.

[2]Sir F. Palgrave, Council p. 20, note (k) p. 118.

[3]Introduction to Close Rolls, p. xxv.; and see Lord Chief Justice Tindal’s Judgment, *Regina* v. *Mills,* in Dom. Proc. Jurist, vii. p. 913.

[1]See *Lord Strange’s* Case, Palgr. Counc. p. 9; *ib.* 93.

[2]Regulations as to the council, &c. 8 Edward I; Ry. Pla. Parl. 442; Legal Jud. in Chancery, 27, 28; Palgr. Council, p. 22. 91. 134; Reeves, i. p. 63.

[3]Palgr. Council, 90. 134; the latter writ brought the Cause and the Body of the Defendant, to be dealt with by the council itself.

[4]Palgr. C. p. 19.

[5]See the Regulations temp. Henry VI. Rot. Parl. iv. p. 201.

[6]Palgrave, C. p. 87.

[7]Palgrave, C. p. 37.

[1]See Parkes' History of the C. of Ch. p. 37. 39, 43.

[2]Rot Parl. iv. 343, et v. *ib.* 201; Hallam, M. A. 111-216.

[3]The title of the earliest Rolls of Parliament extant, viz., 18 Ed. I. vol. i. p. 15, is—"Placita coram Domino Rege et eius consilio ad Parliamenta sua;" and see 1st Report of Lords' Committee, 1823, p. 170. In the reign of Henry IV. these matters were commonly referred to the Council to report upon, Rot. Parl. 9 Hen. IV. p. 613; Lords' Report, 1823, p. 360.

[4]Legal Judicat. p. 26. An account of the receivers and triers of petitions (who were nominated by the king, Palg. C. p. 125) is given in the 2d volume of Reeves's Hist. of the Common Law, p. 26, 407, et v. *ib.* 415. The master or chief clerks of the Chancery were frequently nominated for this purpose.

[5]V. *int. al.* Mem. in Scacc. p. 30; Rot. Parl. iii. 61-2, temp. Rich. II.

[1]See Cruise, Dig. cited in the next Note, and Sir H. Nicholas's Proceedings Privy Council, Pref. p. xxv.

[2]Cruise, v. p. 2.

[3]Reeves, vol. ii. p. 409; Sir F. Palgrave has ample details on this subject, Council, p. 30. 64. 72. 119. 124, temp. R. II. Ed. I. Ed. II. Ed. III. Hen. IV. particularly as to the Proceedings before "Special Auditors of Errors," deriving their authority from the Great Council, p. 119.

[4]Hallam, M. A. iii. 215; Palgrave, C. 64. See the standing order, Dom. Proc. 9th June, 1660; Lords' Report, 1823, p. 449, note. The Commons, 1 Hen. IV. acknowledged that they had no right to interfere in judicial matters, Rot. Parl. iii. 427; Lords' Report, 1823, p. 360.

[5]The Masters in Chancery were doomed to descend still lower. "Doctor Barkley," says the Author of the Treatise of the Masters, (Harg. L. T. p. 298,) "a Master of the Chancery, in the 18th of Elizabeth, sitting in the Parliament House, as the manner is,

upon occasion of speech amongst the Lords of certain officers to have certain privileges, he, without asking leave, got up and entered into a speech of desiring that the Masters of Chancery might also be comprised in the said privilege then on foot. This request came so unseasonably, and was so inconsiderately propounded by *the said Doctor,* as the Lords in general took offence thereat,—some saying that whilst the Queen's learned Council were silent it were great presumption in him, being one inferior to them [*sic*], to be so busy. So upon the next day the Serjeant, Attorney, and Solicitor took place above the Masters in Chancery there, which before time had never been done; and ever since, not only they, but Serjeants-at-Law also, do it generally at all public meetings, upon this reason that they took place before the Attorney and solicitor," (*Ibid.* abridged.)

[1]It is supposed that the king's chapel was used for keeping the records, and that it was from this custom, partly, that the Chancellor, who had the care of the king's chapel, came to be so much connected with the diplomas and archives, Introd. to C. R. p. xxvii. note, and Spelman hac Voce.

[2]In the time of Edward IV., when the Chancery was, as we shall see, completely established as a court of extraordinary jurisdiction, all the judges of England affirm that the Chancery, King's Bench, Common Pleas, and Exchequer, are all the king's courts, and have been so time out of mind, so that no man knoweth which is most ancient, 8 Co. Præf. xvi. Lord C. J. Hobart also treats the Court of Chancery as a court of equity, and the courts of law, equally as fundamental courts. In the 11th year of James I. it was resolved by the Lord Chancellor, Chief Justice of England, Master of the Rolls, and two justices, that the king cannot grant a commission to determine any matter of equity (*i. e.* to constitute a new tribunal); but it ought to be determined in the Court of Chancery, which hath jurisdiction in such case, out of mind, and had always such allowance in law, 12 Rep. fol. 114, *Earl of Derby's* case. But neither Glanville, who wrote in the reign of Henry II., Bracton in the time of Henry III., or Briton in the time of Edward I., and who expressly treats of courts, nor Fleta, nor Hengham, nor the Book entitled "Diversity of Courts," mentions the Court of Chancery as a court of equity. The only extraordinary jurisdiction referred to in these early writers, is that which was exercised by the king himself, advised, no doubt, by his council, or the Chancellor the chief member.

[1]M. Par. ad. Ann. 1231, p. 312.

[2]Lord Lytt. Henry II., vol. ii. 480; Parkes, 42; 3 Bla. Com. p. 51, note; and Introd. to Close Rolls, by Hardy, p. xxviii., note, Sir H. Seton, p. 8.

[3]Discourse of the Judicial authority of the M. R. page 86. "Prout de jure et *Gratia Curiæ* videritis facienda," 5 Edward I.; et *ib.* p. 87. In the 12 Edward I. a writ directed by the king to I. de Kirkby clerico suo, commands him to do "quale de *Jure* et *gratia Cancellariæ"* ought to be done.

[4]Discourse, &c. prf. p. cxii.; Petition of the Commons, 45 Edward III. 1 Roll, Ab. 372; Introd. to Close Rolls, p. xxviii. The Court of Chancery appears at this time to

have been considered as the proper tribunal for a widow to obtain her dower, Mem. in Scacc. Y. B. vol. i. p. 38, and see Lord Campbell's Lives, i. p. 186-7.

[1]Claus. Ann. 8 Edward I., Ryl. Plac. Carl. 442; Legal Jud. 27, 28; Hardy, Introd. C. R. xxviii.

[2]See Lives of the Chancellors, i. p. 206 to 209; and see Legal Jud. in Ch. p. 11, Rot. Parl. 18 Edward II. No. 43. i. p. 428. "Sequator *in Cancellaria* et ibi habeat quod justitia, &c."

[3]3 Bla. Com. 256, Harg. L. T. 299.

[4]Leg. Jud. p. 18; Coke's Entries, 419 d. 422.

[5]As under 11th Edw. I. Stat. of Acton Burnell, Leg. Jud. p. 11.

[6]Legal Judicature, p. 9. 17; Ld. Ellesmere, Treatise on Co. of Ch. 27. 29; Coke's Entries, 438. 678; Palgr. Council, 95, et v. Reg. Lib. A. 1566-7, fo. 91.

[7]Fitz N. B. Crompton, 47 a. We find the remains of this jurisdiction as regards copyholds, temp. Ja. I. Vin. Abr. iv. 385.

[1]Crompton, 47 a.

[2]Discourse of the judicial authority of M. R. p. 4; Legal Jud. in Ch. p. 15, and Documents there cited; 4 Inst. 79. Some of these authorities relate to a later period, but there is no reason to believe that any of the matters above referred to were of subsequent introduction.

[3]Sir. F. Palgr. Council, p. 92.

[4]Sir F. Palgr. Council, p. 95. Recognizances were also, as we shall see, imported into the extraordinary jurisdiction, and made use of to bind the parties to do right and justice.

[5]*Int. al.* Reg. Lib. B. 1571 to 7 A. fo. 2, Temp. Eliz. A. 1573, fo. 27.

[6]Introd. to Close Rolls, p. xxix. Seton, p. 9; Calendar of proceedings in Chancery by the Record Commissioners, i. fo. 1, 2, 3, 68; a great part of this Jurisdiction was transferred to the Court of Augmentations by 33 H. VIII. c. 39, Seton, p. 34.

[7]1 Roll. Ab. 372. It was conceded, 39 Hen. VI., that the king had the option to sue in Chancery or at Common Law, Brooke, Prerog. 45, et Rot. Parl. 45 Edw. III. No. 24; Vin. Abr. iv. 380.

[8]3 Bla. Comm. 49.

[9]Ld. Ellesmere, p. 45.

[1]The stat. 20 Edw. III. c. 6, (Stat. of the R. vol. i. p. 305,) gave a summary jurisdiction to the Chancellor and Treasurer in respect of misdemeanors of officers; 36 Edw. III. c. 9, gave a similar jurisdiction to the Chancery; the 27 Edw. III. c. 1, enforced by 38 Edw. III. c. 2 and 3, gave a summary jurisdiction to the Court of Chancery, and the Council, and the King's Justices, over those who sought to impeach the judgments given in the king's courts by foreign appeals. Lord Coke considered, that in these cases the Chancellor was bound to proceed according to the course of the common law, and that he could not examine the parties; but Lord Coke gives no reason or authority, 4 Inst. 81. The Parl. Roll, 14 Edw. III., and Cal. ii. p. 10, would rather lead to the opposite conclusion.

[2]Introd. to Close Rolls, p. xxviii. The Writ (22 Edw. III.) is there stated; and in Legal Judicature in Chancery, p. 30.

[3]See Legal Judicature in Chancery, p. 31.

[1]Sir F. Palgrave, Council, p. 64, 35 Edw. III. *Ibid.* p. 67, 40 Edw. III. This matter commenced by a complaint made by Lady Audley, suing *without her husband* against her father-in-law, to the king in parliament: the object was to obtain the specific performance of a deed of covenant for settlement of lands made on her marriage; all parties submitted themselves to the king and his council, *ib.* p. 69. This whole proceeding was wholly at variance with the doctrines of the common law, both as regards the institution of the suit by the *wife alone,* and the relief sought—*specific performance of an agreement.*

[2]Thus the Parliament Roll, 14 Edw. III. after taking notice of an ordinance touching the Priory of West Sherborne, &c., adds, that if anything should be done contrary to that ordinance, the Chancellor of England should have power to hear the complaint by Bill, "and upon this to proceed in the same manner as is usually accustomed to be done daily on a writ of subpœna in Chancery," Discourse, &c. Præf. p. cxi. and see the petn. of the Commons. 45 Edw. III. 1 Roll Abr. 372, from which it appears that this also was the course in proceedings before the council.

[3]By an entry in the Close Rolls, 37 Edw. III. cited in the Introd. to Close Rolls, p. xxx. it appears that the mandate of the subpœna was in these terms, "Quod esset in Cancellaria Regis, ad certum diem, ubicunque foret, ad ostendendum si quid pro se haberet, vel dicere sciret, quare, &c., et ad faciendum ulterius quod curia considerarit;" and see Palgr. Coun. p. 41.

[4]Sir or Master John Waltham, whom the Commons, temp. Henry VI., accused of having first invented this writ, was not Master of the Rolls till the 5th year of Rich. II. (1381 to 1386,) Palgr. C. p. 40; he was Master of the Rolls and Keeper of the Seal, but never Chancellor, Discourse, p. 95, Hardy's Catalogue, p. 43-6.

[1]Spence p. 385.

[2]Introduction to Close Rolls, p. xxviii. By the instructions of Edw. IV. (Rot. Claus. 7 Edw. IV.) to Rob. Kirkham, M. R., on delivering to him the Great Seal, he was

ordered to determine according to equity and good conscience, and to the *old course* and *laudable custom* of the court, taking advice of the king's justices in case of difficulty, v. *supra,* chap. iii. et v. Introd. to Close Rolls, p. xxxi. Legal Jud. in Ch. 37. 112; Y. B. 4 Edw. IV. 8. "Mes quant al matters de conscience il (le Chancellor) eux determinera solonque conscience," Y. B. 9 Edw. IV. 14; Crompt. 46 b.; et v. *ib.* fo. 45.

[3]V. *supra,* p. 223, et v. *inf.* tit. *"Equity and Conscience."*

[4]"It is as old as Bracton," Sir T. Clarke, M. R., *Burgess* v. *Wheate,* 1 Eden, 194; v. *supra,* p. 321.

[5]Lord Coke, Com. Journ. i. p. 574, ad 1621, asserted that there were about 400 *causes* in a year in the Court of Chancery at this time; if this be so, he must have had some records or materials to refer to which are now lost, or at least have not yet been brought to light.

[6]Fleta seems to have considered it as almost imperative that a dignified ecclesiastic should be appointed; his words are, "Quod uno viro provido et discreto, ut *Episcopo,* vel clerico magnæ dignitatis, debet committi, simul cum curâ majoris sigilli," Lib. ii. c. 13, p. 75. This is very remarkable, for the functions of the Chancellor, as described by Fleta, were wholly connected with the *common law.*

[1]4 Inst. 79; one of the instances may be seen in the Year Book, 17 Edward III. fo. 14.

[2]Hardy's Catalogue, p. 40.

[3]Rot. Parl. 45 E. III. No. 15, p. 304; 4 Inst. 79; and see Lord Campbell's Lives of the Chancellor's.

[4]It appears from Dugdale's and Hardy's Catalogues, and from the 3 R. II. to 3 R. III. all the Chancellors were ecclesiastics.

[5]Repeated 38 Edward III. c. 9; and as regards criminal matters, by 42 Edw. III. c. 3. There is a petition, 25 Edward III. Rot. Parl. vol. ii. p. 239; Palgrave, 35, 36, praying to a similar effect, to which the king gave his sanction.

[1]Parkes's History of the Court of Chancery, p. 34.

[2]By stat. 1 Edw. III. stat. 2, c. 15; 2 Edw. III. c. 6; 18 Edw. III. stat. 2, c. 3, and 31 Edw. III. c. 1.

[1]These statutes were extended by 8th Hen. VI. c. 9, § 2, 3 and 6, by which the Justices were empowered to give restitution, and treble damages were given. By 31 Eliz. c. 11 and 21 Jac. I. c. 15, the provisions of these statutes were extended. But the law (as Mr. Hallam has observed, Mid. Ages, iii. p. 246-250) permitted a person *to enter* upon lands of which he had been disseised. The learning as to what circumstances deprived a man or his heirs of this right, fills several pages of Lord

Coke's 1st Institute, 23-76; and Littleton has a chapter on the subject, Lit. iii. c. 6, "Discents which toll entries;" but as has already been noticed, Spence, p. 221, the doctrine was of *Roman original.*

[2]By the answer to the petition it would rather appear that it was the Common Law Court that was referred to on this occasion.

[3]5 Rich. II. No. 17, 4 Inst. 79, Rot. Parl. iii. p. 100; the answer is in page 102. Special Commissions of Oyer and Terminer were resorted to in some cases, as will be noticed hereafter.

[4]The Count of the palace was specially charged by Charlemagne to take charge of the interests of the poor, Cap. Car. Mag. et Ludov. iii. § 77.

[5]M. Par. ad. ad 1258.

[1]By the statute 4 Hen. VII. c. 12, § 2, parties aggrieved by default of Justices of the Peace were allowed to complain to the King or the Chancellor.

[2]See their petitions, 3 Rich. II. No. 49, Rot. Parl. III. p. 44, Parkes, p. 39; like petition, 7 Rich. II. Introd. to Clo. Rolls, p. xxix.

[3]There were two lay Chancellors (2 & 5 Rich. II.) at the beginning of this reign, but from the 3d year to the end of this reign (with the short exception of the appointment of Sir M. de la Pole, 6 Rich. II.) the Chancellors were ecclesiastics; two archbishops, and five bishops held the office in this reign.

[4]See Additional Note 1, Spence, Equitable Jurisdiction of the Court of Chancery, p. 353.

[5]Lord Ellesmere (Treatise, p. 21) describing the Court, says, "It is the refuge of the poor and afflicted—it is the altar and sanctuary for such as, against the might of rich men and the countenance of great men, cannot maintain the goodness of their cause and truth of their title." In the time of Hen. VI. we find it expressly recognized, that a man should have a subpœna against a great man to keep the peace, Crompton, 42 a.

[1]V. *infra,* and Sir H. Seton on the Court of Chancery, p. 5 and p. 18.

[2]The ordinances for the regulation of the offices and officers of the Courts of Chancery, hereafter particularly noticed, were made 12 Rich. II. In the Treatise of the Masters of the Chancery, Harg. Law. Tr. 309, it is stated, referring to Rot. Parl. 15 Rich. II. p. 1, that the patent appointing Chancellor Preston ran in these large terms,—"ad omnia et singula quæ ad expeditionem legum, et bonum regimen terræ necessario requiruntur." Preston was not Chancellor, he was Lord Keeper of the Great Seal in Ireland, Cal. Rot. Parl. 15 Rich. II. No. 27. But this writ may perhaps be taken as an indication of what the powers of the Chancellor in both kingdoms were considered to be, in the precincts of the palace at least.

[3]Hardy's Preface to the Calendars, p. xxv. xxvii.

[4]See Spence, Equitable Jurisdiction of the Court of Chancery, Book III. title, *Obsolete Jurisdiction of the Court of Chancery.*

[1]13 Rich. II. No. 30, Rot. Parl. iii. 266; Palg. Council, p. 70; Hardy, Introduction to Close Rolls, p. xxix; Legal Jud. p. 32; 4 Inst. 82.

[2]Summary by Sir H. Seton, 21, 23, 24.

[3]28 Edw. III. c. 3; 39 Edw. III. c. 14; 42 Edw. III. c. 3; Crompt. 41 b; Lord Ellesmere's Treatise, p. 53.

[1]Calendars, i. p. 6, 11, 12.

[2]The writ temp. R. II. set out Cal. vol. i. p. 5, runs, "Coram nobis et dicto consilio nostro in cancellariâ."

[3]See the petitions of the Commons, 12 R. II. & 17 R. II. *sup.;* and 3 Hen. V. ad 1415; Rot. Parl. vol. iv. p. 84, No. 46; Parkes, p. 47.

[4]Cal. vol. i. p. 1, 2, &c. The notices of the decrees made in this reign that have come down to us are few, but we have some memorials of the decrees and injunctions of that time. See Moore's Rep. p. 554; and the Dict. of Egerton, Lord K., 2 Inst. 553, 4 Inst. 83.

[5]See the case, Rot. Parl. 17 R. II. 2 Inst. 553, 4 Inst. 83.

[1]Rot. Parl. iii. p. 297; Introd. to Close Rolls, xxix. n.; and see Proceedings of Privy Council, by Sir Harris Nicholas, p. 18; Seton, p. 17, and Rot. Parl. iii. p. 258, 9.

[2]See particularly the letter of Henry V. to his Chancellor, Cal. vol. i. p. 16; and see Sir H. Seton, p. 106.

[3]John de Scarle, Master of the Rolls, was made Chancellor and Keeper of the Seal, 1 Edw. IV., Dugdale.

[4]See Ranke's Hist. of the Popes, i. 35, Mrs. Austin's edition, and the general histories of the times. It was in this reign, as it will be remembered, that the famous Wickliffe flourished.

[1]Rot. Parl. 11 Rich. II. Pref. to Sir J. Davis's Rep. and Duck. xxvi. viii.

[1]Many quotations establishing this fact, will be found in the pages of Spence, Equitable Jurisdiction of the Court of Chancery, particularly under the title *Injunction;* and I may refer to Mr. Parke's History of the Court of Chancery, during the reigns of Henry VIII., Elizabeth, and James, to supply the rest.

[2]Hargr. Law Tracts, p. 327. This treatise was written against St. Germain's Doctor and Student; there is a reply to it in the same collection, p. 332.

[3]One of his illustrations is, that relief was given where the amount secured by a bond or recognizance had been paid, and no release obtained. When a bill, says he, has been made to them (the Chancellors) that such a man should have great wrong to be compelled to pay two times for one thing, the Chancellor, not knowing the goodness of the Common Law, has temorously directed a subpœna to the plaintiff, commanding him to cease his suit (referring, no doubt, to Doctor and Student, c. 12, where it is so laid down; also by Lord Ellesmere, p. 106); and he, regarding no law, but trusting to his own wit and wisdom, giveth judgment as it pleaseth him; Hargrave's Tracts, p. 326. It was held by Fairfax, and Hussey, J., in the Exchequer Chamber, 22 Edw. IV. 6, that no subpœna should issue in such case, for that the testimony of two witnesses should not defeat a matter of record, or specialty; even the Chancellor agreed as to matter of record.

[4]See the denunciations against the false and crafty invention, and the continuance, of Uses, ib. p. 329. Lord Bacon (Read. p. 40) notices the immoderate invectives against Uses which were current in his time. I have endeavored, as matter of curiosity, to ascertain whether the renewal of Uses, under the form of Trusts, took place under the lay or clerical Chancellors, who held the seals after the passing of the Statute of Uses. The first decision on the subject recorded by Tothill, is 9 Car. I., that would have been under Lord K. Coventry, who was appointed 1 Car. I. Williams, Bishop of Lincoln, immediately preceded him; but the date given in Tothill, as usual, is incorrect; there is no notice of such a cause in that year; the decisions at law, which caused the introduction of Trusts, took place during the Chancellorship of Heath, A. B., of York, Dyer, 155 a, *Tyrrell's* case; and it is not improbable that it was the Archbishop who made the first decree establishing a modern Trust. If the old Registrar's books had been moderately legible, I might possibly have looked through them, to solve this, and some other questions still remaining, as to the early jurisdiction of the court.

[1]See the petitions, Vin. Abr. iv. 378.

[2]4 Hen. IV. c. 23, Crompt. 41 b.

[3]*Dodd* v. *Browning,* Cal. i. p. 13. The proceedings after this time became distinguished as by "English Bill."

[4]Petition of the Commons, 3 Hen. V. Rot. Parl. iv. p. 84, &c.; the answer was, Le Roy soy avisera. See Introd. Clo. R. xxx. Leg. Jud. 33. It was on a similar petition, 15 Hen. VI., that the statute or ordinance mentioned in the text was framed.

[5]See the Petition, 8 Hen. IV., cited Parkes, 47; though the reference is incorrect; 9 Hen. V. Rot. Parl. iv. p. 156; 1 Hen. VI. Rot. Parl. iv. p. 189; and see Palgr. Council, 49, 50.

[1]See the case as to waste, temp. Rich. II. cited by Lord K. Egerton, 41 Eliz. Moore's Reports, p. 554; and the observations of Fairfax, J., temp. Edw. IV. Y. B. 21 Edw. IV. fo. 23; Brooke's Abr. title "Conscience," affords many such instances.

[2]Petition of Commons, 8 Hen. V. Rot. Part. iv. 127, No. 12; and see Report of Lords' Committee (1823), p. 368.

[3]Rot. Parl. iii. p. 633, No. 43; ibid. iv. 151; Cruise, i. p. 392.

[4]See Additional Note (2), p. 353, Spence, Equitable Jurisdiction of the Court of Chancery.

[5]Cal. vol. ii. p. 16. 31; vol. i. p. 51, 52; Palgr. Council, 97. In the 6 Hen. VI. Rot. Parl. vol. iv. p. 321-2, No. 17, is a petition by two executors against a third, who had wasted the testator's goods, which was presented to the Commons, and was carried by them to the Lords; it was thereupon ordered in Parliament, that the Chancellor to whom the matter was referred, should hear and determine the matter as "good faith and conscience" should require, Palgr. Council, p. 77.

[6]Pref. to Cal.

[7]3 Bla. Comm. i. p. 53; Palgr. Coun. 97. In some cases the parties were referred to Parliament, Crompt. 46 b.

[8]Y. B. 9 Edw. IV.; 22 Edw. IV.; Crompt. 41 b, &c.

[9]Palgr. Council, 97.

[1]2 Hen. V. stat. 1, c. 9; 33 Hen. VI. c. 1; Palgr. Council, p. 94.

[2]See Clarendon's Hist. of the Rebellion, ed. 1721, i. p. 285; 4 Inst. 60, 61; the stat. 27 Edw. III. against those who appealed to the Papal Court, recognizes this Council as distinct from the Chancery.

[1]See Reg. Lib. B. 1579, fo. 479.

[2]*Int. al.* forcible entry, Reg. Lib. B. 1587, fo. 626.

[3]4 Inst. 63; Hob. Rep. p. 62, &c.; Sir F. Palgr. Council, 97.

[4]4 Inst. 61. 63; Sir F. Palgr. Council, p. 4.

[5]Reg. Lib. B. 1579, fo. 479.

[6]Clarendon, Rebell. i. 215.

[1]Spence, p. 337.

[2]The Lord Keeper "moved with compassion towards the poor man," applied to the Master of the Requests to take order of a suit instituted in Chancery to be relieved from mistake, Reg. Lib. 5 & 6 Eliz. fo. 471.

[3]Palgrave, Council, 79, 99; and see stat. 16 Car. I. c. 10; Seton, p. 18; 4 Inst. 97; 3 Bla. Comm. 50, Christian's note.

[1]See Palgr. Council, 27. 32, 33. 126.

[2]At the Parliament of Northampton, 2 Edw. III.

[3]See Palgr. Counc. 32-3, et v. ib. 126-7, 9.

[4]Petition of the Commons, 3 Hen. V. ad 1415, Parkes, p. 48, 50.

[5]Sir H. Seton has given a short account of them, p. 3. 10, 12. And see Lord Redesdale, Pleading, by Jeremy, p. 6. 151.

[6]Hoveden, 707, 29; Heywood, p. 85.

[7]Stat. 15 R. II. c. 13.

[1]These extracts are from "The History of English Law," 1903, vol. I, pp. 352-401 (London: Methuen & Co.).

[2]Lecturer in St. John's College, Oxford. A biographical note of this author is prefixed to Essay No. 9, in volume I of this Collection.

[1]Bryce, Holy Roman Empire, 105, 106.

[2]24 Henry VIII. c. 12. Cp. the Arrêt of the Parliament of Paris (1417) Ecclesiastical Commission 1883, 171, "Le Roi notre Sire est *Empereur en son Royaume,* non tenant d'aucun que de Dieu, et non resortissant à quelque personne ou Seigneur que ce soit: et comme Roi et Empereur peut faire Loix en son Royaume, contre lesquels nul de son Royaume peut venir, *directs nec indirecte,* et mêmement par voye d'appel sur peine de Leze-Majesté."

[1]Bryce, Holy Roman Empire, 109.

[2]P. and M. i 89.

[3]Ibid. 92; Encyclopædia Britannica (9th Ed.) sub voc. Canon Law.

[4]Alternative names were canonistæ and civilistæ.

[1]Innocent III. is said to have published 4000 laws.

[2]The five books dealt with (1) ecclesiastical officials and judges; (2) procedure in Ecclesiastical Courts; (3) rights, duties and property of the clergy: (4) marriage; (5) criminal law and ecclesiastical discipline: "Judex, Judicium, Clerus, Connubia, Crimen."

[3]Encyclopædia Britannica (9th Ed.) sub voc. Canon Law; P. and M. i 92, 93.

[4]Instances are, Johannes Teutonicus (1212) and Bartholomæus Brixensis (1258) on the Decretum; Bernardus Parmensis (1266) on the Decretals; Joannes Andreæ (1318) on the Sext and the Clementines.

[5]Maitland, Canon Law, 37.

[1]Maitland, Canon Law, 4-6.

[2]Ibid 16-42.

[3]Ibid 46.

[4]Ibid 103-105, 130.

[5]Ibid 129.

[6]f. 412 (cited ibid 106 n. 1). "Imprimis sicut dominus papa in spiritualibus super omnibus habeat ordinariam jurisdictionem, ita habet rex in regno suo ordinariam in temporalibus, et pares non habet neque superiores; et sunt qui sub eis ordinariam habent in multis, sed non ita meram sicut papa vel rex."

[7]Maitland, Canon Law, 108-115. This is clear from William of Drogeda's Summa (1239) dealing with procedure in ecclesiastical cases.

[8]Ibid 122, 123. Knowledge of the Canon Law was an avenue to preferment. Peckham was Auditor Causarum at Rome before he was Archbishop of Canterbury. Simon of Sudbury was one of the judges of the Rota at Rome. Chicheley was Doctor of Civil and Canon Law, Hale, Precedents of Cases in the Ecclesiastical Courts, xxxii, xxxiii.

[1]Maitland, Canon Law, 116-120.

[2]Maitland, Canon Law, 74, "Some of these prelates were in all likelihood far more at home when they were hearing assizes as *justiciarii domini regis* than when they were sitting as *justices ordinarii,* and they were already leaving the canon law to their schooled officials. . . . Many a mediæval bishop must have wished that, besides having two capacities, he had been furnished with two souls, unless indeed, the soul of one of his subordinates would serve as an *anima damnanda.*"

[1]25 Ed. III. St. 6; Maitland, Canon Law, 69.

[2]27 Ed. III. St. 1 c. 1.

[3]16 Rich. II. c. 5.

[4]§ 6.

[5]§ 4 The spiritual peers being asked their advice as to papal claims protested "quil n'est pas lour entention de dire ne affirmer que nostre Saint Piere le Pape ne poet

excommenger Evesques ne qu'il poet faire translations des Prelatz solonc la ley de Seinte Eglise;" but said that if bishops were excommunicated for obedience to the Pope's commands; or such translations are made whereby the king is deprived of them against his will; "que ce est encountre le Roi et sa corone sicome est contenuz en la petition avant nome." For the council of Merton and legitimation per subsequens matrimonium see Maitland, Canon Law, 53-56. For purposes other than that of descent to land the canon law rule prevailed.

[1]Holdsworth, Hist. Eng. L., vol. I, 382, 383.

[2]13 Ed. I. St. 4.

[3]9 Ed. II. St. 1.

[4]Holdsworth, Hist. Eng. L., vol. I, 392-399.

[5]Maitland, Canon Law, 58, 59; Holdsworth, Hist. Eng. L., vol. I, 400; Holdsworth, Hist. Eng. L., vol. I, App. XVIII.

[1]Hallam, Constitutional History, i 59; Stephen, H. C. L. ii 452, 453.

[2]Maitland, Canon Law, 87-89.

[1]Maitland, Canon Law, 85-87; Ecclesiastical Commission 1883, 170-176.

[2]The first mention of this term is in 27 Henry VIII. c. 20 § 1.

[3]21 Henry VIII. c. 5 (Probate); 21 Henry VIII. c. 6 (Mortuaries); 21 Henry VIII. c. 13 (Pluralities).

[4]See the recognition printed at pp. 70, 71 of the report of the Ecclesiastical Commission of 1883.

[5]Ecclesiastical Commission 1883, 33.

[1]23 Henry VIII. c. 20.

[2]24 Henry VIII. c. 12. See the reprint of the statute with the alterations made by the king in the preamble at pp. 213, 214 of the Ecclesiastical Commission report of 1883.

[1]It may be useful to contrast with this preamble the following passage from Bracton (*f* 5 b), "Apud homines vero est differentia personarum quia hominum quidam sunt præcellentes et prelati, et aliis principantur. Dominus Papa videlicet in rebus spiritualibus, quæ pertinent ad sacer dotium, et sub eo archiepiscopi, episcopi, et alii prælati inferiores. Item in temporalibus sunt imperatores, reges, et principes in hiis quæ pertinent ad regnum, et sub eis duces, comites, barones, magnates sive vavasores, et milites." The two passages well represent the old order and the new.

[2]26 Henry VIII. c. 1.

[3]Report of Ecclesiastical Commission 1883, 72.

[4]37 Henry VIII. c. 17.

[1]Report of Ecclesiastical Commission 1883, 37, 38.

[2]25 Henry VIII. c. 20.

[3]25 Henry VIII. c. 19.

[4]27 Henry VIII. c. 15; 35 Henry VIII. c. 16.

[5]Strype, Memorials, i. c. 29; Anthony Wood, Fasti s. a. 1536; Hale, Precedents, etc., xxxiv, xxxv.

Maitland, Canon Law, 92-99. As to the persons competent to be judges under the older law see Ecclesiastical Commission 1883, 26. Henry could not trust the ecclesiastical lawyers to administer an ecclesiastical law which was destitute of the leading principle of the older system—the supremacy of the pope.

[1]31 Henry VIII. c. 14.

[2]xxxvi, xxxvii. At p. xxxix he points out that there was no change in the ordinary routine of the courts; the officials made no change except that of adding to their names the words "regia auctoritate suffultus."

[3]Ecclesiastical Commission 1883, 41-43; Hale xliv-xlvii.

[4]The Consistory Court of London has no act books between the years 1546 and 1554, Hale xliv.

[1]Ecclesiastical Commission 1883, 41.

[2]1 Eliza c. 1 § 8.

[3]The form of oath to be taken in accordance with the Statute (§ 9) declared the Queen to be "supreme Governor."

[4]Article 37; cp. Ecclesiastical Commission 1883, 73.

[5]1 Eliza c. 1 § 8.

[6]Ecclesiastical Commission 1883, 49.

[7]Ibid 45.

[1]In 1832 the Ecclesiastical Commissioners (at p. 13) reported that the ecclesiastical laws . . . have been for upwards of three centuries administered in the Principal Courts by a body of men, associated as a distinct profession, for the practice of the Civil and

Canon Laws. Some of the members of this body in 1567 purchased the site upon which Doctors' Commons now stands, on which, at their own expense, they erected houses for the residence of the Judges and Advocates, and proper buildings for holding the Ecclesiastical and Admiralty Courts, where they have ever since continued to be held. In 1768 a Royal Charter was obtained, by virtue of which the then members of the Society, and their successors, were incorporated under the name and title of "the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts." It saw to the strict observance of the rule that only civilians should be appointed by the bishops as their chancellors, Ecclesiastical Commission 1883, 46. It was dissolved under the provisions of 20, 21 Vict. c. 77 §§ 116, 117.

[2]Coke, 2nd Instit. 601-609 gives the objections of Archbishop Bancroft and the answers of the judges. In his anxiety to escape from these prohibitions the archbishop comes near to hinting that there had been a breach of continuity. "As both the Ecclesiastical and Temporal jurisdictions be now united in his Majesty, which were heretofore *de facto* though not *de jure* derived from several heads, we desire to be satisfied by the judges, whether . . . the former manner of Prohibitions . . . importing an Ecclesiastical Court to be *aliud forum a foro regis,* and the Ecclesiastical law not to be *legem terrœ,* and the proceedings in those Courts to be *contra Coronam et Dignitatem Regiam* may now without offence to the King's Ecclesiastical prerogative be continued, as though either the said jurisdictions remained now so distinguished and several as they were before, or that the laws Ecclesiastical, were not the King's and the Realm's Ecclesiastical Laws." To which the orthodox answer was given "that both jurisdictions were ever *de jure* in the Crown, though the one sometimes usurped by the see of Rome; but neither in the one time nor in the other hath ever the form of Prohibitions been altered, nor can be but by Parliament," pp. 601, 602.

[3]Holdsworth, Hist. Eng. L., vol. I, p. 327.

[4]Mackonochie v. Lord Penzance (1881) L. R. 6 A. C., at p. 446.

[1]Eliza. c. 1 § 20; Holdsworth, Hist. Eng. L., vol. I, p. 386.

[2]1 Eliza c. 2 § 2.

[3]§§ 4 and 5.

[4](1591) 5 Co. Rep. 1.

[5]At p. 8 a.

[1]At p. 9 b; cp. p. 32 b, "If it be demanded what canons, constitutions, ordinances and syndols provincial are still in force within this realm, I answer that it is resolved and enacted by authority of Parliament, that such as have been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes and customs of the realm, nor to the damage or hurt of the king's prerogative royal, are still in force within this realm, as the king's ecclesiastical laws of the same." Cp. also the Queen v. Millis (1844) 10 Cl. and Fin. 678 per Tindal, L. C. J., "The law by which the Spiritual Courts of this kingdom have from the earliest times been

governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those courts *proprio vigore,* but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our Archbishops and Bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law."

[2]Phillimore, Ecclesiastical Law (1895) 3. Cp. Martin v. Mackonochie (1868) L. R. 2 Ad. and Eccl. 116 for a full statement of the orthodox legal and ecclesiastical view.

[3]16 Car. I. c. 11; 13 Car. II. St. 1 c. 12.

[1]Powell, J., in the Seven Bishops case (1688) 12 S. T. at p. 427, said to the jury, "I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of there will need no Parliament." Cp. Stillingfleet, Eccl. Cases, Discourse ii, chap. iii.

[2]Holdsworth, Hist. Eng. L., vol. I, pp. 378-380.

[1]Ecclesiastical Commission 1832, 11, 12; Eccl. Commission 1883, 25, 26.

[2]Rex v. Tristram L. R. 1902, 1 K. B. 816.

[3]He is the official of the bishop in outlying portions of the diocese, Phillimore, Eccl. Law, 933.

[4]Ecclesiastical Commission 1883, 25, 26.

[5]Stubbs, Sel. Ch. 85, "Nullus episcopus vel archidiaconus delegibus episcopalibus amplius in hundret placita teneant nec causam quæ ad regimen animarum pertinet ad judicium secularium hominum adducant." Offenders are to be tried, "non secundum hundret sed secundum canones et episcopales leges."

[6]Ecclesiastical Commission 1883, 25, 26.

[1]It was the duty of Rural Deans to report on the manners of the clergy and laity. This rendered them necessary attendants at the episcopal visitation, and gave them at one time a small jurisdiction. Sometimes this was specially delegated to them. But this had ceased to be the case before the Reformation. The jurisdiction was absorbed by the archdeacon, Phillimore, Eccl. Law, 211-213.

[2]Ecclesiastical Commission 1883, 26.

[3]Report at p. 11. At p. 21 their number is estimated at 300. It was said that "there were some of so anomalous a nature as scarcely to admit of accurate description. In some instances these jurisdictions extend over large tracts of country, embracing many towns and parishes, as the Peculiar of the Dean of Salisbury. In others several places may be comprehended, lying at a great distance, apart from each other. Again

some include only one or two parishes." Cp. Hale, Precedents, etc., xxix-xxxi. One peculiar of the abbey of St. Albans extended over 26 parishes, and in 1505-1536 700 wills were there proved. In the Commissary's court for the City of London, 1496-1500, 1854 persons were cited, ibid liii.

[1]1, 2 Vict. c. 106; 3, 4 Vict. c. 86; 10, 11 Vict. c. 98; Phillimore, Eccl. Law 927.

[2]The archbishop of Canterbury had also a Diocesan court for the Diocese of Canterbury which was held by a Commissary, Ecclesiastical Commission 1883, 31. As to these courts generally see ibid 31, 32, 44-46.

[3]The offices of Dean of the Arches and Official Principal became merged (4th Instit. 337). The courts of both the Official Principal and the Dean sat at St. Mary-le-Bow which was built on arches. Hence the court of the Official Principal becomes known as the court of the Arches.

[4]Maitland, Canon Law, 117-120.

[5]23 Henry VIII. c. 9.

[6]Ecclesiastical Commission 1853, 31.

[7]Ibid 46.

[1]Ecclesiastical Commission 1853, 31; Phillimore, Eccl. Law, 922, 923; Coke, 4th Instit. 337, said that it possessed no contentious jurisdiction, but dealt merely with matters pro forma, e. g. the admission to benefices, etc.

[2]Ecclesiastical Commission, 1883, 190.

[3]Read v. Bishop of Lincoln (1888) 13 P. D. 221; (1889) 14 P. D. 88. The exact nature of the jurisdiction then exercised is by no means clear, Phillimore, Eccl. Law, 73, 74.

[4]Ecclesiastical Commission 1883, 31.

[5]Lyndwood 174 sub yoc. Laicis; Bl. Comm. ii. 509. The value was ultimately fixed at £5.

[6]Goffin, the Testamentary Executor, 69, 70.

[7]Ecclesiastical Commission 1883, 31.

[8]Phillimore, Eccl. Law, 922; Rex. v. Archbp. of Canterbury L. R. 1902, 2 K. B. 503.

[1]Ibid.

[2]37, 38 Vict. c. 85 § 7.

[3]I. e. The official who granted dispensations (25 Hy. VIII. c. 21) 4th Inst. 337.

[4]Ecclesiastical Commission 1883, 45, 46, 52-69; Read v. Bishop of Lincoln (1889) 14 P. D. 114-117.

[5]4th Instit. 322; cp. Hale, 1 P. C. 390; Gibson, Codex, 353 n.g.

[6](1712) Brod. and Free 325.

[1]Ecclesiastical Commission 1883, 30; Engl. Hist. Review xvi 40, 41.

[2]Ecclesiastical Commission 1883, 30.

[3]24 Henry VIII. c. 12.

[4]Causes testamentary, causes of matrimony and divorce, rights of tithes, oblations and obventions. This did not apparently include heresy.

[5]25 Henry VIII. c. 19. Repealed 1, 2 Phil. and May, c. 8. Revived 1 Eliza. c. 1 with a saving for certain pending appeals to the Pope.

[1]§ 4.

[2]§6.

[3]Rothery's Return (Parliamentary Papers 1867, lvii 75) x-xii.

[4]Ecclesiastical Commission 1883, 47.

[5]Rothery's Return xx-xxii.

[1]Ecclesiastical Commission (1832) Special Rep. 6.

[2]Ibid 6, 159, 160 (Evidence of Joseph Phillimore).

[3]But a recourse to the Delegates by the special provision in the patent of a Colonial Bishop was still possible, Rothery's Return 100.

[4]Holdsworth, Hist. Eng. L., vol. I, p. 293. The hearing of Ecclesiastical cases was not actually mentioned. It was assumed that this jurisdiction passed, and this was recognized by the Church Discipline Act, 3, 4 Vict. c. 86 § 16.

[5]1 Eliza, c. 1 § 8; Ecclesiastical Commission 1883, 49, 50.

[6]Nothing excited more odium than the "ex officio oath." "This procedure, which was wholly founded on the canon law, consisted in a series of interrogations, so comprehensive as to embrace the whole scope of clerical uniformity, yet so precise and minute as to leave no room for evasion, to which the suspected party was bound

to answer upon oath," Hallam, C. H. i 202. It was abolished by 13 Car. II. St. 1, c. 12 § 4.

[1]Prothero, Documents, xl-xlv 227-241.

[2]Ecclesiastical Commission 1883 50; cp. Cases in the Courts of Star Chamber and High Commission (C. S.); Stephen, H. C. L. ii 420-427.

[3]Rymer, Fœdera, xvi 291, 386.

[4]The Commissions of those years provided for a commission of review.

[5]Prothero, Documents, xlvi; Hale, Precedents, etc., xlviii, xlix.

[1]xlvi.

[2]Holdsworth, Hist. Eng. L., vol. I, pp. 290, 291.

[3]5 Rep. 1 (1591) at p. 8 a (and cp. Moore 755) it was said that such a commission would have been lawful by virtue of the Royal Supremacy, apart from the act of Supremacy. James II.'s lawyers would probably have justified their action in setting up a new court of High Commission on some such ground as this, Stillingfleet, Eccl. Cases, ii 200, 201.

[4]4th Instit. 326. Cp. Stephen, H. C. L. ii 416-418.

[5]Ibid 326, 328.

[6]Ibid 331.

[7]Ibid 332-334.

[8]Prothero, Documents, 302-305.

[9]16 Car. I. c. 11.

[10]13 Car. II. St. 1 c. 12 § 3.

[1]At p. 56.

[2]3, 4 Vict. c. 86.

[3]§ 3.

[4]§ 23.

[5]§§ 3, 4, 5.

[6]§ 6.

[7]§ 7.

[8]§ 9.

[9]§§ 11, 13.

[10]§ 13.

[11]§ 15.

[1]Ecclesiastical Commission 1883, xlvi.

[2]§ 19.

[3]§ 22.

[4]§ 14.

[5]55, 56 Vict. c. 32 § 14. 3. The sections of the Church Discipline Act, which are saved, are contained in the schedule. They relate to the definition of terms; power of the bishop to pronounce sentence at once with the consent of the parties; power of the bishop to inhibit the accused party pending enquiry; witnesses to be examined on oath; power as to exempt or peculiar places.

[6]§ 1.

[7]§ 2; cp. Sweet v. Young L. R. (1902) P. 37.

[8]§ 2, a, c, e.

[9]§ 4.

[10]37, 38 Vict. c. 85. Cp. Ecclesiastical Commission 1883 xlvii-xlix; and Green v. Lord Penzance L. R. (1881) 6 A. C. 657.

[1]§ 8.

[2]§ 9.

[3]§ 9.

[4]§ 9.

[5]§ 9.

[6]At p. xlix.

[7]61, 62 Vict. c. 48.

[8]§§ 2, 3. 1.

[9]§ 3. 1.

[10]§ 3. 2.

[11]§ 9.

[1]P. and M. i 430-440; Maitland, Canon Law, 132-147.

[2]Sel. Ch. 138, Clerici rettati et accusati de quacunque re, summoniti a justicia regis venient in curiam ipsius, responsuri ibidem de hoc unde videbitur curiæ regis quod ibidem sit respondendum; Et in curia ecclesiastica, unde videbitur quod ibidem sit respondendum; ita quod justicia regis mittat in curiam sanctæ ecclesiæ ad videndum qua ratione res ibi tractabitur. Et si clericus convictus vel confessus fuerit, non debet de cetero eum ecclesia tueri.

[1]P. and M. i 437, 438 and notes.

[2]Bracton, f. 123 b, states the old practice; Britton, i 27, the new. Coke, 2nd Instit 164, assigns the change to Stat West I. c. 2 (1275). The rolls show that the change had taken place before the Statute, P. and M. i 425 n. 2.

[3]Holdsworth, Hist. Eng. L., vol. I, pp. 138-140. Hobart, Rep. 291 in 1620 described it as “turning the solemn trial of truth by oath into a ceremonious and formal lie.”

[4]P. and M. 429, 430.

[1]For the detailed history of the process see Stephen, H. C. L. i. 458-472; cp. Hale, 2 P. C. 323-390; and Bl. Comm. iv. 358-367.

[2]25 Ed. III. Stat. 3 c. 4.

[3]5 Anne, c. 6 § 6.

[4]1 Ed. VI. c. 12 § 16.

[5]3 Will. and Mary c. 9 § 6.

[6]4 Henry VII. c. 13. The distinction was abolished 28 Henry VIII. c. 1 § 7, but restored by 1 Ed. VI. c. 12 § 14.

[7]1 Ed. VI. c. 12 § 14.

[8]Carter, Legal History, 200. The new practice was also advantageous to the revenue, as, if convicted after pleading to the indictment, the prisoner’s goods were absolutely forfeited; whereas if he were convicted without pleading to the indictment, they were restored if he successfully made his purgation.

[9]18 Eliza. c. 7 §§ 2, 3.

[1]4 Geo. I. c. 11.

[2]Stephen, H. C. L. i 464.

[3]Stephen, H. C. L. i. 464-466.

[4]7, 8 Geo. IV. c. 28 § 6. This act did not repeal 1 Ed. VI. c. 12. There was consequently a doubt whether even after this act of 7, 8 Geo. IV. peers might not claim clergy. The doubt was set at rest by 4, 5 Vict. c. 22, which put peers accused of crimes on the same footing as commoners.

[5]Hale, Precedents, lvii.

[1]Stephen, H. C. L. ii 438. See the Litany, "Sedition, privy conspiracy, and rebellion," are co-ordinated with "false doctrine, heresy and schism."

[2]Maitland, Canon Law, 158-175; Bracton ff. 123 b, 124. He explains that, as a rule, degradation is a sufficient punishment for the clerk. But if convicted of apostasy he must be burnt, "secundum quod accidit in concilio Oxoniensi celebrato a bonæ memoriæ S. Cantuariensi archiepiscopo, de quodam diacono qui se apostatavit pro quadam Judæa, qui cum esset per episcopum degradatus, statim fuit igni traditus per manum laicalem." Cp. Hale 1 P. C. 394 for two other doubtful cases.

[3]Lyndwood 293 refers to a decree of Frederic II., which had been approved by the pope, and incorporated into the Canon Law as c. 18 in Sexto, 5. 2.

[4]293 sub voc. pœnas in jure expressas. "Sed hodie indistincte illi qui per judicem ecclesiasticum sunt damnati de Heresi, quales sunt pertinaces et relapsi, qui non petunt misericordiam ante sententiam, sunt damnandi ad mortem per sæculares potestates, et per eos debent comburi seu igne cremari, ut patet in constitutione Frederici quæ incipit *ut commissi* § *item mortis* . . . quæ sunt servandæ ut patet e. ti. *ut inquisitionis."*

[1]Stephen, H. C. L. ii 445-447; Maitland, Canon Law, 176, 177.

[2]2 Henry V. St. 1 c. 7.

[3]Stephen, H. C. L. ii 450.

[4]25 Henry VIII. c. 14.

[5]Stephen, H. C. L. ii 455.

[6]31 Henry VIII. c. 14.

[1]1 Ed. VI. c. 12.

[2]1550, Joan Boucher was burnt as a heretic.

[3]1 Eliza. c. 1 § 8.

[4]§ 20. They could adjudge nothing heresy but such as had been adjudged to be heresy "by the authority of the canonical scriptures, or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy by the express or plain words of the said canonical scriptures, or such as hereafter shall be . . . determined to be heresy by the High Court of Parliament of this realm with the assent of the Clergy in their Convocation." As Stephen says, H. C. L. ii 461, this meant that no one could be declared heretic, because of his views as to the Catholic and Protestant controversy, unless he was anabaptist.

[5]Rep. xii 93.

[6]29 Car. II. c. 9.

[1]Cp. Chaucer's summary in the Friar's Tale:—

> "Whilom there was dwellyng in my countré
> An erchedeken, a man of gret degré,
> That boldely did execucioun,
> In punyschyng of fornicacioun,
> Of wicchecraft, and eek of bauderye,
> Of diffamacioun, and avoutrie,
> Of chirche-reves, and of testamentes,
> Of contractes, and of lak of sacraments,
> And eek of many another maner crime,
> Which needith not to reherse at this tyme;
> Of usur, and of symony also;
> But certes lecchours did he grettest woo;
> They schulde synge, if that they were hent;
> And small tythers they were fouly schent,
> If eny persoun wold upon hem pleyne,
> Ther might astert him no pecunial peyne.
> For smale tythes and for smal offrynge,
> He made the people pitously to synge.
> For er the bisschop caught hem in his hook,
> They weren in the archedeknes book:
> And hadde thurgh his juredicciooun
> Power to have of hem correccioun."

In vol. xxv (11-56) of the Archælogia Cantiana there is an account of various presentments made between the reigns of Elizabeth and Anne in certain parishes in the Deanery of Westhere. They are of the same general character as those collected by Hale. The extracts after the Restoration deal as a rule simply with ecclesiastical matters.

[1]Hale, Precedents, lvii, lviii.

[2]H. C. L. ii. 402.

[3]Hale, Precedents, liv.

[4]13 Car. II. St. 1 c. 12.

[1]25 Henry VIII. c. 6; 33 Henry VIII. c. 8. Stephen, H. C. L. ii 430, says that the reason why incest in its worst form is not a crime is probably because it was, and still is, an ecclesiastical offence.

[2]1 Jac. I. c. 11.

[3]4 Geo. IV. c. 76.

[4]18, 19 Vict. c. 41.

[5]23, 24 Vict. c. 32.

[6]Co. Litt. 96 b; cp. Phillimore v. Machon (1876) L. R. 1 P. D. 481.

[7]Holdsworth, Hist. Eng. L., vol. I, pp. 378-380.

[8]Stephen, H. C. L. ii 437.

[9]Constitutions of Clarendon c. 15; Circumspecte Agatis, 13 Ed. I.; P. and M. ii 195-200; Holdsworth, Hist. Eng. L., vol. I, p. 242.

[1]Glanvil vii 13, 14; P. and M. ii 365, 366.

[2]Bracton f. 407 b.

[3]P. and M. ii 372-383.

[4]The Queen v. Millis, 10 Cl. and Fin. 534; Beamish v. Beamish, 9 H. L. C. 274; P. and M. ii 369, 370-372.

[1]Ecclesiastical Commission 1832, 43.

[2]Encyclopædia Britannica (10th Ed.) Tit. Divorce. In Lord Northampton's case (Ed. VI) the delegates pronounced in favour of a second marriage after a decree of divorce a mensa et thoro. In the Reformatio Legum the power to grant a complete divorce was recommended.

[3]Foljambe's case; Porter's case, 3 Cro. 461.

[4]1669 Lord de Ross; 1692 Duke of Norfolk. Before 1715 only 5 such bills were known, between 1715 and 1775 there were 60, between 1775 and 1800 there were 74, between 1800 and 1850 there were 90.

[1]20, 21 Vict. c. 85.

[2]§§ 8 and 9.

[3]§ 55.

[4]31, 32 Vict. c. 77.

[5]20, 21 Vict. c. 85 §§ 6, 7, 27, 31, 33.

[6]§ 59.

[7]§ 21.

[1]Encyclopædia Britannica loc. cit.

[2]Selden, Original of the Ecclesiastical Jurisdiction of Testaments, chap. i.

[3]Ibid, chap. vi. Cp. P. and M. ii 339.

[1]Selden, ibid, chap. v, cites a case in Saxon times in which a testator made three copies of his will. One he kept; another he handed to the abbot of Ely, the chief beneficiary; the third he gave to the alderman "et petiit ab illo ut suum testamentum stare concederet." Ibid, chap. vii, there is a case of King John assenting to or licencing the will of a certain Oliver de Rocheford.

[2]vii 8, Placitum de testamentis coram judice ecclesiastico fieri debet.

[3]Selden, Original, etc., chap. v.

[4]Britton i 75 does not mention this among the royal franchises.

[5]P. and M. ii 340. Alexander II. granted to the Cistercians in England the right to grant probate of the wills of their tenants and farmers. In other cases this jurisdiction may be the result of mere usurpation. In 1342 Archp. Stratford complained of this; and this was not a single instance, Lyndwood 260, 263.

[6]Hensloe's case (1600) 9 Co. Rep. 36; Lyndwood 176 sub voc. ecclesiasticarum libertatum.

[7]174 sub voc. approbatis.

[8]Original, etc., chap. vi. Cp. P. and M. ii 339 n. 4.

[1]Selden, Disposition of Intestates' Goods, chap. i; Dyke v. Walford (1846) 5 Moo. P. C. 434, 487.

[2]Charter of Henry I. § 7 (Sel. Ch. 101).

[3]Selden, Disposition, etc., chap. ii.

[4]John of Athona 122.

[5]Disposition, etc., chap. iii.

[6]P. and M. ii 358 n. 2.

[7]M. C. 1215.

[8]f. 60 b.

[9]Bracton f. 60 b.; P. and M. ii 355, 356.

[1]A constitution of archbp. Stratford in 1342 recites that the clergy as executors and administrators have converted goods to their own use, "in ecclesiarum fraudem seu damnum suorum creditorum liberorum et suarum uxorum qui et quæ quam de jure tam de consuetudine certum quotam dictorum bonorum habere deberet." Cp. 13 Ed. I. c. 19; Bl. Comm. ii 495.

[2]31 Ed. III. St. 1 c. 11; 21 Henry VIII. c. 5. It is after the statute of Ed. III. that we get the term administrator technically used. Before, the term had been executor dative and executor testamentary, P. and M. ii 359 n. 1.

[3]Selden, Original, etc., chaps. iii and iv.

[4]Cited ibid, chap. iv, "Si heredes jussa testatoris non impleverint, ab episcopo loci illius omnis res quæ eis relicta est canonice interdicatur cum fructibus et cæteris emolumentis ut vota defuncti impleantur."

[1]vii 6, 7; xii 17.

[2]Original, etc., chap. vii.

[3]Original, etc., chap. viii.

[4]Bracton f. 407, "Item non locum habet prohibitio in causa testamentaria si catella legentur et inde agatur in foro ecclesiastico;" Fleta II. 57. 13.

[5]Bracton's Note Book no. 381.

[6]On this subject see Goffin, The Testamentary Executor 37-63.

[7]vii 8; Holmes, Common Law, 346-348.

[8]ff. 61, 407 b.

[1]f. 407 b; Goffin 40-44.

[2]Britton i 163; Fleta II. 62. 10 “Et notandum quod hæres non tenetur in Anglia ad debita Antecessoris reddenda, nisi per Antecessorem ad hoc fuerit obligatus, præterquam debita Regis tantum, et super hoc fit Statutum tale in magna carta”—i. e. § 26 (1215).

[3]Goffin 45-47.

[4]P. and M. ii 345.

[5]Goffin 47-63.

[6]Specialty debts where the heir is named.

[7]Lyndwood 176 sub voc. inventarium. Cp. 21 Henry VIII. c. 5 § 4.

[8]Ibid 180 (sub voc. sibi). “Inferiores, viz., Ordinarii coram Episcopo, Episcopus coram Archiepiscopo . . . Archiepiscopus autem de administratis per eum coram suis confratribus in Concilio Provinciali reddet rationem; non tamen ab eis, si quid suspiciose fecerit, redarguendus est, sed suo Superiori, viz., Papæ super hoc denunciandus.”

[1]170 (sub voc. sufficienter cavere); 176.

[2]Lyndwood 171, 179.

[3]Constitution of Archbp. Stratford, Lyndwood, at pp. 180, 181.

[4]Lyndwood 177 sub voc. nisi talibus; P. and M. ii. 341.

[5]Disposition, etc., chap. iv.

[6]P. and M. i 111-113, 139.

[7]P. 170 sub voc, insinuationem.

[1]Cleymond v. Vincent, Y. B. 12 Hy. VIII. Mich. pl. 3; Norwood v. Read (1557) Plowden 180; Pinchon’s case (1612) 9 Co. Rep. 86 b.

[2]Vavasour and Kyghley v. Chadworth, Cal. i xciii; Select Cases in Chancery (S. S.) nos. 104, 109, 143; Y. B. 4 Henry VII., Hill, pl. 8.

[3]Holdsworth, Hist. Eng. L., vol. I, p. 250.

[4]Ibid. 325, 326.

[5]Spence, Equity, i. 579.

[6]Ibid.

[7]Hughes v. Hughes (1666) Carter's Rep. 125.

[8]Select Cases in Chancery (S. S.) no. 140 (1454).

[9]Spence, i 580; Polgrenn v. Feara, Cal. i xxxix.

[1]Cary 28, 29; Tothill 86; (1738) 1 Atk. 491, injunction issued to stay a suit in the ecclesiastical court; Goffin 74.

[2]Atkins v. Hill (1775) Cowper 284, 287.

[3]22, 23 Car. II. c. 10 §§ 1, 2, 3.

[4]In Matthews v. Newby (1682) 1 Vern. 133 Lord Hardwicke said that the ecclesiastical court had "but a lame jurisdiction." Its jurisdiction was sometimes simply disregarded. In Bissell v. Axtell (1688) 2 Vern. 47, the Chancellor ordered a fresh account to be taken of the intestate's personal estate, though one had already been taken by the ecclesiastical court.

[5]20, 21 Vict. c. 77 § 23.

[6]20, 21 Vict. c. 77 §§ 4, 5, 8.

[7]§ 10.

[1]§ 4.

[2]§ 39.

[3]Ecclesiastical Commission 1883, li.

[4]6, 7 Will IV. c. 71 (tithes); 31, 32 Vict. c. 109 (church-rates); 34, 35 Vict. c. 43 (dilapidations).

[5]Constitutions of Clarendon c. 1.

[6]c. 9. The assize utrum (App. II.) was provided to try the question whether or no the property was held by this tenure.

[7]P. and M. i 224-230.

[8]Maitland, Canon Law, 53-56.

[1]Holdsworth, Hist. Eng. L., vol. I, App. XVIII.

[2]Bl. Comm. iii 102.

[3]5 Eliza. c. 23.

[4]53 Geo. III. c. 127 § 1.

[5]§ 3.

[1]This essay forms the introductory chapter of the third edition of Mr. E. S. Roscoe's "Admiralty Jurisdiction and Practice," 1903, pp. 1-61 (London: Stevens and Sons).

[2]Barrister-at-law, London; M. A., LL. D., London University 1870.

Other Publications: Analysis of Ortolan's Roman Law, 1876; Institutes of Gaius and Justinian, 1882.

[3]The probable root of the word "admiral" is to be found in the Arabic "amir-al-baha," that is, commander of the sea. The first portion of the compound word, viz. "amir" or "emir," a commander, was applied in the tenth century to the officer in the Eastern Empire (Gibbon's Decline and Fall, ch. 53), representing the *præfectus classis* of earlier times at Rome. In the twelfth century, when maritime commerce was developed owing to the link between Europe and Asia resulting from the Crusades, the word "amiral" travelled along the shores of the Mediterranean to Western Europe, where it was adopted with slight variations by most seaboard continental nations; and towards the end of the next century, when England and Flanders began to share in the trade with the Levant, the word became naturalized in England as "amyrel" or "admyrall," or softened by doubling the *m:* "As when the mast of some tall *ammiral"* (Milton). In the kingdom of Aragon the title of "admiral" does not appear to have superseded that of Captain of the Fleet (*Capitaneus Armatæ*) until about 1354; but it seems to have been introduced in the neighbouring kingdom of Castile somewhat earlier, and Alphonso X. explained it thus: "The chief of all those who compose the crews of the vessels fitted out for war is called the Admiral, and he has over the fleet, which is the main body of the Armada, or over a squadron which may be detached, the same power as the King himself if he were present." See Black Book, Roll Series, vol. ii. Introd. p. lxiii.

[4]Comyns, Dig., tit. Admiralty (A). The words *custos,* for *admirallus,* and *custodia* for *admirallitas,* are used in earlier and later times in the records as equivalent terms.

[1]William de Leybourne was styled "Admiral of the Sea of the King of England" in a treaty between the envoys of the English King and Guy, Count of Flanders, made at Bruges, 15 Edw. I. See Clowes' Hist. of Navy, vol. i. p. 141; Com. Dig. Ad. (A). The first mention of the admiral in our printed law is in 8 Edw. II. See Black Book, Rolls Series, Introd. vol. i. p. xlvi.

[2]Richard Fitzallan. Earl of Arundel and Surrey, 10 Richard II. See Beawes' Lex Mercat. (1813), 6th ed. p. 400.

[3]See the list, according to Sir Henry Spelman, down to James II., given in the Appendix to Godolphin's Admiral Jurisdiction, 2nd ed. (1685), pp. 215-230. "In early times there were occasionally more Lord Admirals than one; not, however, of the

same part of the coast; but one from the Thames northward, and one southward, . . . but not interfering with each other. Which, however, was the most ancient form of executing this office, whether by one officer or by several, is mere conjecture . . . but, however that may be, I am not aware that more than one Lord Admiral has ever been appointed since the time of Henry VIII., and the statute (31 Hen. VIII. c. 10) only speaks of the Lord Admiral," per Sir John Nicholl in *The King* (*in his office of Admiralty*) v. 49 *Casks of Brandy* (1836), 3 Hagg. 257, at p. 279. From a petition presented in the reign of Henry V. (1416), it seems that it was customary in the fifteenth century for merchantmen sailing in consort to elect the master of one of the vessels as the "admiral" for the voyage; and at the present day the senior master in a fleet of fishing vessels is called an admiral: see the royal proclamation of 1708 as to the masters of the first, second and third vessels entering a harbour in Newfoundland for the fishing season being respectively admiral, vice-admiral and rear-admiral.

[4]The special attention bestowed, on account of their geographical position, on the Cinque Ports, carried out a policy originated by the Romans, who found themselves under the necessity of protecting the country from the attacks of pirates, which subsequently assumed the form of wholesale immigration by hordes of Saxons. In order to obtain and keep the command of the sea, the naval forces were, about ad 230, reorganized, and the practice of rewarding, by privileges, the building of ships extended to Britain. Walled camps with fortified harbours were established by the Roman Imperial Government from Southampton, along the line of Sussex, Kent, Essex, Suffolk and Norfolk, round to the Wash; Dubris (Dover) being about the centre, and the base on the opposite coast at Bononia (Boulogne); the British squadron being strengthened by the construction of vessels for coast defence. These were stationed in the great estuaries, under prefects, that is, officers exercising military as well as naval command, the whole force being under the authority of the Count of the Saxon Shore (*Comes Littoris Saxonici*). Details of this organization are given in the "Notitia Dignitatorum" compiled towards the end of the fourth century. In ad 286 Carausius, who had occupied the position of gubernator, or pilot, in the Roman Navy, was appointed to the command of the British fleet, and, crossing over from Bononia to Rutupiæ (Richborough, now Sandwich), he assumed the imperial purple and greatly improved the fleet; but on his murder by his subordinate Alectus, and the defeat of the fleet of the latter by the Roman commander sent against him, the power of the navy to resist the attacks of the Saxons and north Germanic tribes decreased. After the final departure, about ad 430, of the Romans, upon whose power they had entirely depended, the Britons were quite unable to police their own coasts, having neither ships nor officers; but Alfred, about 897, Athelstan, about 937, Edgar, about 964, and Canute, 1016, seem to have availed themselves to some extent of the original organization, and besides creating and maintaining a fleet of "king's" and "people's" ships, developed the principle that the port-towns should find a fixed number of ships, in return for which they were granted exemption from general taxation and permission to govern themselves. This arrangement, by which the mercantile marine undertook both its own business of trade and the national business of territorial defence, the Normans accepted with some adjustment to adapt it to feudal tenures.

Dover, as the nearest point to the Continent, was naturally regarded as of special importance, and from Saxon times downwards Dover Castle was looked upon as the

"key and barrier of the whole kingdom" (Matthew Paris).

In the time of Edward the Confessor, according to Domesday Book, the burgesses of Dover and Sandwich each "furnished the King with twenty ships once in each year for fifteen days and in each ship were twenty-one men." A little later the development of English shipping was greatly stimulated by the necessity for the conveyance by sea to the Holy Land of knights and their followers to join the Crusades, and by the time of Henry II. the two great commercial ports of the kingdom were London and Bristol; but the Cinque Ports revived with the great charter of 6 Edw. I., granted for services rendered in the Welsh war. Fifty-seven ships were to be furnished at their cost for fifteen days, and, in return for the defence of the shores, their privileges were confirmed, including the right of holding pleas and the right of wreck, and they were accorded absolute freedom to trade toll-free throughout the realms of the English kings. This freedom led them to carry on private wars, and in 1293 they fought a battle on their own account in mid-channel which plunged England into a war with France. By the time of Edward II. they had degenerated into pirates (Nicolas, Hist. of Navy, vol. i. pp. 359, 360), and the Cinque Ports became the strongholds of privilege and disorder. Aggrieved parties on both sides of the Channel were permitted and encouraged to settle disputes for themselves which, in later times, have been treated as international questions (Clowes' Hist. of Navy, vol. i. p. 136); but under Edward III. their services assumed a more national character. At the battle of Sluys in 1340 the ships of the ports numbered about one-sixth of the whole fleet, and at the battle of Les Espagnols-sur-Mer the fleet was composed equally of "king's" and of "ports" ships. During peace their vessels served to bring wine from Gascony, or to take wool to Calais; whilst in time of war decks were fitted on which castles were raised at the bow and stern. Under Richard II. they ceased to form the van of the navy; and though the harbours remained deep enough to float the light vessels which supplied the cross-channel traffic, their gradual silting up led to the decline of the Cinque Ports as a source of naval power, Dover being the only port which remained open and in use, the others sinking into small agricultural and fishing places.

In the reign of Henry VIII. the Court of Lodemanage was established, consisting of four respectable mariners (wardens), to settle the disputes of pilots; the pilot service having been constituted by charter under Edward II. This became the Corporation of Cinque Ports Pilots (Dover Trinity House), which in 1853 (16 & 17 Vict. c. 129) was merged in the London Trinity House.

For the internal organization of the ports and their Courts, which seem to have been borrowed in part from that of the communes of Picardy, see Hueffer's Cinque Ports, p. 378, and Jeake's Charters of the Cinque Ports.

[1]The offices of admiral and captain were subsequently divided.

[2]See Wynne's life of Sir Leoline Jenkins, vol. i. p. lxxxv., and *The Lord Warden and Admiral of the Cinque Ports* v. *H. M. in his office of Admiralty* (1831), 2 Hagg. 438, at pp. 444, 445. See also Appendix E. p. 387, Hueffer's Cinque Ports, 1900. The statutes 2 Hen. V. and 28 Hen. VIII. c. 15, reserve the cognizance of such criminal

cases as are therein mentioned in the Cinque Ports to their own admiral, distinct from the Lord High Admiral's jurisdiction.

[3]The Court, presided over by Arthur Cohen, Esq., K. C., sits occasionally at the Royal Courts of Justice, London. It is not a Court of Record, but appeals lie direct to the Privy Council, and appeals may be made to it from the County Court under 31 & 32 Vict. c. 71, s. 33, in causes arising within the jurisdiction of the Cinque Ports.

[4]The terms of one of the earliest commissions issued to an admiral, that of John Lord de Botetort, March 15, 1315, is set out at p. 142, vol. i. of Clowes' History of the Navy.

[5]Comyns, Dig., tit. Admiralty (B); 4 Inst. 145.

[1]The navy consisted of the ships, mariners, pilots, and any other persons able and fit for service arrested as often as occasion required. The Royal Navy—that is, a number of ships of war permanently kept on foot by the Crown—practically dates from the time of Henry VIII., when, in 1512, the first navy office was created, and commissioners appointed to manage naval affairs. A Lord High Admiral continued to be appointed until 1632, when the office was put in commission; and since that date there have been only four, the office in the intervals being executed by a Board of Commissioners. The four were James Duke of York, styled Admiral of England, Scotland and Ireland (1660) (but when excluded from office by the Test Act in 1673 Charles II. had the office executed by commissioners: see Sir L. Jenkins' Letters, Life by Wynne, vol. ii. p. 705); Prince George of Denmark (1702); the Earl of Pembroke (1708); the Duke of Clarence (afterwards William IV.), in 1827, who was assisted by a council (7 & 8 Geo. IV. c. 65). As to the King in his office of Admiralty representing the Lord High Admiral, see *The Mercurius* (1798), 1 C. Rob. 80, at p. 81; and *The Rebeckah* (1799), 1 C. Rob. 227, at p. 229; the distinction involving differences in the rights *jure coronæ* and those appertaining to him in his office of Admiralty.

From 1827 the administration—that is, the government of the affairs of the navy as distinct from the judicial portion of the powers of the office of admiral—has been entirely vested in the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, with, in recent years, preeminent powers and responsibilities in the First Lord.

[2]See Black Book, Rolls Series, vol. i. p. 33, No. 11 of Instructions to the Admiral. This jurisdiction since the time of Charles II. has been exercised by Naval Courts Martial.

[3]See Black Book, Rolls Series, vol. i. p. 57, No. 16 of the Rules or Orders about matters which belong to the Admiralty, probably compiled in the reign of Edward III., and containing preexisting rules of various dates, but probably not so early as those assigned to them.

[4]Lib. iii. fol. 125.

[5]Black Book, Rolls Series, p. 65, No. 17 of the Admiralty Rules or Orders. Prynne's Animadversions, p. 106.

[6]At that time styled *custodes marinæ* or *maritimæ* or *capitanei navium,* though the title of admiral is inserted in the Black Book owing to the date of the compilation of that book being later.

[1]The criminal cases tried, with juries (see *The Ruckers* (1801), 4 C. Rob. 73, note at p. 74), before the admiral, or his deputy, comprised all crimes and offences committed either upon the sea or on the coasts, out of the body or extent of any English county, including (by 15 Rich. II. c. 3) death and mayhem happening in great ships being and hovering in the main streams of great rivers below the bridges; but trial by jury ceased to be usual in Admiralty by the time of Henry VIII., and as the Court proceeded by way of accusation and information conformably to the civil law, "the exercise of a criminal jurisdiction there was contrary to the genius of the law of England: inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers, and besides . . . offenders might, and did frequently, escape punishment; for the rule of the civil law is . . . that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves." 4 Bl. Com. 268.

In consequence the statute 28 Hen. VIII. c. 15, recites that people committing offences on the sea often escape punishment because it is hard to get witnesses, if the prisoners will not confess, which they will not do without torture; and the statute proceeds to enact that all treasons, felonies, robberies, murders, and confederacies, committed within the Admiralty jurisdiction, shall be tried by commissions of oyer and terminer, under the King's great seal, according to the rules of the common law—that is to say, by witnesses and a petty jury, after the indictment has been found by the grand jury. On these commissions the admiral, or his deputy, was always named, with two of the common law judges and some of the practising civilians (see *Reg.* v. *Serva* (1845), 2 Car. & K. 53, at p. 55); and as the commissioners could only try the offences mentioned, the enactment in effect dealt rather with the mode of trial than with the jurisdiction in Admiralty.

This Act was explained and extended by 39 Geo. III. c. 37, and 46 Geo. III. c. 54, with the result that all offences whatever committed on the high seas were made punishable as if committed on land, and triable in the manner directed by 28 Hen. VIII. c. 15. By 4 & 5 Will. IV. c. 36, which established a Central Criminal Court, the judges of that Court were empowered to try offences committed within the Admiralty jurisdiction, and the judge of the Court of Admiralty was appointed one of the judges of the Central Criminal Court. By 7 & 8 Vict. c. 2, power was given to any judge of oyer and terminer to try offences committed within the Admiralty jurisdiction without any special commission being issued. By 24 & 25 Vict. cc. 96 to 100, all indictable offences mentioned in these Acts which shall be committed within the jurisdiction of the Admiralty may be tried and dealt with in the county where the offenders are apprehended or are in custody, as if the offence had been committed on land.

[1]The Black Book of the Admiralty contains numerous references to the fees, commodities, and profits appertaining to the admiral by virtue of his office. See Rolls Series, vol. i. pp. 15, 171, 399, as to poundage on seamen's wages; *Ib.* pp. 23, 145, 151, 173 as to share of prizes; *Ib.* pp. 173, 401, as to fees, &c.; *Ib.* pp. 151, 171, 223, 241, as to share in flotsams, &c. As to the fees appertaining to the admiral in the time of Sir Thomas Beaufort, see Roscoe's Ad. Prac. (3 ed.) p. 8, note 2.

[2]See extract from report of 1829 at p. 50 of the Report (1864) of the Commissioners on the Court of Admiralty in Ireland. The inquisitions of the Cinque Ports seem to indicate "that an important—perhaps the chief—purpose of the (Cinque Ports') Admiral's Court was the collection of his perquisites and forfeitures" (see Marsden, Select Pleas (Selden Society), vol. ii. p. xxiii.); and the claims made by the Lord High Admiral to perquisites within the liberties of the Cinque Ports appear to have led to interminable disputes with the ports and their warden (see *Ib.* pp. xix. *et seq.*).

[3]According to the list of "fees, commodities, and profits appertaining to the admiral by virtue of his office," and alleged to be of the time of Sir Thomas Beaufort, admiral 13 Hen. IV., the admiral took one moiety of waifs, flotsam, and ligan, all deodands (subject to reasonable salvage), all forfeited vessels under 30 tons, and over that tonnage if not required by the king, fourpence in every pound of wages to mariners, twenty pence for every pound recovered in his Court between party and party, two shares of every prize, and such fees for safe conduct as may be agreed. Black Book, Rolls Series, vol. i. pp. 397-401. See also the addition to the Inquisition of Queenborough, arts. 23 and 74, *Ib.* pp. 151-171. "The very large terms of the admiral's patent induced him to make claims to wreck, royal fish, findalls, as well as to rights connected with the seashore which were wholly unfounded in law, and which helped to bring the Court and the office of the admiral into discredit": see Marsden, Select Pleas (Selden Society), vol. ii. p. xviii. Prince George of Denmark surrendered all the rights, profits, and perquisites appertaining to the office to the use of Queen Anne, in return for a fixed increased pay, which was under George I. divided among seven commissioners; but the pay of the First Lord has since been increased, whilst droits of Admiralty are now paid into the Exchequer for the benefit of the public service.

[4]Flotsam, jetsam, and ligan (defined p. 25 Roscoe's Ad. Prac. (3 ed.)), belonged to the King, who granted them to the Lord High Admiral. They pass by the grant of wreck when cast upon the land, but if they are not cast upon the land the admiral hath jurisdiction and not the common law. 5 Rep. 106. The question of these emoluments occasioned a difference between King Charles II. and his Lord High Admiral, which was settled at the Council of March 6, 1665, when the interest of the King was separated from that of the Crown in the person of the Lord High Admiral and his office, and the Duke of York by deed assigned all droits to the King.

[1]Deodands are "things instrumental to the death of a man on shipboard, or goods found on a dead body cast on shore." See Browne on the Civil Law, 2nd ed. vol. ii. p. 56; Coke, Inst. 3, 57; and Black Book, Rolls Series, vol. i. p. 397, note 1.

[2]This share of prize goods consisted of one-tenth after the Royal Navy was formed; but in early times, when the fleets consisted of ships of the subject, the king had one-fourth, the owner of the ships one-fourth, and the remaining half was divided between the admiral and those who took the prize. See Black Book, Rolls Series, vol. i. p. 21, No. 19 of Rules for the Admiral. For a list of the rights and emoluments belonging to the ancient office of Lord High Admiral of England, but returned to and vested in the Crown by surrender in the time of Charles II., see Sir Leoline Jenkins' charge at the Admiralty Sessions, Life by Wynne, vol. i. p. xcviii. For a claim by the king *jure coronæ,* and in his office of Admiralty, see *The Dickenson* (1776), Marriott's Decisions, p. 1. Although droits were reserved to the Crown after the office of Lord High Admiral was executed by commissioners, the Lords of the Admiralty acted as a board of revenue in collecting them, and accordingly appointed their own collectors by their own commission. See Instructions to the Receiver General of the rights and perquisites of the Admiralty, Marriott's Decisions, p. 70. As to wreck at sea after a year and a day being a droit in Admiralty, and wreck on shore after the same lapse of time being the king's *jure coronæ,* see Browne's Civil Law, vol. ii. p. 49.

[3]See Black Book, Rolls Series, No. 21 of the Rules about matters which belong to the Admiralty, vol. i. p. 69, note 3.

[1]See Marsden's Select Pleas (Selden Society), vol. i. p. xiv. As to the establishment of the Court of Admiralty by Edward III., see Spelman, Gloss. 13; Lambard, Archion, 49, both cited in 3 Bl. Com. 69; Beawes' Lex Mercat. (1813), 6th ed. p. 400.

[2]Piracy, letters of reprisal and marque, were "the most noble and eminent piece of the jurisdiction of the Chancery." See Sir M. Hales' Jurisdiction of the Admiralty, Hargr. 93, p. 96. See also *Rex* v. *Carew* (1679), 3 Swanston, 669, at p. 670, where Lord Nottingham says: "I observed that this cause was properly in Chancery upon many accounts, not only as it was a *scire facias* to repeal letters patent, but as it was a cause of state, and likewise as it was a marine cause, and did concern depredations on the sea, in which cases the Chancery as well as the Admiralty hath a clear jurisdiction, and this appears by what was said in *Peter Blad's case* (*Ib.* p. 603), and by many records and precedents cited in my Parliament MSS., tit. Admiralty and tit. Chancery, and is most expressly so settled and enacted in a statute not printed, viz. 31 Hen. VI."

[3]Piracy was not felony at common law, and the proceeding for restitution was subsequently designated in the records of the Admiralty Court by the title of a *causa spolii civilis et maritima.* "There is said to be a fashion in crimes, and piracy, at least in its simple and original form, is no longer in vogue. Time was when the spirit of buccaneering approached in some degree to the spirit of chivalry in point of adventure, and the practice of it, particularly with respect to the commerce and navigation and coasts of the Spanish American Colonies, was thought to reflect no dishonour upon distinguished Englishmen who engaged in it." See per Lord Stowell in *The Hercules* (1819), 2 Dods. 353, at pp. 370, 373, 374, 376.

[1]For an instance of the condemnation to the Crown, as droits of Admiralty, of the proceeds of property taken out of the possession of convicted pirates, see *The Panda* (1842), 1 W. Rob. 423. See also *ib.* p. 431, for a reference to the statute 27 Edw. III. c.

8, s. 2, by which foreign merchants spoiled of their goods at sea were to have restitution upon proof of their property in the goods without having to sue at the common law. By 22 & 23 Car. II. c. 11, s. 2, power was given to the Admiralty Court to punish the masters and officers of merchant vessels for misconduct in not resisting pirates. By 11 & 12 Will. III. c. 7, s. 11, officers and seamen who defended the ship against pirates might recover remuneration through the Admiralty Court. By 8 Geo. I. c. 24, any ship trading or corresponding with or supplying pirates, and any goods on board, might be forfeited and sued for in the Court of Admiralty. By 6 Geo. IV. c. 6, and 13 & 14 Vict. c. 26, the ancient jurisdiction of the Court was confirmed, by which it can adjudicate respecting the return to their rightful owners of goods found in the possession of pirates.

[2]The record is set out in part by Lord Coke (4th Institute, tit. Admiralty, 143), on the question of the rights of the admiral's office, and by Selden (Mare Clausum, 275) in proof of the antiquity of the claim of the Kings of England to the dominion of the neighbouring seas. (See Edwards' Adm. Jurisd. p. 10 *et seq.*) This portion of the record appears to be the draft of an instrument intended to serve by way of petition to certain commissioners appointed by the Kings of England and France as arbitrators in respect of disputes between English and French subjects as to depredations at sea which the English complained were acts of spoliation by French subjects, whilst the French alleged that the depredations had been committed under the orders of a Genoese commander in the service of France, who was "admiral of the sea," and who had seized the English ships on behalf of the French King on the ground that they were carrying goods to the Flemings, enemies of the French King.

[3]Park, in his Marine Insurance (1842), vol. i. Introd. p. xlviii., states the commonly accepted view that the Rhodians promulgated "a system of marine jurisprudence to which even the Romans themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs. These excellent laws not only served as a rule of conduct to the ancient maritime states, but, as will appear from an attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce. The time at which these laws were compiled is not precisely ascertained, but we may reasonably suppose it was about the period when the Rhodians first obtained the sovereignty of the sea, which was about 916 years before the era of Christianity." The existence, however, of a code of Rhodian maritime law has been seriously questioned, since the work entitled the "Nautical Law of the Rhodians"—of which there is a manuscript in Greek dated 1478—has been shown to be a forgery (see Browne's Civil Law, vol. ii. pp. 38, 39), and the alleged wholesale adoption of that law into the law of Rome hangs on a very slender thread, viz., the single Greek sentence in Dig. xiv. 2. 9, which has been translated: "*Ego quidem mundi dominus, lex autem maris; lege id Rhodia, quae de rebus nauticis praescripta est, judicetur, quatenus, nulla nostrarum legum adversatur.*" The meaning of this sentence, which depends on the punctuation, has been hotly disputed. It is put into the mouth of the Emperor Antoninus by way of reply to the petition of Eudæmon of Nicomedia, who had been ship-wrecked in Italy and plundered by tax-gatherers on one of the islands of the Cyclades. The reasonable inference seems to be that the island of Rhodes, from its central geographical position and natural capabilities, its naval power and its commerce, exercised in its palmy days

considerable influence in maritime matters, and the usages of the sea as there observed between seafaring men and merchants were, no doubt, inquired into, and may have been in part accepted, by the Romans; though the only evidence of this consists in the heading "Of the Rhodian Law of Jettison" to the short title of the fourteenth book of the Digest of Justinian, the opening paragraph of which contains an extract from the chapter on the Rhodian law of jettison in the Sentences of Paulus, and the rest of the title consists of paragraphs from the writings of Paulus and other prominent Roman jurists whose names are prefixed to the extracts in which the principle as to contribution is worked out from their writings; but in all the other extracts in the Digest from the writings of Roman jurists on maritime law the authority of Rhodes is not given. See the whole subject discussed in the Report of the Buffalo Conference of the International Law Association, 1899; and for the headings of the more important subjects of maritime law dealt with in the Digest of Justinian, see Browne on the Civil Law, vol. ii. pp. 35, 507.

[1]See Ortolan's Institutes of Justinian, vol. i. History of Roman Legislation, par. 529 *et seq.*

[1]The ordinances and customs of the Sea of Trani are stated in the preamble to have been published in the year 1063, and are alleged to be the most ancient body of mediæval maritime laws in existence. The thirty-two articles of which the ordinances consist are a series of decisions made by the maritime consuls of the guild of navigators at Trani, which was a leading city on the Adriatic coast in the eleventh century. The articles are set out in the Appendix to the Black Book of the Admiralty, Rolls Series, vol. iv. pp. 522-543. The third ordinance contains a departure from the Roman law of general average, presumably due to the organised system of piracy which existed in the eleventh century in the Adriatic. Another town, on the Adriatic, that of Amalphi, was a maritime port of some importance in the ninth century. In the tenth century it is alleged to have had a maritime court presided over by consuls of the sea, and at the same period formed commercial establishments in Sicily, and at Alexandria. In ad 1178, Amalphi obtained from the King of Jerusalem the privilege of having the disputes of its merchants, established in the ports of Syria, settled by their own consuls according to their own customs, and in 1190 a similar privilege was obtained from the magistrates of Naples. A manuscript containing the chapters and ordinances of the Maritime Court of the noble City of Amalphi, commonly called the Amalphitan Table, was discovered in the Imperial Library at Vienna in 1843. The date of the tables has been determined to be of the eleventh century, and they indicate a system of trade in which each voyage was a joint adventure, all the merchants on board being associated for the voyage with the ship and making up a common purse. The text of the sixty-six articles of which the table consists is set out in the Black Book, Rolls Series, Appendix, vol. iv. pp. 2-51.

[2]Black Book, Rolls Series, vol. i. Introd. p. lxix.

[3]See the seven chapters on Maritime Law in the "Livre des Assises" of the Latin kingdom of Jerusalem, set out in the Black Book, Rolls Series, Appendix, vol. iv. pp. 498-519. In the Court of the Merchants (or the Exchange Court) a Frank bailiff

nominated by the Crown presided, assisted by two Franks and four Syrians as a jury, and it therefore partook of the character of an international Court.

[1]The Domesday of Ipswich, recording the laws and customs of that town, dates from 17 Edw. I., the book having been drawn up from the original Roll issued under the authority of a charter granted by King John in 1199. The text is set out in the Black Book, Rolls Series, Appendix, vol. ii. pp. 16-207. The jurisdiction of the sworn twelve "capital portmen," elected from amongst the most fit, discreet, and wealthy of the burgesses, was abolished by the Municipal Reform Act (5 & 6 Will. IV. c. 76), s. 108.

[2]ad 1199, Rymer's Fœdera, i. 111.

[1]The text of the customs of Oleron is given in the appendix to the Black Book of the Admiralty, Rolls Series, vol. ii. pp. 254-397.

[2]See Art. 87 of the Coutumier of Oleron with reference to a dispute as to the sale of a ship between two part owners, both being Bretons. Black Book, Rolls Series, vol. ii. p. 385.

[3]Roscoe's Ad. Prac. (3 ed.) p. 13.

[4]See Black Book, Rolls Series, vol. i. Introd. p. lxii.

[5]In the lengthy controversy which has been maintained on the question of Richard I. publishing the roll of Oleron as laws of the sea in the island of Oleron, the difficulty appears to be that that king did not visit the island on his way home from the fourth Crusade, and that the roll in question does not contain ordinances but judgments. See Black Book, Rolls Series, vol. i. Introd. p. lvii. *et seq.;* vol. ii. Introd. pp. xlviii., li. *et seq*.

[1]A copy of the Rolls of Oleron also exists in the Guildhall of the city of Bristol which appears to date from 18 Edw. III. See Black Book, Rolls Series, vol. i. Introd. pp. lviii.-lxi.

[2]The writing of the existing book is of a period not earlier than the reign of Henry VI. There is good reason for assuming that this part was compiled from earlier sources after the appointment of Sir John Beauchamp to be admiral of all the fleets of ships south, north and west, in 1360. See Black Book, Rolls Series, vol. i. Introd. p. xlvi.

[3]Articles 16 and 17. See Roscoe's Ad. Prac. (3 ed.) p. 6.

[4]Article 18 regulates the mode of arresting vessels (that is, private ships) and men for the king's service, and, after referring to an ordinance made at Grimsby by Richard I., states that the court of the admiral is a court of record, which it continued to be at the time of 13 Rich. II. c. 5 (see Black Book, Rolls Series, vol. i. Introd. p. xlvii., and p. 67, n. (1), after which it appears to have lost its position until restored by 24 Vict. c. 10, s. 14. That it was a court of record is denied in *Sparks* v. *Martyn*

(1680), 1 Ventr. 1; *Pane* v. *Evans* (1675), 1 Keb. 552; see also Brooke's Abr., tit. "Error," 177. "The Admiralty is said to be no court of record on account of its proceeding by the civil law." Beawes' Lex Mercat. (1813), 6th ed., p. 401; 4 Inst. 135.

[5]See Black Book, Rolls Series, vol. i. Introd. p. lvi.

[6]They correspond with the twenty-four articles in the old Flemish tongue, known as the "Judgments of Damme," which are a translation of the judgments of Oleron, and constitute the earliest body of sea laws in use amongst the merchants of Damme and Bruges, and the shipowners and shipmasters who frequented the port of Sluys in the fourteenth century. These articles, which purport to be "a copy of the Rolls of Oleron of the Judgments of the Sea," have been preserved in the Purple Book of Bruges, the text of which is set out in the Black Book, Rolls Series, Appendix, vol. iv. pp. 302-333.

In the Appendix to the same volume of the Rolls Series of the Black Book, pp. 54-129, is set out, under the title of "Gotland Sea Laws," the text of a MS. at Copenhagen of the fifteenth century, which also includes the laws of Oleron. The MS. purports to contain those laws of Wisby (a town in the island of Gotland at the entrance of the Gulf of Bothnia) which were called the "Supreme Maritime Law," and which seem to have been agreed to, according to the custom of the time, by the merchants frequenting the island of Gotland assembled in common council. These laws consist of sixty-six articles, fourteen of which are from a Baltic source, and are to be found in the laws of Lubeck. They were probably derived from Wisby at a time when that town took that lead in foreign trade which was subsequently acquired by Lubeck; twenty-five are Flanders sea laws, being a Flemish translation made in the middle of the fourteenth century of the judgments of Oleron; and the remainder are Dutch sea laws known as the ordinances, or usages, of Amsterdam, probably reduced to writing in the latter part of the fourteenth century.

[1]Black Book, Rolls Series, vol. i. Introd. p. lxi., citing Prynne's Animadversions, p. 117.

[2]In *The Gas Float Whitton,* No. 2, [1896] P. 42, Lord Esher refers to these articles and argues that, as the mariners were at liberty to cut off the head of a pilot who lost a ship, the penalty is so barbarous that it is ridiculous to suggest that the laws of Oleron "are part of the English law"; but the early period in our history, when they appear to have been used as rules for the decision of maritime causes in Courts of the sea, must be taken into account, the law of the sea providing a summary remedy with a view to deter a pilot from casting away the ship when in league with the lord of the soil and with wreckers lying in wait on the beach. (See Roscoe's Ad. Prac. (3 ed.) p. 24.) Browne, writing in 1802 (Civil Law, vol. ii. p. 210), says: "The instance Court is governed by the civil law, the laws of Oleron, and the customs of the Admiralty, modified by statute law." On the other hand, Molloy, *De jure maritimo* (1722), 7th ed., writes (p. 285): "By the laws of Oleron, if his (the pilot's) fault is notoriously gross, that the ship's crew sees an apparent wreck, they may then lead him to the hatches, and strike off his head; but the laws of England allow no such hasty execution," and Lord Tenterden (Abbott's Treatise on Merchant Ships and Seamen,

5th ed. p. xi.) says: "It should be observed, however, not only of all these treatises, but also of the civil law, and the ordinances (viz. the ordinances of Oleron, and Wisbuy, the two ordinances of the Hanse Towns, and the Ordinances de la Marine of 1681), without excepting even the ordinance of Oleron (which, being considered as the edict of an English prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received, sometimes to show the opinion of learned persons, and the rule adopted in maritime nations upon points not hitherto settled by the authority of our own law; and at other times to furnish information that may be useful in our commercial intercourse with foreign states." But it would seem probable that litigants resorting to the Admiralty Court would expect to have their disputes settled summarily, according to the usages to which seafaring men were accustomed; and the principles upon which actions for damage to cargo are based, and which were derived by the Admiralty Court from the customs of the sea (chaps. xviii., xix., xx. Consolato del Mare, Black Book, Rolls Series, vol. iii. pp. 92-95), will be found formulated in the Admiralty Court Act of 1861; so the provisions of art. 3 in the customs of Oleron (Black Book, Rolls Series, vol. ii. p. 213), as to the duty of the master and mariners in the preservation of the ship, and also arts 13, 14 *et seq.* in the Amalphitan table (Black Book, Rolls Series, vol. iv. p. 11), as to the support of a mariner ill or absent on business of the ship, will be found incorporated in the Merchant Shipping Act, 1854, having previously been acted upon by Admiralty judges. See further as to the law governing the Court of Admiralty: *The Neptune* (1834), 3 Hagg. 129, at p. 136; *The Eliza Cornish* (1853), 1 Spinks, 36, at p. 45; *The Saxonia* (1862), Lush, 410; *The Patria* (1871), L. R. 3 A. & E. 436, at p. 461. "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the ordinary municipal law of the country," per Lord Esher in *The Gaetano and Maria* (1882), 7 P. D. 137, at p. 143.

[1]The next following 52 articles, under the letter D., are an addition of later date to the Inquisition of Queenborough, Arts. 45, 46, and the inquiry to be made under art. 47 refers to the judgments of Oleron as to assaults by a mariner on the master, disobedience of the commands of the master, and as to pilots; so in art. 60 as to removal of anchors.

[2]In 1357 the King of Portugal complained that Portuguese goods had been taken by the English from a French ship which had "spoiled" a Portuguese vessel. Held that the goods were good prize. See Marsden's Select Pleas (Selden Society), vol. i. Introd. p. xli.

[1]For a summary of these contracts relating to masters and mariners and other matters within the laws of Oleron, see charge by Sir Leoline Jenkins, 1668, Life by Wynne, vol. i. p. lxxxvii.

[2]In 1364 the reason given for a supersedeas to justices to stay proceedings on an indictment for a nuisance by driving piles into the bed of certain creeks near Colchester is that the matter had been dealt with in the court of the admiral, and the court seems to have been recognized as a court of record. In 1369 an action on a

charter-party was tried before the admiral, and an action in the same matter in the Sheriff's Court of London was stayed on production of the admiral's certificate. See Marsden's Select Pleas (Selden Society), vol. i. Introd. pp. xlv., xlvi.

[3]As to what is *infra corpus comitatûs,* see Com. Dig. Ad. E. 14; Jacob's Law Dict. "Admiral."

[4]Institute, 134, 135.

[5]These towns had either by charter granted by the Crown exemption from the admiral's authority or had express grants of Admiralty jurisdiction, whilst some of the statutes relating to the admiral's jurisdiction contain an express saving of seaport towns. By sect. 108 of the Municipal Reform Act, 1835 (5 & 6 Will. IV. c. 76), courts possessing Admiralty jurisdiction created by charter, with the exception of that of the Cinque Ports (Roscoe's Ad. Prac. (3 ed.) p. 5), were abolished. Amongst these old local maritime courts so abolished were the Maritime Court of Ipswich (*ib.* p. 15), the Admiralty Court of Yarmouth, in existence prior to Edward III., and which claimed exemption from the Admiral's jurisdiction in the reign of Edward IV. and obtained it by charter from Queen Elizabeth in 1559, the reservation in cases of piracy being removed by James I. (As to the borough rolls of this town, see Marsden's Select Pleas (Selden Society), vol. i. Introd. p. xiv.). The Admiralty Court of the Borough of Poole has records going back to 1550; the Admiralty jurisdiction of the town of Southampton was granted in 23 Hen. VI. As to the Admiralty jurisdiction of the Mayor of Newport in the Isle of Wight, see Raikes & Kilburn's Admiralty Jurisdiction in County Courts, pp. xxxi.-xxxiii., where also will be found references to the Admiralty jurisdiction existing by prescription or charter prior to 1846 (9 & 10 Vict. c. 99, ss. 21, 40) of Kingston-on-Humber in Yorkshire, Boston in Lincolnshire, King's Lynn in Norfolk, Dunwich and Southwold in Suffolk and Harwich and Malden in Essex. The exemption of Bristol from the Admiral's jurisdiction was confirmed by charter of Henry VI. and Edward IV. Newcastle-upon-Tyne had a Maritime Court as early as Henry II. See Stubbs' Select Charters, p. 107. In 1383, in a case in the King's Bench in which application was made to obtain execution of a judgment obtained in the maritime Court held at Padstow (Aldestowe), it was asserted that that town was an ancient seaport, the liberties of which were confirmed by Magna Charta, including jurisdiction in maritime causes. The defendant made default in appearance and his vessel was attached. The trial took place before the mayor and burgesses with a jury of mariners and merchants, and the evidence was given by witnesses on oath. The case was settled on the production of the king's letters patent protecting the defendant, see Marsden's Select Pleas (Selden Society), vol 1. Introd. p. xlix. As to the Vice-Admiralty jurisdiction of counties and districts derived from the Lord High Admiral, the Admiral of the Cinque Ports, or the Admiral of the North and West, with an appeal to the Admiralty Court, see Clerke's Praxis, tit. 56; and Sir Sherston Baker's Vice-Admiral of the Coast (1884); and as to the Admiralty coroner, see *ib.* p. 21. The terms of the letters-patent of Lord Wodehouse, Vice-Admiral of the County of Norfolk, 1838, are set out in 2 W. Rob. 254, note (*a*). Any military power that may have been possessed under grants made by the Crown in early times to persons to exercise Admiralty jurisdiction within certain places independently of the Lord High Admiral has long ceased to exist, and their Admiralty jurisdiction only

extends to the civil rights conferred on them, such as the right to wrecks and other droits of Admiralty found within the limits of their manors, and these rights are now controlled by the general statutory provisions consolidated by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), Part IX. ss. 523-529.

[1]The petitions to the king and parliament complained *inter alia* of the removal of causes from the west to the key of William Horton at Southwark in London. See Marsden's Select Pleas (Selden Society), vol. i. Introd. p. li. It would seem that the courts of the admirals of the north, south, and west, now fell into disuse, in favour of the *curia principalis admiralitatis angliæ,* which, according to the ancient custom of the Admiralty, sat upon the key *"juxta fluxum maris."* In the reign of Henry VIII. Orton key, near London Bridge, was a usual place of sitting, see Prynne's Animadversions, pp. 82, 402. In the reign of Charles II. the Court sat in St. Margaret's Church, in Southwark, see Pepys' Diary, 17 March, 1663, and Sir Sherston Baker's Vice-Admiral of the Coast, pp. 27, 28. During the plague the Court sat in Jesus College, Oxford, see Wynne's Life of Sir L. Jenkins, vol. i. p. ix. About 1675 it was removed to the hall of the College of Advocates, Doctors' Commons. In 1860 it sat at Westminster, and now, as a branch of the High Court, it sits at the Royal Courts of Justice, Strand.

[1]By the law of Rome (Cod. xi. 5, *De Naufragiis,* 1. 2), the treasury (*fiscus*) was not allowed to profit by the disaster of a shipwreck, the property remaining with the owners, or if unclaimed it was retained for a year. Any abstraction of fragments or prevention of succour to the shipwrecked persons was rigorously punished (Dig. 47. 9, *De naufragio.* &c., l. 3, § 8; l. 7; l. 12), both the actual parties concerned and the owner of the land where the vessel went ashore being required to find sureties to appear before the president of the province, whilst the exhibition of a light by fishermen to mislead a vessel and so cause her destruction involved heavy penalties. By Dig. 14. 2, *De Lege Rhodia de jactu,* 2. § 8, property thrown overboard to lighten a vessel only became the property of the finder if intentionally abandoned; otherwise (Dig. 47. 2, *De Furtis,* 43. § 11) he who carried them off from the shore or fished them up from the bottom of the sea committed theft. This view as to the restriction on the right of the first occupant is contained in art. 31 of the Roll of Oleron (Black Book, Rolls Series, vol. ii. p. 469), and by art. 45 (*Ib.* p. 477) salvors were to be remunerated for their trouble in getting up anchors and cables slipped, which were not deemed lost unless the owner could not be found, in which case the lord took his share and the salvors theirs. But the tendency to claim a distinct share in the property of persons in distress at sea is shown by art. 19 of the Ordinances of Trani (Black Book, Rolls Series, vol. iv. p. 537), which modifies the Roman law by giving the finder of goods floating on the sea one-half if delivered up to the court, and the owner found; but if at the end of thirty days the owner did not appear, the whole belonged to the finder. By art. 20, in the case of goods under water, and marked, two-thirds belonged to the finder. In the result the humane principles of the Roman law, which had tended to soften the barbarous usages of earlier times, were obliterated by a return to that *inhumanum jus naufragii* to which Blackstone alludes (see 1 Bl. Com. 293), which involved the sufferers by shipwreck not only in the forfeiture of their property to the lords of the soil, but they themselves were often sold into slavery, until the effects of the Crusades in stimulating international commerce, and the efforts of the

Church, brought about a partial renunciation by the local authorities of the right of wreck.

In 1243 full protection was secured to the person and property of all who might suffer shipwreck on the coasts of Catalonia or Valencia: Black Book, Rolls Series, vol. iii. Introd. p. lxix. In 1287, by the resolutions of the merchants frequenting the island of Gotland, all persons were prohibited under heavy penalties from purchasing or selling goods plundered from wrecked vessels, and any city which would not enforce the prohibitions was excluded from the league: Black Book, Rolls Series, vol. iv. Introd. p. xlii. By art. 26 of the Roll of Oleron (Black Book, Rolls Series, vol. ii. p. 461), if a single person escaped the lord of the place was not only not to hinder, but to aid the saving of the fragments of the vessel or of her merchandise by those to whom they belonged, subject to just remuneration to any salvors for their trouble, without regard to any promise made to them, by the master of the vessel or the merchants owning the goods, of (art. 4, *Ib.* p. 437) a reward of a third or a half of the goods; but (art. 27, *Ib.* p. 463) if no one survived, then, subject to payment to salvors for their trouble, the lord of the place should advise the relations of the deceased persons and keep the goods for a year, and then sell them by public auction, and use the money for pious purposes without retaining a fourth. In art. 29, *Ib.* p. 467, reference is made to a decree of the Lateran Council of 1179 excommunicating the lord or salvors who should possess themselves of shipwrecked goods, and the article refers to and condemns the practice of pilots, in connivance with wreckers and the lord of the place, running ships ashore for the purpose of the lord and the salvors claiming a third or a fourth each, which shares had been substituted for the absolute right of the lord of the coast to all wreck. By art. 41 the right of the first occupant to derelict goods is declared not to apply where the goods may be assumed to have belonged to someone, and neither the lord nor the finder are entitled to keep them: Black Book, Rolls Series, vol. ii. p. 475.

By chap. iv. of the Wisby Town Law (Roscoe's Ad. Prac. (3 ed.) p. 18, n. (*a*)) (Black Book, Rolls Series, vol. iv. p. 393), in case of shipwreck within the limits of the town's jurisdiction, the remuneration to salvors was fixed by the prud'hommes, or, in case of dispute, by the Court. By chap. xiii., *Ib.* p. 405, the finder of a derelict ship or of goods driving on the sea, with no land in sight, was entitled to a moiety for his labour in recovering the property; if land was in sight, or the goods were on the ground, one-third part; if the goods could be reached by wading or if they were on the shore, the eighth penny.

By art. 7 of the Maritime Assise of the Kingdom of Jerusalem (Black Book, Rolls Series, Appendix, vol. iv. p. 517), the finder of goods thrown overboard, and floating on the water, was entitled to a moiety, the owner to the other moiety; if found at the bottom of the sea, only one-third went to the finder—in any case the owner of the soil taking the owner's share if the latter did not appear to claim it.

By art. 14 of the Maritime Law of the Osterlings (and the law of Hamburg, see Black Book, Rolls Series, Appendix, vol. iv. p. 367), salvors of derelict goods floating on the open sea were entitled to one-twentieth part, but in the case of shipwreck the amount due to those who brought the goods to land was smaller. By art. 15 salvors of

goods driving upon a beach, or of a ship breaking up in a harbour, were to be paid such a sum for their work by the owners as arbitrators should award.

By chap. 207 of the Customs of the Sea (Consolato del Mare, Roscoe's Ad. Prac. (3 ed.) p. 33. n. (*g.*)), derelict goods are to be reported to the authorities, and if perishable, sold, and the finder rewarded with half, the goods or the proceeds being kept for a year and a day, after which the authorities were entitled to one-fourth, and the remainder was to be devoted to pious purposes: Black Book, Rolls Series, vol. iii. p. 439; see also chap. 245, *Ib.* p. 619.

Similar steps toward the mitigation of the law of wreck of the sea took place in England, where by the common law the general rule that the property in derelict, that is, *bona vacantia* designedly abandoned, vests in the finder as the first occupant (Britt. bk. i. c. xviii.), was set aside in favour of the Crown (see as to royal fish, wrecks, treasure trove, waifs and estrays, 1 Bl. Com. 299); so that if any ship was lost at sea, and the cargo thrown upon the land, the goods were adjudged to belong to the King: see Dr. & St. d. 2, c. 51; Molloy, *De jure maritimo,* 7th ed., p. 269; 5 Rep. 108, b; but by an ordinance attributed to Henry I., but in 1 Rymer's Fœdera, 36, to Henry II. (1174), and by Cleirac to Henry III. (1226), if a single person escaped alive all right to wreck was renounced if claimed within three months, otherwise to belong to the King, or other lord of the franchise; and the law in the reign of the last mentioned king appears to have been that if only a dog or other living animal escaped, by which the owner might be discovered, or if the goods were marked so that they might be known, it was no wreck: Bracton, l. 3, 2nd treatise, c. 3, s. 5. See also 2 Coke's Inst. 166.

By art. 33 of the rules or orders about matters which belong to the Admiralty (Black Book, Rolls Series, vol. i. p. 81), inquiry is to be made concerning all those who claim to have wrecks on the sea coast and have no right to wrecks by any charter or prescription, and if any one be thereof indicted and convicted by twelve men he shall pay to the King the double of what he shall have got by such wrecks; and by art. 42 of the addition to the Inquisition of Queenborough (Black Book, Rolls Series, vol. i. p. 159), inquiry is to be made about all those who suffer wreck of any ship or boat perished upon the sea whereout man, cock, dog, or cat doth escape alive, and the owner thereof, or of the goods which were therein, come within a year and a day to challenge the ship or goods and cannot have restitution thereof.

The revenue from wreck, that is, goods coming to land, was granted out to lords of manors as a royal franchise; but, by the grant of wreck, things *jetsam* (goods cast into the sea and there sinking and remaining under water), *flotsam* (continuing to float on the surface after the vessel has sunk), and *ligan* (sunk in the sea tied to a buoy, so as to be found again): *Constable's Case* (1601), 5 Rep. 106—did not pass, for they were not deemed *wreccum maris* unless they came ashore (*The King* v. *Two Casks of Tallow* (1837), 3 Hagg. 294), as they were not held to be abandoned, and they only became the property of the Crown if no owner appeared to claim them.

The trial of cases of spoil of wreck properly belonged to the courts of common law, and the above-mentioned statute of Richard II. required questions concerning wreck of the sea to be tried by the law of the land, and not before the admiral or his

lieutenant; but owners of ships and goods wrecked found it convenient to resort to the Admiralty Court to obtain possession of their property, and the statute of Richard came to be disregarded, commissions issuing from the Admiralty directing the search for and taking possession of wrecked goods in the hands of persons other than the owners: Marsden's Select Pleas (Selden Society), vol. i. Introd. p. lxviii.

By 27 Edw. III. c. 13, if any ship were lost on the shore, and the goods came to land, "which may not be said wreck," they should presently be delivered, upon proof of ownership, to the merchants, "paying to them that have saved and kept them the sum (salvage) convenient for their travel." See 1 Bl. Com. 293.

In the reign of James I. the practice seems to have been, in the case of things found floating at sea and brought by the finder to land, to divide it into three parts: the first to the finder, the second to the lord of the fee where it was landed, and the third to the King or to the lord admiral. Hale, De Jure Maris, Harg. Tracts, pt. i. c. 7, p. 41.

In the next reign the vice-admirals throughout the kingdom were directed to conform to the practice of the Cinque Ports, by which, if the finders of wrecks certified them to the droit gatherers, one-half belonged to the salvors and one-half to the admiral; otherwise the admiral took the whole, and the finders were fined and imprisoned. In 1632, by the compromise between the Admiralty and the common law judges (Roscoe's Ad. Prac. (3 ed.) p. 54) the "saving of ships" is expressly mentioned as cognizable in Admiralty when the proceedings are against the ship itself, and in 1633, in the case of a ship ashore off the Essex coast, proceedings were taken in Admiralty to have her condemned to the King as wreck. The owners and the salvors intervened in their respective interests, the salvors asking for a moiety as due to them by custom, and, according to Marsden (Select Pleas, Selden Society, vol. ii. p. xxxvi.), this is the first case in which the precarious right of salvors to a half of findalls, derelict, or waifs, or to a recompense in the nature of payment for work and labour from the owners of property which was not wreck in the legal sense, was converted into a recognized right to sue in Admiralty for salvage, though the recognition was resented by the vice-admirals of the coast, who objected to owners of ships in distress being at liberty to make contracts with salvors enforceable in Admiralty, as it was their duty to take possession of and preserve shipwrecked goods, and the salvage payable by owners was one of their perquisites; but the practice grew for the owners and salvors to intervene in proceedings taken in Admiralty on behalf of the Crown, or for the owner to sue the salvors for detention of the property, in which case sentence was given for restitution of the property or its value, power being reserved for the Court to award salvage. During the Commonwealth efforts were made to put down wrecking, and to recompense salvors who assisted ships in distress, but after the Restoration, so far as droits are concerned, the customary half was reduced to a gratuity from the Crown or the admiral. In 1771 Lord Mansfield, in *Hamilton* v. *Davis,* 5 Burr. 2732, decided that the property in wrecked goods was not divested out of the owner by the fact that no living thing escaped from the wreck alive. By 1 Will. IV. c. 25, droits were transferred from the Crown to the Consolidated Fund, sect. 12 reserving the right of the Crown to reward the salvor. The practice in such cases is indicated in *The Thetis* (1833), 3 Hagg. 14, at p. 38, where—upon the arrival in this country of the first consignment of the treasure recovered—the Admiralty proctor arrested it as derelict,

and as such droits of Admiralty. Upon this a claim was made on behalf of the owners, and restitution, subject to salvage and expenses, was ordered. As further consignments arrived in England they were also arrested, and the actions in respect of them consolidated. With regard to derelicts being perquisites of Admiralty, see *The Aquila* (1798), 1 C. Rob. 37, at p. 43; and with regard to the practice in the eighteenth century as to the *quantum* of salvage, Sir C. Robinson in the above case (*The Thetis*) said (at p. 62) that "the maritime laws of England fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble and expense of saving; an eighth or tenth, except in cases of extreme hazard, is as much as is usually allowed. Neither the Lord High Admiral nor lords of manors have any right of salvage, but only those who save." For a summary of the (so-called) Rhodian, Roman, English, and French law as to wreck, see *The Aquila* (1798), 1 C Rob. 37, note at pp. 47, 48. For the existing law as to wreck and salvage see Roscoe's Ad. Prac. (3 ed.) chap. Salvage.

[1]See Wynne's Life of Sir L. Jenkins, Argument before the House of Lords, vol. i. p. lxxviii.

[2]This Act was repealed in 1861 by sect. 31 of the Admiralty Court Act, 24 Vict. c. 10.

[3]*E. g.,* the patent of the Earl of Pembroke in 1708.

[1]"Of the right of pressing or seizing of ships or mariners for service publick," see Molloy, *De jure maritimo,* 7th ed. (1722), chap. vi.

[2]An Ordinance of King John (Black Book, Rolls Series, Rule No. 25, vol. i. p. 73) required the admiral to make inquisition as to unlawful claims of customs or tolls on the coast, except for anchorage, and another in 1201, that vessels meeting the king's ships must lower their upper sails, otherwise they would be seized and forfeited as enemies' goods and the crews imprisoned: see No. 35 of the laws of Oleron, Black Book, Rolls Series, vol. i. p. 129. The date of this Ordinance has been much disputed, but beyond the fact that the language has been altered to suit the time when the Black Book was written, and that it is inserted in the laws of Oleron as if those laws then existed in England, there seems no reason to doubt its accuracy. This provision as to vailing the bonnet is cited by Selden in his Mare Clausum, bk. 2, c. 26 (1635), in support of the supremacy asserted by the Crown of England to the sovereignty of the Narrow Seas, and was rigorously enforced at the time that that claim was put forward, any disrespect being severely punished. See Molloy, *De jure maritimo,* 7th ed., p. 79. For a late case, see that of *The Native* in 1829 (3 Hagg. 97), where the master of a schooner was arrested for contempt in not lowering his royal when passing a man-of-war. This offence (as well as that for secreting seamen in fraud of the public service) has been long unknown in practice, and when proceedings were instituted by the Admiralty proctor they usually terminated by an apology and payment of costs. Similarly it was an offence against the laws of the sea and ancient constitutions of the Admiralty to carry a flag not easily distinguishable from the king's jack. See the paragraph from a charge of Sir Leoline Jenkins set out in a note to *The Minerva* (1800), 3 C. Rob. 34. See also *The King* v. *Miller* (1823), 1 Hagg. 197. For the

procedure in the case of such a complaint, see the evidence of Sir Herbert Jenner at pp. 35, 297, of the report of the Select Committee on the Admiralty Court, 1833, and *Reg.* v. *Ewen* (1856), 2 Jur. N. S. 454. The penalties for unduly assuming the British character, are now included under the headings "National Character and Flag" and "Forfeiture of Ship," in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 68-76. The jurisdiction of the High Court with reference thereto is, by the Merchant Shipping Rules, 1894, s. 1, assigned to the Probate, Divorce and Admiralty Division, that is, to the Admiralty Court.

[1]See Black Book, Rolls Series, vol. i. p. 3.

[2]The word "lieutenant" was held to apply to the judge. See Wynne's Life of Sir L. Jenkins, vol. ii. p. 706.

[3]This implies the existence of a maritime law and body of ancient customs already in use. By art. 5 the admiral is to take care that the whole office be well executed and justice done to all parties "according to the law and ancient custom of the sea." By art. 6 the admiral is to have letters of aid from the king directed to the sheriffs of counties, and other officers of the king.

[4]See Black Book, Rolls Series, Appendix, vol. i. p. 409.

[5]The deputies or vice-admirals, and their lieutenants or judges were appointed under the Admiralty seal in the principal ports of the kingdom and its dependencies, and constituted the Vice-Admiralty Courts with an appeal to the High Court of Admiralty, see *The Fabius* (1800), 2 C. Rob. 245. As to the appointment and jurisdiction of Vice-Admirals, see Sir Sherston Baker's Vice-Admiral of the Coast, chap. v. As to Vice-Admiralty Courts, see Browne's Civil Law, vol. 2, chap. xii. In 1833, by 3 & 4 Will. IV., c. 41, appeals from Vice-Admiralty Courts abroad were transferred to the Judicial Committee of the Privy Council.

[1]See Rymer's Fœdera, 6, 170, and Marsden's Select Pleas (Selden Society), vol. i. Introd. p. xlii.

[2]See Rymer's Fœdera (Record ed.), iii. 505 and 597.

[3]See the material words of the patent of Sir Leoline Jenkins, set out in one of his letters, Life by Wynne, vol. ii. p. 706.

[4]See Marsden's Select Pleas (Selden Society), vol. i. Introd. p. lv. The Court of Requests also exercised Admiralty jurisdiction by delegation from the Privy Council in matters of salvage, spoil, piracy, letters of reprisal and prize. Some of the judges of the Admiralty Court were masters of this Court, see Marsden, *ib.* p. lxv. Sir J. Cæsar, judge of the Admiralty Court, 1584, states that the procedure was according to the process of summary causes in the civil law, see Leadam's Select Cases in the Court of Requests (Selden Society), vol. xii. p. xxi.

[5]Set out in Rymer's Fœdera, 13, 700.

[1]“*Breviter, summarie et de plano, absque strepitu judicii et figura, sola facti veritate attenta, prout de usu et consuetudine maris fieri est assuetum.*” See chap. xxxvi. of the Judicial Order of the Court of the Consuls of the Sea, set out in the Appendix to the Black Book, Rolls Series, vol. iv. p. 489. Under Imperial Rome maritime causes were directed to be heard without delay before the competent judge in each province. Code xi. 5 (*De Naufragii*), 5.

[2]*De Lovio* v. *Boit* (1815), 2 Gall. 398, at p. 400.

[3]The Consolato del Mare was a collection of the customs of the sea observed in the Consular Court of Barcelona, and called “Chapters of the Sea.” The collection received many additions and acquired the name of the “Consulate” early in the fifteenth century. The so-called book of the Consulate is a volume printed at Barcelona, in the Catalan tongue, in 1494, and was drawn up by the notary of the Consular Court for the use of the consuls of the sea at Barcelona. The first part of the book consists of regulations for the procedure to be observed by the consuls of the sea at Valencia, who appear to have been first established by King Peter III. of Aragon, in 1283, but from internal evidence the date of this part of the book is not earlier than ad 1336. Next come the Constitutions and Customs of the Sea, of which the date is not earlier than ad 1340. The third part is a treatise on cruisers, which from the use of the word “admiral” cannot be earlier than the middle of the fourteenth century. Then follow eleven documents dating from ad 1340 to 1488. See the whole subject of the dates of the various parts of the book learnedly discussed by Sir Travers Twiss in the Appendix to the Black Book, Rolls Series, vol. ii. Introd. pp. lx.-lxx., and that portion of the book of the Consulate of the Sea which contains the Customs of the Sea, and which constituted the important part of the maritime customs of Europe in the fourteenth century, is printed in the Appendix to the same work, vol. iii. pp. 50-657.

Lord Mansfield, in *Luke* v. *Lyde* (1776), 2 Burrows, 882, at p. 889, quotes from the Consolato del Mare as a Spanish book containing a valuable body of maritime law, and Lord Stowell refers to it in *The Aquila* (1798), 1 C. Rob. 37, at p. 43; and in *The Ceylon* (1811), 1 Dods. 105, at p. 116. Dr. Christopher Robinson, afterwards judge of the High Court of Admiralty, published in 1801 a translation of two chapters of the Customs of the Sea on the subject of maritime prize, and observes that the Consulate of the Sea is generally allowed to have been composed from the Amalphitan Table (Roscoe’s Ad. Prac. (3 ed.) p. 14); but the internal evidence afforded by the difference of the provisions in the table and in the customs, particularly on the subject of contribution in cases of jettison, and as to vessels sailing as consorts, disproves this suggestion, and shows that the prud’hommes who compiled the Customs of the Sea at Barcelona framed them after a different set of usages.

[1]See chap. xxii. of the Judicial Order of the Court of the Consuls of the Sea, Black Book, Rolls Series, App. vol. iv. p. 473.

[2]The Court consisted of two consuls and a judge of appeal annually elected from amongst the masters and mariners constituting the Guild of Navigators. The consuls were paid by a poundage on the amount of the claim, and the judge of appeal by a poundage on the amount adjudged to be due by the consuls. On election the consuls

took an oath to do justice alike to rich and poor, and the judge of appeal was presented to the King's procurator for appointment. A scribe was then appointed to whom the custody of the seal of the Court was entrusted. (The Registrar of the Admiralty Court in England was also called a scribe, see list of fees appertaining to the scribe of the Court of Admiralty, Black Book, Rolls Series, Appendix, vol. i. p. 403.) The consuls and the judge of appeal might be represented in their absence by members of the Guild of Navigators, as in the case of members of the College of Advocates in London who could act as surrogates of the judge of the High Court of Admiralty.

[1]See this oath (*sacramentum calumniæ*) in the order of procedure, or *Praxis Curiæ Admiralitatis,* Black Book of the Admiralty, Rolls Series, vol. i. Introd. pp. xxxiv., 188.

[2]This indicates that the authority of the consuls was primarily introduced to interpose them as arbitrators between the representatives of the Guild of Merchants and those of the Guild of Mariners.

[1]Roscoe's Ad. Prac. (3 ed.) p. 18.

[2]Ib. p. 18.

[3]Ib. p. 18.

[1]What has become of the earlier records is not known. See Marsden, Select Pleas (Selden Society), vol. i. p. lx.

[2]"An author of undoubted credit," per Lord Hardwicke in *Sir Henry Blount's Case* (1737), 1 Atkyns, 295, at p. 296.

[3]For the summary procedure in marine civil matters, see Ridley's View of the Civil and Ecclesiastical Law (1639), 3rd edit. p. 94. See also Godolphin's Admiral Jurisdiction, 2nd edit. (1685), p. 41.

[4]Edit. 1722, tit. 1.

[5]Beawes' Lex Mercat. (1813), 6th edit. p. 401.

[6]See 3 Bl. Com. 108, citing Clerke's Praxis.

[7]See *The Assunta,* [1902] P. 150, at p. 152, note (3).

[1]See a form of bond to pay what may be adjudged due in the action: *The Robert Dickinson* (1884), 10 P. D. 15.

[1]*"Si habuerit aliqua bona, merces, vel navem aut naviculam super mare vel intra fluxum aut refluxum maris ac jurisdictionem domini Admiralli, impetrandum est warrantum ad hos effectus: viz., ad arrestandum talia bona, vel talem navem, ad N. reum debitorem spectantia in quorumcunque manibus existentia, et ad citandum apud bona hujusmodi N. debitorem in specie, ac omnes alios in genere jus aut interesse in*

bonis hujusmodi habentes, aut habere prætendentes, ad comparendum tali die, M. in quâdam causâ civili et maritimâ de justitiâ responsurus." Clerke's Praxis, edit. 1743, tit. 28.

"One need not cite or summon him who is *contumax,* and will not appear, but where the ship or goods in question lie, or at the port usual of their haunting." Welw. Tit. 5, f. 62. *"Si in re, quæ arrestari debet, habeat portionem indivisibilem tantùm tota res potest tùm arrestari."* Peck, *de jure sistend.,* C. 4, n. 18. See Roscoe's Ad. Prac. (3 ed.) p. 45.

[2]Beawes' Lex Mercat. (1813), 6th edit. p. 402.

[1]The appeal from the Instance Court lay to the King in Chancery, who appointed delegates by commission to hear and determine it. The effect of 2 & 3 Will. IV. c. 92, 3 & 4 Will. IV. c. 41, and 6 & 7 Vict. c. 38, was to abolish the old Court of Delegates (which had been the Court of Appeal from the Instance Court since 8 Eliz. c. 5 made the appeal final), and substitute an appeal to the Judicial Committee of the Privy Council for report to the Sovereign. By sect. 18 of the J. A. 1873, and sect. 4 (3) of the J. A. 1891, the jurisdiction of the Judicial Committee upon any judgment or order of the Admiralty Court was (except as to prize) transferred to the Court of Appeal.

[1]Per Fry, L. J., in *The Heinrich Bjorn* (1885), 10 P. D. 44, at p. 54. The learned judge adds, "or by proceedings against the real property of the defendant within the realm." As to this, see the mode of satisfying a judgment out of real property, in the absence of moveables, indicated in the above-mentioned Valencian Regulations (Roscoe's Ad. Prac. p. 36); but in the Admiralty Court the stipulations, in the nature of a recognizance, entered into by the principal parties and their sureties, only affected body and goods, not lands. "The Court of Admiralty may cause a party to enter into a bond, in nature of caution or stipulation, like bail at common law; and if he render his body, the sureties are discharged; and execution shall be of the goods, or the body, &c., not of the lands": Beawes' Lex Mercat. (1813), 6th edit. p. 402. These stipulations were not under seal from fear of prohibition, and for a similar reason the principal parties and their sureties, each time they entered into a stipulation, expressly submitted to the jurisdiction of the Court, and consented, that in case of default in the performance of the conditions, the Admiralty process should issue against them. In other respects the stipulation followed the practice of the civil law with regard to fidejussory cautions, and the sureties on both sides on behalf of the principal party undertook to pay the condemnation or sum agreed, and costs (*judicatum solvi*), to appear from time to time, and at the hearing, to abide the sentence (*de judicio sisti*), and to ratify the acts of the proctor (*de rato*). The bail were not liable beyond the extent of their fidejussory caution, and the security did not extend to the Court of Appeal, where the principal party had to obtain fresh fidejussors. See Browne on the Civil Law (quoting Clerke), vol. ii. pp. 408-412.

[1]In 1684 Saunders, C. J., observed that "nothing was more frequent than for the Admiralty to arrest ships riding in the river, that it was done every day for mariners' wages and other maritime causes": *Sandys* v. *East India Co.,* Skinner, 91, at p. 93.

[2]*Taylor* v. *Best* (1854), 14 C. B. 487, argument of Mr. Willes, pp. 510, 511.

[3]*Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414, per Lord Blackburn, at p. 430.

[4]Owing to the pressure of the courts of common law exercised by prohibiting actions against individuals personally whilst they allowed actions to proceed when based upon a claim over the *res* (*Johnson* v. *Shippen* (1704), 2 Ld. Raym. 982, at p. 984), the Admiralty Court was driven to arrest property in the first instance, on the ground of hypothecation or lien, so as to have jurisdiction *quoad* the *res.* and avoid the question of jurisdiction *quoad* the owner, with the result that the proceeding by arrest of the person compelling bail to be given to submit to the jurisdiction of the Court became obsolete, and the practice of attaching the goods or a ship of a party who could not be found, or who lived in a foreign country, to compel appearance also fell into disuse. See Browne's Civil Law, vol. ii. pp. 434, 435. Hence, Browne, writing in 1802, commences his chapter on the practice of the Admiralty Instance Court with the remark that "Clerke in his Practice begins with the process *in personam* . . . we shall begin with the process *in rem* as the most usual and frequent." He goes on to say that "proceedings *in rem* take place principally in suits for seamen's wages, when they proceed against the ship or cargo, this being their most expeditious mode, though they may also have their remedy against the master or owner (as is the constant practice, and admitted to be right in *Howe* v. Napier (1766), 4 Burr. 1945), in suits on hypothecation, or bottomry bonds, in which the ship and goods are solely and specifically bound; in suits insisting on a right of possession, where there is a clear *constat* of the property, as where one part-owner unjustly refuses possession of the ship to the master nominated by the majority of his part-owners; and in actions for collision, where there is no pretence for making the owner answerable, or demanding reparation, *as against him,* beyond the value of the ship, for against the master, according to Bynkershoek, there is remedy *in solidum,* and beyond the value of the ship. . . . When the proceeding is against the ship, the action being entered, and an affidavit of the debt made by the person on whose behalf the warrant is prayed, or by his lawful attorney, process commences by a warrant directed to the marshal of the Court, commissioning him to arrest the ship or goods, or both; which warrant contains also a citation to the master of the ship in particular, and all others in general, having or pretending to have an interest in the said ship, her tackle, apparel and furniture, or (as the case may be) in the cargo or goods, to appear personally on a day, and at a place therein named, to answer and defend, in a certain cause, civil and maritime. This warrant is executed by producing the original before the master and crew, and affixing a copy to the mast of the ship; after which an affidavit must be made of the following tenor, to wit, that the deponent did arrest the ship mentioned in the warrant thereunto annexed, her tackle, apparel and furniture; and that he did cite all persons in general, and those requisite in special, to appear as above. . . . This warrant and affidavit or certificate are then to be returned, and if there be any apprehension of the ship's being carried to sea, the sails may be taken on shore or a custodee put on board. The ship being thus arrested, a proctor appears for the promovent and makes himself party for him; and either the owner will appear to defend his interest, and by voluntarily entering into a stipulation, give jurisdiction to the Court over him personally, or by not entering an appearance (which, perhaps, if the demand exceed the value of the ship, he may think superfluous), may oblige the Court to proceed for defaults, which

word here signifies non-appearance. The proceeding for defaults is as follows: The warrant which issued against the ship having been returned with the marshal's certificate of its execution, and a proctor having appeared for the promovent, and none of the persons generally or specially cited appearing on the day or at the place assigned, after being thrice publicly called in Court, their contumacy is accused; and in pain of this contumacy, the ship, or rather they, are said to incur the first default, and then time is given to them to appear on the next court day, which is technically called continuing the certificate of the execution of the warrant to that day. This step is repeated four times, on four successive court days . . . and then, the four defaults being incurred . . . the proctor of the complainant exhibits a summary petition . . . reciting the cause of suit, the party cited having been thrice called and not appearing, and his standing in contempt by having incurred four defaults, whereupon the oath required by law having been made, viz., of the debt, the proctor of the complainant prays right and justice, and to be put in possession of the ship, her tackle, apparel and furniture to the extent of the debt . . . and for the expenses. This article or allegation being porrected to the judge, with a schedule of expenses to be taxed, and an oath of their necessity, and the parties being again thrice called and not appearing, the judge pronounces them to be contumacious, and in pain of their contumacy admits the article, and the instruments on which the suit or debt is founded, *e. g.,* a bottomry bond, being exhibited to him . . . a *first decree* is porrected to the Court, and by it read, signed and promulged, and the expenses taxed. By this first decree . . . the Court decrees that the complainant shall be put in *possession* of the ship, her tackle, apparel and furniture, or, as the case may be, of all the goods, wares or merchandise, now or lately on board the same, to the extent of the debt, if the things so possessed be sufficient, and if not, as far as their value, security being first given to answer for the same to any person claiming right or intervening for their interest within a year. . . . No second decree is necessary in the Court of Admiralty, where the proceeding is *in rem,* the first decree by the civil law giving nude possession, and the lapse of a year producing a possessory right and enjoyment of the fruits." But the possession of the thing gives no power over the proceeds; a subsequent application to the Court is therefore necessary (*The Exeter* (1799), 1 C. Rob. 173, at p. 175) for a decree of sale and possession of the proceeds, usually obtained as matter of form on "an allegation of the perishable condition of the ship, and of its actual or probable deterioration by time, concluding with a prayer that the ship may be appraised and valued and decreed to be sold, and that the moneys arising therefrom be brought into the registry. . . . Upon this the Court decrees a perishable monition, *i. e.,* it decrees all persons to be monished (by affixing an original monition on the Royal Exchange, and by leaving there affixed a true copy thereof) to appear in Court on a certain day and hear an allegation as to perishable condition, and witnesses being there sworn, or a commission issued to take their depositions, and such their depositions published, to shew cause why the ship should not be exposed to public sale, and the money proceeding from the sale be brought into the registry for the use of all persons interested, with the usual intimation. The cause is then assigned to be heard summarily on perishable condition, which appearing by the attestations, the judge decrees a commission to sell the ship or cargo or both, as the case may be, the proceeds to be brought into the registry for the use of all persons interested. The proceeds of the sale being brought into the registry, the Court exercises its discretion over them, giving priority, where there are various suitors, according to precedence in

commencing the suit . . . and decreeing the balance over and above the principal demand of the promovent's to be paid over to the true owner, saving the demands of any persons legally intervening in the cause *pro interesse suo.* It is very usual for the impugnant or some other person interested to come in while the defaults are running, or after they are all incurred, or even within a year after the first decree obtained, and on giving security and paying all costs to be admitted to defend," and if the bail was sufficient the ship was released. The libel and all the proceedings were sometimes *vivâ voce,* but usually the party appearing was sworn to give in his personal answer before a day assigned, which if he omitted to do he was attached, though he could not be visited with a fine or pecuniary penalty, as the Admiralty Court was not a Court of record. The proceedings then went on up to the definitive sentence in a similar way to a personal *summary* cause in the Ecclesiastical Court, and are given in detail in Browne's Civil Law, vol. ii. p. 413 *et seq.*

With regard to the effect of the mode of initiating a suit by the usual form of warrant for the arrest of the ship, her tackle, apparel and furniture in a cause of damage civil and maritime, the question was raised in *The Dundee* (1823), 1 Hagg. 109, whether the owner of the vessel arrested was liable beyond the appraised value of the "ship, her tackle, apparel and furniture," and Lord Stowell held (p. 124) that this ancient formula led "to a full remedy affecting all the property of every kind belonging to the owners . . . (and was) no further restricted than as the statutes (for limitation of liability) restricted it." This view is contrasted by Lord Blackburn in *The Khedive* (1882), 7 App. Cas. 795, at p. 813, with the opinion of Parke, B., in *Brown* v. *Wilkinson* (1846), 15 M. & W. 391, at p. 398, that the Admiralty Court "proceeds *in rem,* and can only obtain jurisdiction by seizure, and the value when seized is the measure of liability"; but in spite of the views of Dr. Lushington (see *The Volant* (1842), 1 W. Rob. 383, at p. 389), the opinion of Lord Stowell has prevailed, and it seems that if the owners do not appear the judgment is limited to the *res* in the hands of the Court, though if they do appear they are in the same position as if they had been brought before the Court by personal notice, see *The Dictator,* [1892] P. 304, where execution issued against owners, who had appeared in an action *in rem,* for the recovery of the amount by which a decree exceeded the amount of the bail, and in *The Gemma,* [1899] P. 285, the owners of a foreign vessel, who had appeared, were held to be personally liable for the balance with costs over and above the full value of the vessel and her freight, which had been released on bail for that amount, and further that the payment of the balance could be enforced by a writ of *fieri facias* against any of their goods and chattels, including the released vessel, within the jurisdiction.

[1]Roscoe's Ad. Prac. p. 7.

[2]This synchronises with the formal declaration by Parliament in 1534 of the supremacy of the Crown in ecclesiastical matters, and the Admiralty Court was always associated in its methods and practice with the Ecclesiastical Courts which were, at this time, undergoing reform.

[1]See the letter (1598) set out in Burrell's Admiralty cases by Marsden, pp. 232, 233.

[2]See the agreement set out in Prynne's Animadversions, p. 98, and in Edwards' Admiralty Jurisdiction, p. 21.

[1]Lord Coke (4th Inst. 136) says that though, in 1611, this agreement was read over in the presence of King James I. and in the hearing of the judges, they did not assent to it.

[2]See Carter's Outlines of Legal History, p. 140.

[3](1610), 2 Brownl. & G. pt. 2, 37.

[1]In his view of the Admiralty jurisdiction (4 Inst. 134 to 147), Sir Edward Coke also adduces a number of cases before 13 Rich. II. to disprove the extent of the jurisdiction claimed for the Admiralty; but in *Smart* v. *Wolff* (1789), 3 T. R. 323, which was an application for a prohibition to the Prize Court, Buller, J., observes, at p. 348, that these statements are to be received with caution, and adds that Lord Coke "seems to have entertained not only a jealousy of, but an enmity against," the Admiralty.

[2]*Palmer* v. *Pope* (1612), Hobart, 79, 212.

[1]*Sir Henry Constable's Case* (1601), 5 Rep. 106. See also Sir L. Jenkins' charge at the Admiralty Sessions, Life by Wynne, vol. i. p. xci.

[2]After applications to the Council and to the Chancellor to interfere by way of supersedeas and certiorari had been found to fail.

[3](1782), 2 Dougl. 612 (n). In this case the foundation and nature of prize distribution in the Court of Admiralty is explained by Lord Mansfield. Sir Julius Cæsar in the reign of Queen Elizabeth, and Sir Henry Vane in the time of Charles I., were eminent judges of the law of prize. Sir Leoline Jenkins in 1664, with the assistance of other civilians, drew up a body of Rules and Ordinances on the adjudication of prizes, for the guidance of the judge of the Admiralty, which was approved by King Charles II. Sir Thomas Exton in the time of Charles II., and Sir Charles Hedges in the reigns of King William and Queen Anne, were also eminent judges in the law of Prize; but the most distinguished judge was Lord Stowell (see Roscoe's Ad. Prac. (3 ed.) p. 57), whose judgments during a time of successive hostility with most of the European states have excited universal admiration. According to Marsden (Select Pleas, Selden Society, vol. ii. p. lxxix.), the separation of Prize from Instance business was made shortly after the restoration. The judge of the High Court of Admiralty has hitherto by royal warrant exercised in time of war the office of judge of the Prize Court which is deemed distinct from the ordinary court, that is, the Instance Court. Browne, writing in 1802 (Civil Law, vol. ii. pp. 208, 210, 212), says "the jurisdiction depends not on locality but on the subject-matter, and the Prize Court hears and determines according to the course of the Admiralty and the law of nations. . . . I strongly suspect that, before the last century, he (the admiral) did exercise a jurisdiction over prize without any special or distinct commission; and certain it is, before Britain had a regular or royal navy, that the admiral . . . was

entitled to a very considerable share of prize ships or cargoes taken; besides, no prize commission having issued, as far as appears, in ancient times, how could he have then exercised the authority, unless it was considered as inherent?"

The Court of Admiralty had no jurisdiction to decide any question concerning booty of war, that is, property captured on land by land forces exclusively until, by sect. 22 of the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), power was given to the Court to try such questions as should be referred to it by Order in Council, and to proceed as in cases of prize of war. See *Banda and Kirwee Booty* (1866), L. R. 1 A. & E. 109; (1875), L. R. 4 A. & E. 436.

[1]4 Inst. 124, 135. See Bl. Com. iii. 68, 107, iv. 267; and Black Book, Rolls Series, vol. i. p. xxxviii. and 281.

[2]See Com. Dig., Adm. E. 10, 17; *Menetone* v. *Gibbons* (1789), 3 T. R. 267.

[3]These resolutions are set out in Zouch on the Admiralty Jurisdiction; and in Edwards, p. 23. See also Prynne's Animadversions, c. 22, p. 100, and Browne on the Civil Law, vol. ii. p. 78.

[1]In Sheppard's Abridgement (1675) (pt. i. p. 128), 3 Cro. 296, 297, is quoted for the statement that "a suit may be in the Admiralty for building, saving, amending, and victualling of a ship against the ship itself, not against the party, but such as make themselves for their interest parties." This remarkable clause keeping alive the earlier practice, and enabling a shipwright to sue in Admiralty, provided his suit was against the ship, together with all the other resolutions of 1632, were inserted in the two first editions of Croke's Reports, but according to Comyns (Dig. Adm. E. 10, F. 3) they were intentionally omitted in the third edition, and a declaration inserted that they were of no authority. See Edwards' Adm. Jur., p. 25.

[1]See Scobell's Acts and Ordinances (1658), c. 112 (1648). As to the extent of the Admiralty jurisdiction down to the time of the Commonwealth, see Godolphin's Adm. Jur., 2nd ed. (1685), cap. iv. pp. 37 to 50, and cap. viii. and ix. pp. 91 to 118.

[2]Scobell's Acts and Ordinances, c. 112 (1648); c. 23 (1649); c. 3 (1651).

[3]See *Ouston* v. *Hebden* (1745), 1 Wils. K. B. 101, at p. 102, and *Woodward* v. *Bonithan* (1661), Sir T. Raym. 3.

[4]See his vigorous assertion of, and attempt to maintain, the claims of the Admiralty Court, in an argument delivered before a committee, appointed in 1669 to consider a bill for "declaring and ascertaining the jurisdiction of His Majesty's Court of Admiralty in marine causes." Wynne's Life of Sir Leoline Jenkins, vol. i. pp. lxxvi-lxxxv.

[5]History of the Common Law, 6th ed., ch. 2, p. 39.

[1]The Court of Admiralty has no jurisdiction over any causes of action arising in foreign countries beyond the seas (*in partibus transmarinis*). Com. Dig., Admiralty, F. 3.

[2]*Hook* v. *Moreton* (1698), 1 Ld. Raym. 397, at p. 398.

[3]4 Coke's Inst. 134.

[4]See per Lindley, L. J., in *The Mecca,* [1895] P. 95, at p. 106. As to the expression "high seas" (*super altum mare*), with reference to the jurisdiction of the Court of Admiralty, see 28 Hen. VIII. c. 15; Com. Dig., Admiralty E. (1), (7), (14); *Reg.* v. *Anderson* (1868), L. R. 1 C. C. 161; *Reg.* v. *Carr* (1882), 10 Q. B. D. 76.

[5]Com. iii. 107.

[1]Roscoe's Ad. Prac. (3 ed.) p. 52.

[2]The publication of Admiralty Reports began in 1798. See *The Neptune* (1824), 1 Hagg. 227, at p. 235 (n).

[3]Civil Law, vol. ii. pp. 72, 100.

[4]In *Bridgeman's Case* (1614), Hob. 23 (5th ed., p. 11), the master of a ship borrowed money from a passenger on his own private account, and not for the purposes of the ship, but empawned the vessel at sea, Prohibition issued because the subject-matter of the suit in Admiralty did not appear to be a marine contract. So in *Atkinson* v. *Maling* (1788), 2 T. R. 462, on a common sale or mortgage of a ship at sea, trover was held to be the remedy.

[5]Reports (1664), p. 500, pl. 56.

[6]*Greenway and Barker's case,* p. 64.

[1]*Menetone* v. *Gibbons* (1789), 3 T. R. 267, at p. 270.

[2]*Ouston* v. *Hebden* (1745), Wils. K. B., pt. I. 101.

[3]Page 103.

[4]See Roscoe's Ad. Prac. (3 ed.) p. 51. In the United States of America at the present time the test of Admiralty jurisdiction seems to be as to contracts, subject-matter; as to torts, locality. See Two Centuries Growth of American Law (1901), p. 453; and navigability is substituted for tides as a test of jurisdictional locality. *The Genesee Chief* (1851), 12 Howard's Rep. 443.

[5]Page 121.

[6]It is commonly alleged that according to the law of countries following the Roman law, and according to the ancient practice in Admiralty (Life of Sir L. Jenkins, by

Wynne, Letter to the King in Council, vol. ii. pp. 746-7) derived from that law, the building and equipping of ships, and the supplying them with necessaries, creates a lien on the ship, that is, gives the security of the specific ship in favour of the material man, the ground being that the repairs are done, or the goods supplied, on the credit of the ship, so that the ship is liable, in addition to the liability of the owners for the contracts of the supercargo or master. This lien was held to extend to the proceeds of the ship, if sold by the Court in another cause, and the great authority of Lord Mansfield and Lord Tenterden are quoted in support of this view (see per Sir John Nicholl in *The Neptune* (1834), 3 Hagg. 129, at pp. 136, 137); but, so far as the Roman law is concerned, there seems no authority for the proposition, as the passages usually cited (see Abbott on Shipping, 5th ed. p. 108) do no more than establish that, by the Roman law, a preferential right of payment existed, which, in the case of the repair of any specific article, might be enforced by retaining possession until payment was made, or by securing the arrest of the ship, as being amongst the assets of the debtor, until bail was given for appearance; and, in this country, the doctrine, as affecting the ship, was repudiated by the Courts of common law, in the reign of Charles II., as being in derogation of the common law (see per Lord Stowell in *The Zodiac* (1825), 1 Hagg. 320, at p. 325); that is, it was held that a material man out of possession had no lien on the ship, though the practice of paying such demands out of the proceeds of the sale of the ship, on which proceeds the lien was alleged to exist, continued. See, further, "Maritime Lien," Roscoe's Ad. Proc., p. 68.

[1]*The Neptune,* 3 Knapp, P. C. C. 94.

[2]See per Dr. Lushington in *The Pacific* (1864), Br. & L. 243, at p. 245.

[1]As the result of the Report in 1833 of the Commission appointed to inquire into the office and duties of the judges of the Court of Admiralty.

[1]This essay forms chapter I of "A Preliminary Treatise on Evidence, 1898, pp. 7-46 (Boston, Little, Brown, & Co.).

[2]1831-1902. Harvard University, A. B. 1852, LL. B. 1856, LL. D. 1894; Iowa University, LL. D. 1891; admitted to the Boston (Suffolk Co.) Bar in 1856; master in chancery 1864-1873; Royall professor of law in Harvard University, 1873-1893, Weld professor of law in the same, 1893-1902.

Other Publications: Cases on Evidence, 1892; Origin and Scope of the American Doctrine of Constitutional Law, 1893; The Teaching of English Law in Universities, 1895; Cases on Constitutional Law, 1895.

[1]Maine, Early Law and Custom, c. 6; Pop. Gov., pp. 89-92; Essays in Anglo-Saxon Law, 2-3.

[1]So often in our older records. This rigor survives now chiefly in the fading rules of criminal pleading. It is interesting in the great Statute of Wales, 12 Edw. I. (1284), to see the contact of our old law with the customs of a region still less advanced. In certain pleas (s. 8), the demand is to be set forth in words stating the fact, without any

exception for mistake in words, *non observata illa dura consuetudine, Qui cadit a syllaba, cadit a tota causa.*

Of course it is to be remembered that in this husk of formalism lay, often, the safeguard of men's rights. "We may say with the great Romanist of our own day, that formalism is the twin-born sister of liberty." 2 P. & M., Hist. Eng. Law, 561.

[2]Brunner, *Die Entstehung der Schwurgerichte,* 174; Von Bar. *Beweisurtheil, passim.* As regards the German books I am greatly indebted to my friend and cousin, Gamaliel Bradford, of Boston. With lavish generosity he read to me the whole of the two books just cited and several others.

[1]The reasons which still make it so difficult to refer international controversies to the rational mode of trial may help us to understand our older law.

[2]See Brunner, Schw. 428 *et seq.;* P. & M., Hist. Eng. Law, ii. 603 *et seq.*

[3]Brunner, Schw. 170 *et seq.,* 175. Lea, Sup. and Force, 4th ed. 95-6.

[4]As to this term *lex,* see Thayer, Preliminary Treatise on Evidence, 199, 201.

[5]Brunner's explanation of this passage is found in Schwurg., 199-200. "If a lord appears with a complaint-witness against his vassal, in his own court, the vassal must answer, although no witnesses are brought. . . . Sometimes this privilege was limited so that the lord had it but once a year. The privilege of the fisc [or, as we should say, the crown] in this respect was unlimited. If a royal officer appears as plaintiff in a complaint belonging to his chief, he need not produce any witness . . . Even if such a complaint only called for the oath of purgation from the defendant, yet for this there was need, not merely of a clear conscience, but compurgators, and the painful formalism of the oath might only too easily bring the swearer to grief. Article 38 in Magna Carta may have owed its origin to such considerations when it provided, 'Nullus ballivus,' " etc. See also Brunner in Zeitschrift der Savigny-Stiftung (Germ. Abt.), ii. 214. Compare Glanv. ix., 1, and *ib.* Beames's trans. 222 n. 1. Compare also Bracton, 410 (say ad 1258). *Ad simplicem rocem querentis non habent judices necesse, nec pars de qua queritur, defendere se per legem.* And Bract. N. B. ii. case 260 (1227): *Et quia . . . predictus Rogerus nichil ostendit . . . nec sectam producit, nec cartam profert, nec aliquid aliud nisi simplicem vocem suam,* &c. See also *ib.* case 425, and *ib.* iii. case 1565.

The meaning of this article of Magna Carta seems to have been the subject of dispute very early. In Y. B. 32 & 33 Edw. I. 516 (1304), after quoting the principal words and setting forth two interpretations, it is added: *Alius intellectus et melior, quod defendens in brevi de debito et in aliis brevibus consimilibus non ad legem ponatur nisi querens arramaverit sectam versus eum, &c.* The handwriting of the MSS. of this passage is said to be of the time of Edw. II. (1307-1327). Compare Coke (2 Inst. 44), citing the "Mirror."

Holt, C. J., in City of London *v.* Wood, 12 Mod. 669, 678, 679 (1700-1), ventured

upon some dubious explanations of this article, in the course of which he truly said: "The witnesses mentioned by the statute are not to be produced after issue joined, or to be cross-examined, but only to give proof of a probable cause of action, that is, such proof as we now require of a *modus decimandi,* when we grant a prohibition to stay a suit for tithes *in specie.*" Compare Webb *v.* Petts, Noy, 44, where in a question on a modus, "it was agreed that a proof (by hearsay) was good enough to maintain the surmise within the statute 2 Edw. 6." [c. 13, s. 14.]

[1]See Thayer's Cas. Evid. 726.

[1]Pleading (Tyler's ed., from the 2d Lond. ed. of 1827), 370-2.

[2]Palgrave has a lively thirteenth century illustration of this in his fiction founded on fact, "The Merchant and the Friar," 173; see also Palg. Eng. Com., ii. p. clxxxvii, pl. 21 (1221); s. c. Maitland, Pl. Crown for Gloucester, 92, pl. 394; ib. 45, pl. 174, and notes pp. 145, 150; Pike's Hist. Crime, i. 52. It is an entire misapprehension to suppose, as Stephen does, Hist. Cr. Law, i. 259, that this is a trial. The very point of the matter is that trial is refused. Compare Ass. Clarend., s. 12 (1166), Ass. North., s. 3 (1176), 3 Br. N. B., case 1474 (1221), Stat. Wall. s. 14 (1284). This principle also covered cases that were not so plain; as in 1222 (Br. N. B. ii., case 194), in an action for detaining the plaintiff's horse which he had sent by his man to Stamford market for sale, it is charged that the defendant had thrown the man from the horse in the market, imprisoned him five days, kept the horse so that afterwards he was seen in the Earl of Warenne's harrow at Stamford, etc., *et inde producit sectam* (giving ten or eleven names). The defendant defends the taking and imprisonment and all, word for word, etc. "But because all the aforesaid witnesses testify that they saw the horse in the seisin of Richard and in the harrow of the Earl, and this was done at Stamford market," the defendant had his day for judgment. The author of the note-book has a memorandum on the margin at this case: *Nota quod ea que manifesta sunt non indigent probacione.*

[1]St. 15 & 16 Vic., c. 76, s. 55.

[2]Maitland, Pl. Cr. i., case 87.

[3]This was good old Germanic usage. Brunner, Schw. 201. Compare LL. H. I., xciv, 5 (Thorpe, i. 608).

[4]Bracton's Note Book, iii., case 1693.

[5]Bracton's Note Book, ii., case 325.

[6]As to the meaning of this phrase, see P. & M. Hist. Eng. Law, ii., 598, n. 4. De Gruchy, Anc. Cout. de Norm., 192, n. 6. The common meaning in England appears to have been that of the Statute of Wales (in 1284), *cum undecim secum jurantibus,*—in Coke's phrase "an eleven and himself." 2 Inst. 45. And in 1454-5 Needham, Serieant, says (Y. B. 33 H. VI. 8): "The tenant shall bring his law *de duodecima manu,* that is to say, eleven and himself." Compare King *v.* Williams, 2 B. & C. 538 (1824); s. c. 4

D. & R. 3, Thaver, Preliminary Treatise on Evidence, p. 33; also Laws of Canute, c. 66, Lea, Sup. & Force (4th ed.), 48.

[1]Y. B. Ed. II. 507.

[2]Maitland, “Mirror,” p. xxiv.

[3]*Ib.* 162, 71. Compare P. & M. Hist. Eng. Law, ii., 213.

[4]Y. B. Ed. II. 242.

[5]*Ib.* 582.

[6]2 Rot. Cur. Reg. 102.

[7]Y. B. 17 Ed. III. 48, 14.

[1]Whether Shardelowe or Shareshull, both judges of the Common Bench at this time, I do not know. Selden seems to have misconceived this matter when he said (Note 8, Fortescue de Laud., c. xxi), after citing a case of trial by witnesses, in 1234 (Thayer, Preliminary Treatise on Evidence, 21), printed for the first time in Maitland’s invaluable “Bracton’s Note Book”: “The proofs of both sides are called *secta.* It was either this or some like case that Shard[elowe] entended in 17 Ed. III., fol. 48 b, in John Warrein’s case—speaking of a justice that examined the suit. And it appears [he adds truly] there, that under Ed. III., the tendering of suit or proofs was become only formal as at this day, like the *plegii de prosequendo.*”

[2]For certain other modes of “trial” see Stephen, Pl. (Tyler’s ed.), 114, 129, and 3 Blackstone, Com. 329.

I use the word “trial,” because it is the word in common use during recent centuries. But as applied to the old law this word is an anachronism. The old phrases were *probatio, purgatio, defensio;* seldom, if ever, in the earlier period, *triatio.* In those days people “tried” their own issues; and even after the jury came in, *e. g.* in the early part of the thirteenth century, one is sometimes said to clear himself (*purgare se*) by a jury; just as a man used to be said in our colonies to “clear himself” and “acquit himself” by his own oath, as against some accusations and testimony of an Indian. Plym Col. Rec. xi. 234, 235 (1673); 1 Prov. Laws Mass. 151 (1693-4). *Triare,* from the French *trier,* is, indeed, seen, although very seldom, in our early books, *e. g.* in Bracton, f. 105 (say 1259); Fleta, iv., c. 11, ss. 4 and 5 (say 1290); Britton, f. 12, and the “Mirror,” iii., c. 34 (both near the same date as Fleta); but Pollock and Maitland (Hist. Eng. Law, ii., 596, n. 2) point out a more probable MSS. reading in Bracton, of *terminandae,* instead of *triandae,* and suspect the text of Fleta. In Y. B. 30 & 31 Ed. I., 528 (1302), it is said of challenges to several jurymen *triebantur per residuos de duodecim.* In that century the word grew common. In 1353 (Rot. Parl., i., 248, 12) it is said that if there be a plea before the Mayor of the Staple *et sur ceo pur trier ent la verite enqueste ou proeve soit a prendre,* if both are foreigners, *soit trie per estranges;* if both are denizens, *soit trie per denzeins,* etc. In 1382 the St. R. II. st. 1, c. 6,

provides that *rei veritas . . . per inquisitionem trietur.* Everybody knows how familiar the word has become in the last three centuries.

[1]Brunner, Schw. 54-59, 84 *et seq.,* 195 *et seq.,* Big. Pl. A. N. xx., Stat. Wall. § 14, Lyon, Hist. Dover., ii. 292, 294.

[2]As to dower, see Brunner, Schw. 342-344, 432-434; Pl. Ab. 21, col. 2 (1198).

[3]Si quis cum altero de qualibet causa contentionem habuerit, et testes contra eum per judicium producti fuerint, si ille falsos eos esse suspicatur, liceat ei alios testes, quos meliores potuerit, contra eos opponere, ut veracium testimonio falsorum testium perversitas superetur. Quod si ambæ partes testium ita inter se dissenserint, ut nulla tenus una pars alteri cedere velit, eligantur duo ex ipsis, id est, ex ultraque parte unus, qui cum scutis et fustibus in campo decertent utra pars falsitatem, utra veritatem suo testimonio sequatur. Et campioni qui victus fuerit, propter perjurium quod ante pugnam commisit, dextera manus amputetur. Cæteri vero ejusdem partis testes, quia falsi apparuerint, manus suas redimant; cujus compositionis duæ partes ei contra quem testati sunt dentur, tertia pro fredo solvatur.—(Capitulare Primum Ludovici Pii, ad 819. *Baluze,* Capitularia Regum Francorum, I. 601.) Compare Henry II. of England in 1186, when charters were produced on both sides: *"Iste carte ejusdem antiquitatis sunt et ab eodem rege Aedwardo emanant. Nescio quid dicam: nisi ut carte ad invicem pugnent!"* Big. Pl. A. N. 239, citing Chron. Joc. de Brakel. 37 (Camden Soc.).

[1]Mun. Gild. Lond. i. 62.

[2]But in 1 St. Realm, 222, it is put as "*temp. incert.*"

[3]Brunner, Schw. 189.

[4]Schw. 205.

[1]Bracton's Note Book, ii., case 46; cited in Bracton, f. 424 b.

[2]See also *ib.* iii., case 1131 (ad 1234), and case 1362 (in 1220).

[3]Thayer, Preliminary Treatise on Evidence, 102, 103.

[4]Bellewe, 237.

[1]Keilwey, 176-7.

[2]pp. cxlix-cliii. Camden Soc. (1846).

[3]Pl. Ab. 293, col. 1.

[4]Baigent, Crondal Records, 431-436.

[1]Y. B. 21 H. VII. 40, 58. Brooke's Ab. Trial, 60. In 1375-6 (Y. B. 50 Edw. III. 6, 12), Cavendish, Chief Justice of the King's Bench, being asked to view a woman, and determine her age or nonage, declined, with the prompt remark: "There is not a man in England who can rightly adjudge her of age or under age. Some women who are thirty years old will seem eighteen."

[2]Thayer, Preliminary Treatise on Evidence, 17.

[3]Bracton's Note Book, iii., case 1115.

[1]For the theory of such cases see Brunner, Schw. 431. See also, Thaver, Preliminary Treatise on Evidence, p. 15, n. 7.

[2]Selden, Fortescue de Laud., c. 21, n. 8. For early cases, see Wm. Salt Soc. Coll. (Staffordshire), iii. 120-121 (1203), and Br. N. B. ii. case 356 (1229).

[1]Y. B. Edw. II. 24.

[2]Trial, 46.

[3]Dyer, 185 a, pl. 65, quotes this case as showing four witnesses for the woman and twelve for the tenant.

[4]Lib. Ass 273, 26; Brooke, Ab., Trial, 90, makes the phrase read *cesty qui nient provera nient avera.*

[5]Dyer, 185 a, (ed. 1601); s. c. Old Benloe, 86. Compare Rastall's Entries (ed. 1579), Dower, Barre, 1, for another case in 1559.

[1]Compare Pl. Ab. 287, col. 1-2 (1292, 20 Edw. I.).

[2]Case of the Abbot of Strata Mercella, 9 Co. 30 b.

[3]Digest, Trial, (B). For a specimen of what might be called trial by witnesses, see St. 5 & 6 Edw. VI. c. 4, s. 3 (1552).

[4]Com. iii., c. 22.

[5]Pleading, Tyler's ed. (from the 2d Eng. ed., 1827), 114, 131.

[6]Maine, Early Law and Custom, 144.

[7]Hessels & Kern col. 208, xxxvii; and see *ib.* Extravagantia, B, p. 421; Lea, Sup. and Force, 4th ed. 34, 42.

[1]Lea, Sup. and Force, 4th ed. Mr. Lea's excellent book is full of instruction. Lewis, Anc. Laws of Wales, 30, 112.

[2]Palgrave, Eng. Com. i. 262-3. Glanv. viii, 9, Bigelow, Pl. A. N. xviii. For its extensive use in the manor courts, see Selden Soc. Publications, vols. ii. and iv. The highly formal character which it sometimes took on, and the perils which attended it, are illustrated in a passage from an unpublished treatise of the fourteenth century, preserved by Professor Maitland in *ib.* vol. iv. p. 17. All comes to naught if the principal withdraws his hand from the book while swearing, "or does not say the words in full as they are charged against him. . . . If a defendant fails to make his law he has to pay whatever the plaintiff has thought fit to demand." We are told (Lea, Sup. and Force, 4th ed. 78) that in the city of Lille, down to the year 1351, the position of every finger was determined by law, and the slightest error lost the suit irrevocably.

[3]Black Book of the Admiralty, ii. 170-173.

[4]Pike, Hist. Crime, i. 130: "The mode of trial was to be what it had been before the Conquest, with the difference that compurgation was no longer permitted in those cases which were of sufficient importance to be brought before the justices in eyre." See Stubbs, Select Charters (6th ed.) 142 Palg. Com. i. 259, Pike, Hist. Crime, i. 122, 123.

[1]Compare Palgrave, Merchant and Friar, 182-3. As to this "trial" in the ecclesiastical courts, see Pollock and Maitland. Hist. Eng. Law, i. 426. Compare Dr. Hooke's case, Gardiner, Star Chamber and High Commission Cases (Camd. Soc.), 276.

[2]Com. ii., p. cxvi, note; compare *ib.* i. 217.

[3]Sometimes it was the rule that twelve of the thirty-six produced by the accused were set aside on the king's behalf, and twelve by the town, and that only the remaining twelve swore with the accused. See the custumals of Winchelsea, Dover, Romney, Rye, and Sandwich in John Lyon's History of Dover, ii. 265. I am indebted to my colleague Dr. Charles Gross for this reference.

[4]Norton's London, 324, note. Palgrave, Merchant and Friar, 180.

[1]Of Henry II., Richard, John, Henry III., the three Edwards, and Richard II. For the charters, see Liber Albus, Mun. Gild. Lond. i. 128 *et seq.*

[2]Lib. Alb., Mun. Gild. Lond. i. 137-8; *ib.* Riley's ed., 123, note.

[3]Liber Albus, Mun. Gild. Lond. i., 57-59, 92, 104, 203; Thayer, Preliminary Treatise on Evidence, 199.

[4]A good Anglo-Saxon method. Fleta, Lib. 2, c. 63, s. 12, gives the merchants' way of proving a tally by his own oath in nine churches. He was to swear to the same thing in each, and then return to Guildhall for judgment. As to the tally, see Y. B. 20 & 21 Edw. I. 68, 304, 330, Y. B. Edw. II. 278, Black Bk. Adm. ii. 126.

[5]Maitl. Pl. Cr. i., case 61; s. c. Palg. Com. ii., p. cxix, note. And so elsewhere abundantly in the earliest records; *e. g.* in 1198-9, Rot. Cur. Reg. i. 200. And see Glanvill, Bk. 1, cc. 9 and 16 (1187), Braction, 410.

[6]St. 6 Rich. II. c. 5.

[1]See Pl. Ab. 291, col. 1 (1293-4).

[2]Steph. Pl. (Tyler's ed.) 131-2.

[3]It was allowed sometimes where it seemed desirable to relieve a party against a burdensome or unfair claim; *e. g.* in 1363, against the claim of Londoners that another was indebted to them, when they had taken no tally or deed, and offered to prove it merely *par lour papirs.* So in 1403 (St. 5 H. IV. c. 8) it is protected against contrivances for depriving one's adversary of it, and driving him to an inquest of unfriendly neighbors. Jenkins, Rep. ix, among "Abuses of the Law," numbers "the taking away wager of law upon contracts."

[4]Y. B. 19 H. VI. 10, 25.

[5]Y. B. 33 H. VI. 7, 23.

[1]For the established rule in such cases see 2 Rot. Cur. Reg. 125 (1198), Bracton, 334 *b.,* 366, Y. B. 30 & 31 Edw. I. 189 (1302), Y. B. 15 Edw. III. 299 (1341).

[2]Cal. Proc. in Chanc. i. ccxx-cxxii; cited in Spence Eq. Jur. i. 696.

[3]*Ubi supra.*

[4]Goldsborough, 51, pl. 13; Doctor and Student, ii. c. 24, end.

[1]4 Rep., p. 95.

[2]Anon., 2 Salk. 682.

[3]"The defendant was set at the right corner of the bar, without the bar, and the secondary asked him if he was ready to wage his law. He answered yes; then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose whether the plaintiff was demandable? And a diversity taken where he perfects his law instanter, and where a day is given in the same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the court admonished him, and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn, that he owed not the money *modo et forma,* as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

[4]London *v.* Wood, 12 Mod. 669, 684.

[1]London *v.* Wood, 12 Mod. 669.

[2]*Ib.* p. 669-70.

[3]*Ib.* p. 677.

[4]*Ib.* p. 679. Perhaps this came from Coke, who shows little knowledge of the history of the matter. In Inst. ii. 45 (printed about 1642, several years after Coke's death), he says:—"The reason wherefore in an action of debt upon a simple contract, the defendant may wage his law is for that the defendant may satisfy the party in secret, or before witness, and all the witnesses may die; . . . and this for aught I could ever read is peculiar to the law of England."

[1]Com. iii. 347-8. This clause had already been found in English statutes for three centuries and more; it appeared also on this side of the water, in our colonial acts, even in regions like Massachusetts, where it is said that wager of law was not practised. Dane's Ab. i., c. 29, art. 8. In Childress *v.* Emory, 8 Wheat. 642, 675 (1823), Story, J., is of opinion that "the wager of law, if it ever had a legal existence in the United States, is now completely abolished." "Trial by oath," however, was not unknown here. See Thayer, Preliminary Treatise on Evidence, p. 16, n. 1. See also the effect of the defendant's oath as neutralizing the plaintiff's shop-books in Plym. Col. Laws, 196 (1682). By a statute of Massachusetts (St. 1783, c. 55) on a charge of usury a like purgation was given, at a time when a party to the suit could not be a witness. When, later, he was admitted, in such cases, to testify, we find Shaw, C. J., in Little *v.* Rogers, 1 Met. 108, 110 (1840), describing the situation as one where "the trial by jury has been substituted for the old trial by oath." Compare Fry *v.* Barker, 2 Pick. 65. Lea, Sup. and Force, 4th ed. 87-88 quotes cases from the English colony of Bermuda in 1638 and 1639, where, at the assizes, persons "presented upon suspicion of incontinency," are sentenced to punishment unless they purge themselves by oath.

[2]Barry *v.* Robinson, 1 B. & P. (N. R.), p. 297: "If a man," argued counsel, "were now to tender his wager of law, the court would refuse to allow it." . . . "This was denied by the court," adds the reporter.

[3]King *v.* Williams, 2 B. & C. 538; s. c. 4 D. & R. 3.

[4]St. 3 & 4 Wm. IV. c. 42, s. 13.

[5]Com. i. 262-3.

[1]Patetta, *Ordalie,* c. 1. See Inst. of Narada, Jolly's Trans. 44-54. This book is attributed to some period between the second and ninth centuries before Christ; "but the materials of our work," says the translator (p. xx), "are of course much older, and many of the laws it contains belong to the remotest antiquity." Beginning at Part I. c. 5, s. 102, and ending at Part II. (pp. 44-54), we have the doctrine of ordeals. After speaking of the situation where there are neither writings nor witnesses, and of the examination of the defendant, it is said that "If reasonable inference also leads to no result," the defendant is to be put to the ordeal. "He whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune must be

held veracious in his testimony on oath. Let ordeals be administered if an offence has been committed in a solitary forest, at night, in the interior of a house, and in cases of violence and of denial of a deposit. . . . The balance, fire, water, poison, and sacred libation are said to be the five divine tests for the purgation of suspected persons." Then follows an account of each of these ordeals. 1. After describing the scales and the first weighing of the accused, it is said: "And having adjured the balance by imprecations, the judge should cause the person accused to be placed in the balance again. 'O balance, thou only knowest what mortals do not comprehend. This man being arraigned in a cause is weighed upon thee. Therefore mayest thou deliver him lawfully from his perplexity.' . . . Should the individual increase in weight, he is not innocent; if he be equal in weight or lighter, his innocence is established." 2. In the ordeal of fire seven circles with a diameter equal to the length of the man's foot, and thirty-two inches distant from each other, are marked on the ground. The circles are smeared with cows' dung, and the man, having fasted and made himself clean, has seven *açvattha* leaves laid on his hands and fastened there, and takes in his hands a smooth ball of red-hot iron, weighing fifty *palas,* and walks slowly through the seven circles. He then puts the ball on the ground. "If he is burnt, his guilt is proved; but if he remains wholly unburnt, he is undoubtedly innocent. . . . 'Thou, O fire, dwellest in the interior of all creatures, like a witness. Thou only knowest what mortals do not comprehend. This man is arraigned in a cause and desires acquittal. Therefore mayest thou deliver him lawfully from his perplexity.' " 3. In the ordeal of water, the man wades out into the water up to his navel, and another shoots an arrow. The man dives or ducks into the water, and if he remains wholly under while a swift runner gets and fetches back the arrow he is innocent. The adjuration to the water is similar to the above, in the case of fire and the balance. 4. In the ordeal by poison elaborate directions are given about the choice of the poison and the time of year for administering it. The invocation runs: "Thou, O poison, art the son of Brahma, thou art persistent in truth and justice; relieve this man from sin, and by thy virtue become as ambrosia to him. On account of thy venomous and dangerous nature thou art the destruction of all living creatures; thou art destined to show the difference between right and wrong like a witness," etc., etc., much as in the other cases above. "If the poison is digested easily, without violent symptoms, the king shall recognize him as innocent, and dismiss him, after having honored him with presents." 5. In the ordeal by sacred libation, "the judge should give the accused water in which an image of that deity to whom he is devoted has been bathed, thrice calling out the charge with composure. One to whom any calamity or misfortune happens within a week or a fortnight is proved to be guilty." Sir Henry Maine, writing in 1880 (Life and Speeches, 426), after saying that "perjury and corruption are still deplorably common in India," adds: "Ordeals are perpetually resorted to in private life."

[1]Book xiv., c. i. See also cases from Domesday Book and other eleventh century sources in Bigelow, Pl. A. N. *passim.*

[2]And so the *Dialogus de Scaccario,* ii. 7, written ten years earlier; Pollock and Maitland, Hist. Eng. Law, i. 154, n. 7.

[1]Rot. Cur. Reg. i. 204. See several cases of uncertain date in the reign of Rich. I. in Pl. Ab. 13-17.

[2]*Sacros. Conc.* xiii. ch. 18, pp. 954-5. Rymer's *Foedera* (old ed.), 228, *ib.* (Rec. Com. ed.) 154, has one of these writs. Maitland quotes it in his Gloucester Pleas, p. xxxviii. How promptly it was obeyed by the ecclesiastics in the local courts is seen in a case of 1231 (2 Br. N. B. case 592), where on a writ of false judgment to the court of the Abbot of St. Edmunds in an appeal of felony for wounds it appeared that the case had been tried by jury, without the king's warrant. The Abbot's steward being asked *quo warranto faciunt talem inquisitionem de vita et membris,* said that since the war [1215-1217], this had been usual in the Abbot's court. Before the war, it is added, they had the ordeal of fire and water.

Patetta, *Ordalie,* 312, doubts the accepted opinion that the disappearance of the ordeal in England was thus due to the Lateran Council decree. He remarks, truly, that the action of the Council merely forbade ecclesiastics to take part in the ordeal, and adds that there is mention of the ordeal in Henry the Third's Magna Carta of 1224-5. Compare also Bigelow, Hist. Proc. 323-4. But one is inclined to doubt whether Dr. Patetta had in mind the king's writs above referred to; those and the sudden cessation of the cases seem conclusive. As regards the mention of *legem manifestam* as late as the Magna Carta of 1224-5, it may, probably, be explained by the circumstance that this was a reissue of an earlier document; the mere *legem* of the former documents had already become *legem manifestam nec adjuramentum,* in the second reissue of 1217. This was not in the reissue of 1216. Its appearance in 1217 is not an unnatural or untimely expansion of the term *legem.* The new phrase was also used for the battle as well as the ordeal in its narrower sense—the sense now under consideration. See Brunner's interesting comment on this passage of Magna Carta in Zeits. der Sav.-Stift. (Germ. Abt.) ii. 213. In 1291 *legem manifestam* is used in the sense of the duel. In an appeal of mayhem, the appellor made default. The appellee being then put on his defence to the king's prosecution, set up the point that the only way of proving a mayhem was by having the party maimed inspected, and in the absence of this denied that any one *poni debet ad legem manifestam.* Pl. Ab. 285, col. 1. There occurs a reference to the ordeal in a record of 1221, but on examination it proves to be a statement that one Robert underwent the ordeal at a previous trial, which may well have been some years earlier. Maitland's Gloucester Pleas, case 383, and p. xxii; and notes on this case at p. 150, and on case 434, at p. 151.

[1]Plac. Ab. 90, col. 2. One of these cases and another separate one are found in Maitland. Sel. Pl. Cr. i., case 116. In this volume there follow three others, 119, 122, and 125, "of uncertain date."

[2]Eadmer, Hist. Nov. (Rolls Series), 102, Pollock and Maitland, Hist. Eng. Law, ii. 597, Brunner, Schw. 182. Compare the cool sense of Frederic II. in 1231, Lea, Sup. and Force, 4th ed. 422.

[1]Maitland, "Mirror," 173 (Book 5, c. i. s. 127).

[2]Whitebread's case, 7 How. St. Tr. 383; cited by Stephen, 1 Hist. C. Law, 253 n.

[3]Com. ii. 177.

[4]Sel. Charters, 6th ed. 142.

[5]Gardiner's Star Ch. and High Com. Cases, 259.

[6]Pollock and Maitland, Hist. Eng. Law, i. 16.

[1]Lib. 10, c. 17.

[2]Lib. 13, c. 11.

[3]Lib. 9, c. 1.

[4]Lib. 8, c. 9. See generally *St. de Magn. Ass. et Duellis,* St. Realm, i. 218.

[5]Mun. Gild. Lond. i. 128, s. 5, and Thorpe, i. 502—*quod nullus eorum faciat bellum.* Pl. Ab. 26, col. 2, Lincoln; Pike, Hist. Crim. Law, i. 448; Patetta, *Ordalie,* 307, 308.

[6]Essays in Anglo-Saxon Law, 379; s. c. Bigelow, Pl. A. N. 19; Brunner, Schw. 197, 400-1.

[7]Lea, Sup. and Force, 4th ed. 120.

[8]Schw. 197-8; *ib.* 68, 401, citing Glanvill, lib. 10, c. 12; lib. 2, c. 21.

[9]Thayer, Preliminary Treatise on Evidence, p. 17 n.

[1]See *e. g.* the recitals in the St. of Vouchers (20 Edw. I. st. 1) of 1292. So also we are told that "Saint Louis abolished battle in his country because it happened often that when there was a contention between a poor man and a rich man, in which trial by battle was necessary, the rich man paid so much that all the champions were on his side, and the poor man could find none to help him." *Grandes Chroniques de France,* vol. 4, p. 427, 430, al. 3, cited in Brunner, Schw. 295, note.

[2]Schw. 300-304. Compare Bigelow, Pl. A. N. xxvii n.

[3]Glanvill, lib. 2, c. 7. This well-known passage runs in substance thus: The Grand Assize is a royal favor, granted to the people by the goodness of the king, with the advice of the nobles. It so well cares for the life and condition of men that every one may keep his rightful freehold and yet avoid the doubtful chance of the duel, and escape that last penalty, an unexpected and untimely death, or, at least, the shame of enduring infamy in uttering the hateful and shameful word ["Craven"] which comes from the mouth of the conquered party with so much disgrace, as the consequence of his defeat. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins as the duel; thus labor is saved and the expenses of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, by so much is this process more equitable than the duel. For while the duel goes upon the

testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.

[1]*Duello,* cc. 8 and 13.

[2]If the lawyers knew how much they could promote the cause of legal learning, and thereby improve our law, by becoming members of this excellent society (it costs a guinea a year), they would not neglect the opportunity. The American Secretary and Treasurer is Mr. Richard W. Hale, of No. 10, Tremont St., Boston.

[3]pp. 41, 42, 43, 61, 305.

[4]*Duello,* c. 13.

[5]Glanvill, lib. 2, c. 3, sets forth that in this class of cases the plaintiff cannot be his own champion, for he must have a good witness, who shall speak of his own knowledge or that of his father. So in the recognition, substituted for the battle, the jurymen—the twelve witnesses of Glanvill's eulogy, so much better than the one battle-witness—are to speak of their own personal knowledge, or by the report of their fathers, *et per talia quibus fidem teneantur habere ut propriis. Ib.* lib. 2, c. 17. Compare Brunner, Schw. 180.

[1]Maitland, Sel. Pl. Cr. i. 192; s. c. Bracton, 151 b.

[2]Y. B. 17 Edw. III. 2, 6; s. c. Lib. Ass. 48, 1; Y. B. 9 H. IV. 3, 16.

[3]Y. B. 1 H. VI. 6, 29.

[4]Com. England, bk. ii. c. 8.

[5]Dyer, 301.

[6]Glossary, *sub voc. Campus* (ad 1625).

[1]How rusty the lawyers were in 1554, as regards the Grand Assize, is shown in Lord Windsor *v.* St. John, Dyer, 98 and 103 b.

[2]Cro. Car. 522; Rushworth's Coll. ii. 788. Milton, a contemporary of this case, has gravely entered in his Common Place Book, the following, having reference to a case of the last preceding century: "*De Duellis:* Not certain in deciding the truth, as appears by the combat fought between 2 Scots before the L. Grey of Wilton in the market place of Haddington, wherein Hamilton, that was almost if not cleerly known to be innocent, was vanquish't and slain, and Newton the offender remained victor and was rewarded by the Ld. Grey. Holinsh. p. 993."

[3]Ashford *v.* Thornton, 1 B. & Ald. 405.

[4]Neilson, Trial by Combat, 330.

[5]Stat. 59 Geo. III. c. 46,—reciting that "appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished." The statute went on to enact that all such appeals "shall cease, determine, and become void and . . . utterly abolished, [and that] in any writ of right now depending or hereafter to be brought, the tenant shall not be received to wage battle, nor shall issue be joined or trial be had by battle in any writ of right."

[1]"The writs of parliament are," said Coke, nearly three centuries ago (2 Inst. 597), "to return two knights for every county *gladiis cinctos,* not that they should come to the parliament girt with swords, but that they should be able to do knight's service." But the courts always kept up the real thing. The ceremony of choosing the knights is described in 1406 (Y. B. 7 H. IV. 20, 28) thus: "The four knights were called, who came to the bar girt with swords ["girt with swords above their garments," says Dyer in Lord Windsor *v.* St. John, Dyer, 103 b. ad 1554] and were charged . . . to choose twelve knights girt with swords from themselves and others, . . . and the justices ordered the parties to go with the knights into a chamber to choose and to declare their challenges of the others chosen by the four, for after the return of the panel so made by the four knights the parties shall have no challenge to panel or polls before the justices."

In Y. B. 30 & 31 Ed. I. 117 (1302), the oath of the four electing knights is: "I will lawfully choose sixteen knights girt with swords, from among myself and the others," etc. This appears to have been the rule, to choose twelve and to add the four,—so that the whole assize was sixteen. (Brunner, Schw. p. 365.) The old cases show the full number, but sometimes only a part of the four electors are included, and sometimes none of them, perhaps owing to challenges. See cases of 1198-9 in 1 Rot. Cur. Reg. 197, 198, 200, and 201, a case of 1199 in 2 *ib.* 27, and one of 1269 in North. Ass. Rolls (Surtees Soc.) 137. Stephen (Pleading, 129, Tyler's ed.) says: "These knights [the four] and twelve of the recognitors so elected, together making a jury of sixteen, constitute what is called the grand assize."

[2]Except as a belated case or two of a writ of right may have remained over for trial at a later date. The latest case appears to have been that of Davies *v.* Lowndes, reported as of April, 1835, in 1 Bing. N. C. 597, and, at a second trial, as of November and December, 1838, in 5 *ib.* 161 (Forsyth, Tr. by Jury, 139).

[1]This essay was first printed in the Harvard Law Review, vol. XIII, pp. 177-189 (1900).

[2]A biographical notice of this author is prefixed to Essay No. 3, in volume 1 of this Collection.

[3]Cn. ii. 12 (Wessex), 15 (Danelaw).

[1]Ll. Hen. c. 10. This text, as printed, reckons “furtum morte impunitum” among pleas of the Crown; but it is clear from Glanv. xiv. 8 that ordinary thefts were left to the justice of the County Courts.

[2]“Murdrum enim idem est quod absconditum vel occultum,” Dial. Sc. I. C. 10. So for Glanvill (xiv. 3) murder is that kind of homicide which is done in secret, so that the slayer cannot be followed with hue and cry.

[3]See Maitland, P. C. for the County of Gloucester, xxix; and examples in the text *passim.*

[1]Y. B. 11 Hen. IV. 12, pl. 24.

[2]Glanv. viii. 9. A much more elaborate practice, which does not concern us here, was developed in the 13th cent., see P. and M. ii. 666.

[1]See the quotations *s. v.* in the Oxford English Dictionary, and cp. P. and M. ii. 661.

[2]Bract., fo. 142 *b.*

[1]In 1219, P. and M. ii. 650, Thayer, Preliminary Treatise on Evidence, 69.

[2]See the case of Ailward, Bigelow Pl. A. N. 260, Materials for Hist. St. Thomas (Rous series), i. 156, ii. 171. For a similar case where the trial had been by battle, cp. Maitland, P. C. for Gloucester, 142.

[3]Assizes of Clarendon (1166), c. 14, and of Northampton (1176) c. 1.

[1]Thayer, Preliminary Treatise, 82, 83.

[2]Case from Warwickshire Eyre, ad 1221. Select Pleas of the Crown, ed. Maitland (Seld. Soc.), No. 153. Appeal of murder brought by widow against one Thomas. She is adjudged disqualified because she has married again and the second husband makes no appeal: “et ideo inquiratur veritas per patriam. Et Thomas defendit mortem set non vult ponere se super patriam. Et xij juratores dicunt quod culpabilis est de morte illa, et xxiiij milites alii a predictis xij ad hoc electi idem dicunt, et ideo suspendatur.” Similar process in a case of theft, in same eyre, No. 157. The verdict of a jury reinforced by a second jury of double their number was apparently taken as equivalent to ocular proof.

[1]P. and M. ii. 649; Stephen, Hist. Cr. L. i. 298, 299; Thayer, Preliminary Treatise, 74.

[2]Assize of Northampton, art. 3, S. C. 151.

[1]Maitland, P. C. for the County of Gloucester, No. 280 (a. p. 1221). Magna Carta had already forbidden inferior courts to hold pleas of the Crown; it would seem that summary disposal of a “hand-having” thief was not deemed a *placitum* at all.

[2]Bracton, fo. 137; Note Book, No. 138; P. C. for County of Gloucester, No. 394, where we have the form of judgment by the king's judges in such a case: "consideratum est quod ipse non potest defendere et ideo suspendatur." The twelve jurors mentioned here and in the similar case No. 174 (translated in our text) are an accusing body, not the final judges of the fact, that is, they are more like a grand than a petty jury as we understand those terms. What Bracton calls the "violent presumption" takes the place of any further proof or trial. Sir James Stephen's comment (Hist. Cr. L. i. 260) is rather misleading, as its language ignores this distinction.

[3]Præterea in quolibet comitatu eligantur tres milites et unus clericus custodes placitorum coronæ, "Judicial Visitation," art. 20, S. C. 260; Gross, Introduction to Select Coroners' Rolls, Seld. Soc. 1896. The phrase "custodire placita coronæ" was in use earlier; the doubt is how much of the significance given to it in 1194 was new.

[1]C. 24. This was not held to apply to summary and interlocutory business. Cp. as to the county court xiii Harv. L. R. p. 182, and see Bracton 150 *b.*

[2]Gross, *op. cit.* xxv.-xxx.

[3]S. C. 264. And see Const. Hist. c. 15.

[1]S. C. 448.

[2]P. and M. ii. 525-6.

[1]Bracton, fo. 111. This was of course possible independently of the clause of Magna Carta which led to the commission of assize properly so called, and, as I read Bracton, it was a known thing in the earlier practice. And see "Circuits and Assizes" by Mr. G. J. Turner, in 3 Enc. Laws of Eng. 26.

[1]Stubbs, C. H. c. 15, § 235.

[2]S. C. 358; Bract. 115 *b;* Maitland, Pleas of the Crown for Gloucester, xxiv.

[3]*Op. cit.* xxvi.

[1]Assize of Clarendon, Stubbs, S. C. 143.

[1]See L. Q. R. ix. 278-9.

[2]Commonwealth of England, Bk. 2, Ch. 26.

[1]This essay forms Chapters VI and VII of "Court Life under the Plantagenets," 1890, pp. 81-113 (London: Swan Sonnenschein & Co.).

[2]Of His Majesty's Public Record Office, London; F. S. A.; Director of the Royal Historical Society; Teacher of Early Economic Sources, in the University of London.

Other Publications: History of the Customs Revenue, 1885; Society in the Elizabethan Age, 1888; Antiquities and Curiosities of the Exchequer, 1891; The Red Book of the Exchequer, vols. I-III, 1897 (Rolls Series); and various articles in historical journals.

[1]These passages are extracted from "A History of the Criminal Law of England," 1883 (London: Macmillan & Co.), vol. 1, parts of chapters VII, VIII, and XI (pp. 184-197, 200, 216-231, 232-236, 238-243, 244-254, 319, 324-335, 337-351, 354-358, 364-365, 369-370, 382-383, 397-399, 415-417, 424-427).

[2]1829-1894. Cambridge University, M. A. 1854, London University, LL. B. 1854, Oxford University, D. C. L. (Hon.) 1878; Honorary Fellow of Trinity College (Cambridge) 1885; Legal Member of the Council of the Governor-General of India, 1869-1872; Professor of Common Law in the Inns of Court, 1875; Judge of the High Court of Justice, Queen's Bench Division, 1879-1891.

Other Publications: Essays of a Barrister, 1862; General View of the Criminal Law of England, 1863 (2d ed. 1890); The Indian Evidence Act, with an Introduction on the Principles of Judicial Evidence, 1872; Liberty, Equality, and Fraternity, 1873; Digest of the Law of Evidence, 1874; Digest of the Criminal Law, 1877; Digest of the Law of Criminal Procedure in Indictable Offences, 1883.

[1]As to existing laws of arrest, see *Dig. Crim. Proc.* ch. xii. arts. 96-98.

[2]On the conservators of the peace, see FitzHerbert, *Justices of the Peace,* 6 B.; Coke, 2*nd Inst.* 538; a large collection of authorities in Burn's *Justice,* title "Justices of the Peace;" Hawkins, *Pleas of the Crown,* bk. ii. ch. viii. vol. ii. p. 38, edition of 1814; but the best and most instructive account of the matter is to be found in the celebrated judgment of Lord Camden in Entick *v.* Carrington (the case of the seizure of papers), 19 *St. Trials,* 1030. See also Stephen's Hist. Cr. L. of Eng. p. 110, &c.

[3]Stubbs, *Charters,* 140-146.

[4]*Ib.* 150-153.

[1]Arts. 2, 4.

[2]"Robator vel murdrator vel latro."

[3]Arts. 9-11.

[4]Art. 12; Stubbs, *Charters,* 152.

[5]"Essonium," this is the technical word for the excuses given for not taking a step in procedure, *e. g.* for not appearing on being summoned in an action.

[6]Stubbs, *Charters,* 154.

[1]Bracton, iii. 1, vol. ii. p. 235-237 (Twiss's edition).

[1]This enactment was followed by others, *e. g.* 9 Geo. 1, c. 22, s. 7 (the Black Act), which in particular cases rendered the hundred liable for damages inflicted by criminals. They were all repealed by 7 & 8 Geo. 4, c. 27. There are, however, still one or two cases in which such a liability is imposed by 7 & 8 Geo. 4, c. 31. These relate to damages caused by rioters.

[1]See *e. g.* a petition in 1377 (1 Richard II.): "Item supplient les ditz communs q les Srs qui ount letters et viewe de frank plegg' q'ils faient due punissement as Taverners de vins si avant come des autres vitailles." The answer is, "Il n'est mye article de veue de frank plegge mais en soit usee come ad estee fait resonablement avant ces heures." 3 *Rot. Par.* 19; and see 4*th Inst.* 261.

[1]The Statute of Winchester is not mentioned in Coke's 2*nd Institute,* and though it was not repealed till 1828, it had for centuries before that time been greatly neglected. See Barrington's *Observations on the Statutes,* p. 146.

[1]"At eleven o'clock the same night, as I was going into bed, Mr. Thynne's gentleman came to me to grant a hue and cry" (on his master's murder by the friends of Count Coningsmark).—*Sir J. Reresby's Memoirs,* p. 235 (edition of 1875).

[2]See *e. g.* 9 Geo. 1, c. 7, s. 3; 13 Geo. 3, c. 31; 44 Geo. 3, c. 92.

[3]*Dig. Crim. Proc.* arts. 99-108.

[4]Bk. ii. ch. xiii. vol. ii. pp. 129, 130, edition of 1824.

[1]4*th Inst.* 176, 177.

[2]2 P. C. 107-110.

[1]2 Hale, 72-105.

[2]As to present law of summary arrest, see *Dig. Crim. Proc.* ch. xii. arts. 96-98.

[1]1 Hale, 481, 489; and see Foster, 271. This rule seems to overlook the distinction between taking a man prisoner and taking possession of his dead body, for it is difficult to see in what sense a pickpocket can be said to be taken if he is shot dead on the spot. The rule would be more accurately expressed by saying that a man is justified in using any violence to arrest a felon which may be necessary for that purpose, even if it puts, and is known and meant to put, his life in the greatest possible danger, and is inflicted by a deadly weapon, and does in fact kill him.

[2]1 Hale, 490; Foster, 418.

[1]Dalton's *Justice,* p. 3; Burn's *Justice,* title "Constable." A tithingman seems to have been subordinate to the constable.

[2]1st Report, p. 17.

[3]P. 29.

[1]Published in 1796. In the *Report of a Select Committee on the Police of the Metropolis,* published in 1838, the Committee says of this work, "The merit of being the first to point out the necessity and practicability of a system of preventive police upon an uniform and consistent plan is due to Mr. Colquhoun, the author of the treatise *On the Police of the Metropolis."*

[2]Colquhoun, p. 232.

[1]Parliamentary committees reported on the subject in 1816, 1817, 1818, 1822, and 1828. The evidence given before them fills several bluebooks, and is curious and instructive.

[1]For the present law on this subject, and on incidental procedure, see *Dig. Crim. Proc.* ch. xiii.—xvii., arts. 99-140.

[2]*Const. Hist.* i. 505. For present law, see *Dig. Crim. Proc.* ch. vii. arts. 43-60, as to appointment and removal of coroners, as to inquests, procedure, &c., arts. 207-232.

[3]Bracton, lib. iii. (*De Corona*) ch. v. Sir T. Twiss discusses the question whether Bracton copied from the statute or the statute from Bracton, and gives reasons in support of the latter view in the introduction to vol. ii. of his edition of Bracton, p. lxi. The Statutum Walliæ contains provisions substantially identical with those of 4 Edw. 1.

[1]"Sicut statim vendi possunt."

[1]The historical reason for these enactments will be found in Stephen's Hist. Cr. L. of Eng., p. 236.

[2]11 & 12 Vic. c. 42, s. 17. See *Dig. Crim. Proc.* art. 109, &c.

[1]30 & 31 Vic. c. 35, s. 3.

[2]S. 25.

[3]S. 27.

[4]S. 17.

[1]The subject is fully described in Mr. Lea's *Superstition and Force,* Philadelphia, 1878, 371-522. According to Mr. Lea, torture was gradually introduced throughout the Continent in the course of the fourteenth, fifteenth, and sixteenth centuries. It was connected with the revival of the Roman law.

[2]6 *St. Tr.* 619, 630.

[1]*Ib.* 572-575.

[2]9 *St. Tr.* 1, and the *Memoirs of Sir John Reresby,* pp. 235-241.

[3]9 *St. Tr.* pp. 122-124.

[1]*Memoirs,* p. 281.

[2]8 *St. Tr.* 525.

[1]In the Revised Statutes. In other editions it is s. 11.

[2]8 *St. Tr.* 723-726, 732.

[1]Mr. Chitty moved in arrest of judgment that the proceedings were void because part of the trial took place on the Feast of the Epiphany.

[2]The charge is published in the *Times,* Dec. 5, 1823, also in two printed accounts of the trial which appeared at the time, one of which is in the Inner Temple library. Both of them appear to be in substance reprints from the *Times.*

[1]This observation is too characteristic to have been invented, and so guarantees the authenticity of the report.

[1]Introduction to *Journal of a Voyage to Lisbon, Works,* xii. p. 230, edition of 1775.

[1]This reads like an insinuation that he book bribes.

[2]This brother was John Fielding, well known for many years as the blind justice. Henry Fielding's son, William Fielding, was also a London magistrate. He gave evidence before a Committee of the House of Commons in 1816, when he said he had been fifty years in the commission for Westminster.

[3]Report of 1816, pp. 139, 140.

[1]*Dig. Crim. Proc.* arts. 136-140.

[1]Lib. xiv. c. 1.

[2]In cases of treason, ii. 261; homicide, ii. 283; treasure trove, ii. 287; rape, ii. 289; wounding, ii. 288; and see 293.

[3]Hist. Cr. L. of Eng. 302.

[1]Coke labours to show that this means "by a court of justice," through which alone the king can act (*2nd Inst.* p. 186), and see 2 Hale, *P. C.* 131. This may be very sound constitutional doctrine, but it seems to make nonsense of the alternative "or of his justices."

[1]Mr. Stubbs, in his glossary, says, *"Retare, Rettare,* to accuse, from the Norse *rett,* an imputation or accusation." It soon ran into *rectatus* from a reminiscence of *rectum.*

[2]2 Hale, *P. C.* 138-140.

[3]For them see 7 Geo. 4, c. 64, s. 32, the repealing clause.

[1]There were various forms of it, one for common offences, another for forest offences. See FitzHerbert, *De Naturâ Brevium,* and see also *2* Hale, *Pleas of the Crown.*

[1]2 Hale, *P. C.* 124.

[2]2 Hale, *P. C.* 140.

[3]Malice. "Ex Anglo-Saxonico forte 'hatung' unde Anglis 'hate' et Germanis 'Haet' . . . vel potius a Greco ?τη" (Ducange).

[4]Bracton, ii. pp. 292-296.

[5]I suppose sheriffs and coroners.

[1]Bracton, ii. 295-297.

[2]"Nihil detur vel capietur de cetero pro brevi inquisitionis de vita vel membris, sed gratis concedetur et non negetur."—Stubbs, *Charters,* p. 301. Magna Charta, art. 36.

[3]See on this writ, 2 Hale. *P. C.* 148; Coke, *2nd Inst.* 421, on Magna Charta, c. 26, p. 315, on the Statute of Gloucester, c. 9. See also Foster, 284-285.

[4]See *e. g.* the case of Witmore for kidnapping in 1682, 8 *State Trials,* 1347, and two records of *de homine replegiando* printed at pp. 1350-1385. See also some remarks in Selden's argument in the case of the writ of *habeas corpus* moved for on behalf of Hampden and others, 3 *St. Tr.* 95. In the case of Lord Grey of Werke, a writ *de homine replegiando* was issued to force him to produce his sister-in-law, Lady Henrietta Berkeley, whom he had seduced. See 9 *St. Tr.* 184.

[1]The Courts of Common Pleas and Exchequer had originally to issue the writ under a fiction to the effect that the person requiring it was privileged or was to be sued in the court from which the writ issued. See 2 Hale, P. C. 144; but by 16 Chas. 1, c. 10, s. 6, the Common Pleas obtained original jurisdiction in the matter and by 31 Chas. 2, c. 2, all the three courts are empowered to grant the writ.

[2]Stephen's Hist. Cr. L. of Eng., ch. vi.

[3]If compurgation is counted there have been four, but compurgation in criminal cases hardly survived the Norman Conquest, though some traces of it remained in the hundred and manor courts. In the ecclesiastical courts it lasted till 1640, as will appear hereafter. In the form of "wager of law" in civil cases it maintained a nominal existence till the year 1834, when it was abolished by 3 & 4 Will. 4, c. 42, s. 13. Probably the last case in which it was actually put in force was King *v.* Williams (2 B. and C. 538, 1824). In this case on an action of simple contract the defendant prepared

to bring eleven "compurgators, but the plaintiff abandoned his action." Much information on this subject is to be found in Pike's *History of Crime.* The references are collected in the Index.

[1]Brac. 424-33.

[1]Bracton, ii. 425.

[2]*Ib.* p. 434.

[3]*Ib.* p. 442.

[4]*Ib.* p. 452.

[5]*Ib.* p. 448.

[6]Britton (by Nicholls), 97-125.

[1]Bk. ii. ch. xxiii. vol. ii. p. 223-281, ed. 1824. The book was written early in the eighteenth century.

[2]3 *St. Tr.* 483-519. Some other cases of trial by combat in civil cases are referred to in the notes to this case. One of the combatants in the last case of trial by battle in a civil action was Lilburn, the father of John Lilburn, known under Charles I. and Cromwell as "Free-born John."

[1]Corone, No. 44, H. 22 Edw. 4.

[1]In Spencer Cowper's case, 13 *St. Tr.* 1190, as also the cases of Bambridge and Corbet, 17 *St. Tr.* 395-7. In Bigby *v.* Kennedy, 5 *Bur.* 2643, a careful report is given of the proceedings in an appeal on account of their rarity.

[2]See an account of this in Horne Tooke's defence on his prosecution for libel in 1777. 20 *St. Tr.* 716, 717.

[3]1 Bar. and Ald. 405.

[4]Mr. Chitty and Sir N. Tindal argued the case. It will be found that practically Bracton is the great authority.

[1]Bracton, 523, &c.

[2]*Ib.* 532.

[1]Glanville, book xiv.

[2]Stubbs, *Charters,* 143, 150.

[1]This was the common punishment for robbery in India under native rule. I have myself seen men in Lahore whose hands (as they said themselves) had been cut off by Runjeet Singh for theft. In the *Life of Thomas,* a Baptist missionary at Calcutta, there is an account of the punishment of fourteen decoits in the neighbourhood of Calcutta, each of whom had his hand and foot cut off on the 15th February, 1789, on the western bank of the Hooghly, opposite Calcutta.—Lewis's *Life of Thomas,* p. 18.

[2]Palgrave, clxxxv.—clxxxviii.

[1]Palgrave, cxiii.

[2]The last reference to the system which I have met with is in one of the trials for the Popish Plot. Gavan, one of the five Jesuits who were tried and executed upon the evidence of Oates in 1679, begged to be allowed "to put himself upon the trial of ordeal" (7 *St. Tr.* 383), alleging that "in the beginning of the Church it was a custom, and grew to a constant law," that a person accused of a capital offence should be allowed to do so when there was only the accuser's oath against his denial. It is odd that Gavan should have supposed that judgment by ordeal was a specially ecclesiastical mode of proceeding, when, in fact, its abolition was due to the ecclesiastical legislation on the subject.

[3]Stephen's Hist. Cr. L. of Eng., p. 102.

[1]The law relating to petty juries is now regulated by statute in most though not in all particulars (see 6 Geo. 4, c. 50, and some later acts, especially 33 and 34 Vic. c. 77). As to grand juries, see *Dig. Crim. Proc.* ch. xxii. arts. 184-188.

[1]1 *St. Tr.* 395.

[1]The copy of the indictment is very imperfect. 1 *St. Tr.* p. 869.

[2]In Fortescue's time the judges usually sat from 8 to 11.

[1]He was probably the Prime Serjeant, who, if there were such a personage in these days, would take precedence of the law officers. In most of the cases referred to the Prime Serjeant is leading counsel for the prosecution.

[1]"Proveably attainted by open deed by *people of like condition."* People of like condition, according to Bromley, C. J., means "your accomplices in treason—traitors like yourself"—which Throckmorton naturally called "a very strange and singular understanding."

[1]1 *St. Tr.* 957-1042.

[1]1 *St. Tr.* 1049-1088.

[2]*Ib.* 1141-1162.

[3]*Ib.* 1253.

[4]*Ib.* 1271-1315.

[1]2 *St. Tr.* 1-60.

[2]*Ib.* 159-359.

[3]*Ib.* 911-1022.

[4]*Ib.* 965-1022.

[5]*Ib.* 936.

[6]*Ib.* 992-994.

[7]*Ib.* 939-940.

[8]*Ib.* 941.

[9]*Ib.* 946.

[1]2 *St. Tr.* 25.

[2]*Ib.* 26:—"*Att.:* Thou art the most vile and execrable traitor that ever lived. *Raleigh:* You speak indiscreetly, barbarously, and uncivilly. *Att.:* I want words sufficient to express thy viperous treasons. *Raleigh:* I think you want words, indeed, for you have spoken one thing half a dozen times. *Att.:* Thou art an odious fellow. Thy name is hateful to all the realm of England for thy pride. *Raleigh:* It will go hard to prove a measuring cast between you and me, Mr. Attorney. *Att.:* Well I will now make it appear that there never lived a viler viper upon the face of the earth than thou." In the case of Wraynham before the Star Chamber for slandering Lord Bacon, Coke said, "Take this from me, that what grief soever a man hath, ill words work no good, and learned counsel never use them."—2 *St. Tr.* 1073. As to Raleigh's trial viewed historically, see Gardiner's *Hist. of Eng.* i. 93-109.

[1]3*rd Inst.* 25-26.

[2]2 *St. Tr.* 14.

[3]*Ib.* 15.

[4]*Ib.* 18.

[1]2 *St. Tr.* 1022.

[1]*Tristia,* iii. 5, 35, 36. The first line is both incorrect and imperfect. It is "Ut lupus et *turpes* instant morientibus ursi."

[2]3 *St. Tr.* 519.

[3]3 *St. Tr.* 373.

[1]3 *St. Tr.*

[2]*Ib.* 572.

[3]*St. Tr.* 585.

[1]Under the name of the "voir" (vrai) "dire." "You shall true answer make to all such questions as shall be demanded of you."

[2]3 *St. Tr.* 1315-1368.

[3]*Ib.* 1317.

[1]3 *St. Tr.* 1320.

[2]3 *St. Tr.* 1322.

[3]*Ib.* 1325.

[1]Smith's *Commonwealth,* ch. xxv. pp. 183-201.

[1]"It will seem strange to all nations that do use the Civil Law of the Roman Emperors that for life and death there is nothing put in writing but the indictment only. All the rest is done openly in the presence of the judges, the inquest, and the prisoner, and so many as will or can come so near as to hear it, and all *depositions* and witnesses given aloud, that all men may hear from the mouth of the *depositors* and witnesses what is said."—P. 196.

[1]*Observations on the Statutes,* pp. 89, 90.

[2]The paper is not printed in the *Journals,* but the House had then before it a question as to giving Scotch courts jurisdiction over Englishmen charged with border offences. See Gardiner, *Hist. of Eng.* i. 320-321.

[1]This matter is fully examined in Mr. Gardiner's *History of England,* i. pp. 96-108; see in particular pp. 106-7.

[1]4 *St. Tr.* 1101-1113.

[1]7 & 8 Will. 3, c. 3.

[1]7 Anne, c. 27. s. 14.

[2]1 Anne. st. 2. c. 9.

[3]See *e. g.* the trial of Harrison for the murder of Dr. Clench, in which the prisoner was questioned at some length by Holt, 12. *St. Tr.* 859.

[1]19 *St. Tr.* 815.

[2]*Ib.* 886.

[1]6 & 7 Will. 4, c. 114, s. 1.

[1]This essay was first published in the Law Quarterly Review, vol. XVIII, pp. 64-77 (1902).

[2]A biographical notice of this author is prefixed to Essay No. 2, in volume I of this Collection.

[1]The only serious attempt at history known to the writer is that of Mr. A. A. Fry, who was counsel for the Canadian prisoners in 1838, and who published a pamphlet on the subject. This pamphlet was afterwards made the basis of an essay by a learned Dutchman, Dr. Van der Veen (De Engelsche Habeas Corpus Act. Leiden. 1878). But Mr. Fry gives up the inquiry at the very point at which it becomes interesting, adding some rather unkind suggestions about antiquarians and their amusements (p. 9, n.).

[2]Commentaries, iii. 131. This has become the orthodox phrase.

[3]'In all pleas of felony the accused is wont to be let out on bail, except in plea of homicide' (xiv. 1). I doubt very much whether this includes the person indicted at the suit of the king. We must remember that the indictment was a novelty when Glanvil wrote. The corresponding passage in Bracton (fo. 123) clearly refers only to *Appeals*.

[4]2 Inst. 42.

[1]Cap. 39.

[2]Edw. I. c. 15.

[3]2 Inst. 186.

[4]See the form in F. N. B. 66 F.

[5]Ibid. 68 C.

[1]For convenience a few of these may be named: Natura Brevium (Pynson), about 1510; Liber Intrationum (Pynson), 1510; Novae Narrationes (Pynson), about 1516; Registrum Omnium Brevium (Rastell), 1531; Novel Natura Brevium (Fitzherbert), 1534; Natura Brevium (Rastell), 1534; Retorna Brevium, 1541 (but previously); Natura Brevium, newly and most trewly corrected (Redman), about 1543; Intrationum Liber (Henry Smythe), 1546; Registrum Omnium Brevium (Yetsweirt), 1595; Booke of Entries (Coke), 1614; Book of Entries (Moyle), 1658; Thesaurus Brevium, 1661; Brevia Judicialia (Brownlow), 1662; Officina Brevium, 1679.

[2]E. g. Registrum (Rastell), 83; F. N. B. 249 G.

[3]28 Edw. III. c. 9.

[4]4 Edw. III. c. 2.

[5]Little Treatise of Bail and Mainprize, cap. 3.

[6]Fo. 123 a.

[1]See Pollock and Maitland (2nd ed.), ii. p. 588 n.

[2]2 Inst. 43. The extreme unfairness of Coke's argument on the Statute of Westminster I is apparent from the writ *de bono et malo,* which he quotes in another part of his book. This writ apparently allowed a prisoner to be delivered from gaol if he were willing to put himself upon a jury. But it contained the express words *et non per aliquod speciale mandatum nostrum* (2 Inst. 43). One would like to know more of this writ; but it seems to have disappeared before the Register got into print.

[3]It may be noted that in his Treatise on Bail and Mainprize (cap. 10), Coke had already given a different account of the disappearance of the writ *de odio et atia.*

[4]13 Edw. I. c. 29 'appealed or indicted.'

[5]Fo. 123 a. The writ *de cautione admittenda,* also alluded to by counsel for the prisoners in the *Five Knights' Case,* seems to have been applicable only to secure the release of a person who had been taken on an *excommunicato capiendo,* and who was willing to purge himself of his contumacy (F. N. B. 63 C).

[1]Registrum (Rastell), ii. 23.

[2]Ibid. 29.

[3]Ibid. 1.

[4]13 Edw. I. c. 11 (Account); 25 Edw. III. st. v. c. 17 (Debt, Detinue, and Replevin); 19 Hen. VII. c. 9 (Case).

[5]Registrum, 24. The absurdities to which this clumsy form of procedure gave rise are well illustrated by the fact that, in the reign of Elizabeth, an outlawed defendant claimed to be discharged on the ground of a general pardon (Coke, Entries, 345, *Pewe of Penrhyn's Case*). At one time he could always get out of prison by suing a *supersedeas* before he was finally exacted, or a pardon afterwards. These abuses were put an end to by statute (5 Edw. III. c. 12).

[6]If there was the slightest suspicion of the sheriff's good faith, there might be added to this writ a *subpoena duces tecum* (Officina, 65), or a fine might be imposed on the sheriff at once (Registrum, ii. 76).

[1]Registrum, ii. 74.

[2]25 Edw. III. st. v. c. 14.

[3]Registrum, ii. 31.

[4]History (2nd ed.), ii. 593.

[1]Fo. 344. It should be noticed that Coke's form does not always include the *et detentionis.*

[2]Hawkins, P. C. ii. 27, § 27; *R.* v. *Eaton* (1787) 2 T. R. 89; C. O. R. 1886, R. 29.

[3]2 Hen. V. st. i. c. 2. 'Writs of *certiorari* and *corpus cum causa.*'

[4]15 Hen. VI. c. 4. See also 6 Hen. VIII. c. 6, and 1 Ph. & M. c. 13, § 7.

[1]11 Hen. VI. c. 10. 'Divers writs of *corpus cum causa* before the king in his Chancery.' It is possible that the origin of the Chancery jurisdiction in this procedure is the statute of 1414 (2 Hen. V. c. 9). But, of course, recognizances were specially the concern of the Chancellor.

[2]10 Hen. VI. c. 6.

[3]43 Eliz. c. 5; 21 Jac. I. c. 23.

[4]Glanvil, vi. 7.

[5]Maitland, Harvard Law Review, iii. 113.

[6]Ed. of 1607, sub tit. *Habeas Corpus.* The writ referred to by Cowell in the Register Judicial (fo. 81) is not, however, the *Corpus cum causa.* See also under that title in Cowell.

[1]Y. B. 14 Hen. IV (Hill.), pl. 72.

[2]See the writ in Liber Intrationum, fo. 11.

[3]Y. B. 4 Hen. VI (Mich.), pl. 22; 9 Hen. VI (Mich.), pl. 40, *Lucy Water's Case.*

[4]Y. B. 9 Hen. VI (Pasch.), pl. 16.

[5]Y. B. 9 Hen. VI (Mich.), pl. 24.

[6]Y. B. 22 Hen. VI (Hill.), pl. 34, *Danby's and Baker's Case.*

[7]Y. B. 39 Hen. VI (Hill.), pl. 15; affirmed, 2 Hen. VII (Mich.), pl. 6.

[1]Y. B. 8 Edw. IV (Mich.), pl. 23.

[2]Y. B. 16 Edw. IV (Mich.), pl. 5; *Worlay* v. *Harrison* (Dyer, 249 b).

[3]The *Supersedeas* as a writ of Privilege, with date 39 Edw. III, is given in the Registrum (Rastell), fo. 91. The Common Law Courts did not, apparently, issue a writ of Privilege; but, upon presentation of a Bill of Privilege by the applicant, awarded at once the *Corpus cum causa* to the gaoler.

[4]One very interesting writ in Brownlow (p. 115) bids the sheriffs (*vobis* . . . presumably, of London) *nolentes ipsum W. vinclum imprisonamenti tamdiu subire,* 'to have the body of the said W. on Friday, the 3rd August next, before W. P. one of the Justices of Our Bench at the mansion house of the said Justice at Strond (? Stroud) Bridge to do and receive.' If the W. P. referred to is William Peryam, the writ must date from the last quarter of the sixteenth century. But if it be William Paston, whose ancestors were settled at Horton, near Stroud (Glouc.), long before they colonized Norfolk, then the writ is 150 years older. But these are guesses.

[5]Liber Intrationum (Pynson), fo. 25.

[1]I cannot find any trace in the histories of any John Elyngton. He may have been the John Alyngton of whom we read in the Paston Letters (ed. Gairdner, i. 277) as having been one of the informers against the notorious rioter, Robert Ledham, in 1453. But this is mere conjecture.

[2]Obviously, the amount was only just enough to give the Bench jurisdiction (6 Edw. I. c. 8, Stat. Glouc. c. 8).

[3]13 Hen. VII (Mich.), pl. 1. This had been previously admitted (Y. B. 9 Hen. VI (Mich.), pl. 24).

[4]ff. 66, 81.

[1]1 Leon. 70.

[2]Ibid. 71.

[3]Anderson's Reports, p. 298.

[1]C. J. i. 149. In this case the *Habeas Corpus* was issued by virtue of a warrant of the Speaker directed to the Clerk of the Crown in Chancery. In former days a writ of Privilege would have been necessary.

[2]See the writ in Brownlow, 122. Coke claimed (4 Inst. 333) that a similar victory had been obtained over the same Commission in 1567, in the case of Thomas Lee. But a reference to the writ in this case (Moyle, 61) shows that it issued on the ground of privilege. Lee was an attorney of the Common Pleas.

[3]Rep. 121 b.

[4]Moyle, 56.

[5]3 St. Tr. pp. 1-235.

[1]3 St. Tr. p. 127.

[2]1 Ric. III. c. 3.

[3]3 Hen. VII. c. 3.

[4]1 Ph. & M. c. 13, § 2.

[1]'And that no freeman in any such manner as is before mencioned [*i. e.* without any cause shewed] be imprisoned or deteined.'

[2]3 St. Tr. (Howell), pp. 235-294.

[3]Hyde, however, threw out a hint that the Court might not be so complaisant on a future occasion (3 St. Tr. p. 289).

[4]3 St. Tr. p. 240. And production expressly refused (p. 286).

[5]Littleton's argument (p. 262); Selden's (p. 265).

[6]Ibid. p. 281.

[7]Ibid. p. 289.

[1]C. J. ii. 21, Nov. 6.

[2]Ibid. 28.

[3]16 Car. I. c. 10.

[4]Statutes (Record Commission), v. 112.

[5]6 St. Tr. 1189-1208, *anno* 1676.

[1]31 Car. II. c. 2

[1]This essay was first published in the Harvard Law Review, vol. III, pp. 97-115, 167-179, 212-225 (1889).

[2]A biographical notice of this author is prefixed to Essay No. 1, in volume I of this Collection.

[1]Preface to 9 Rep.

[1]Stat. Westm. II., c. 14.

[1]This change I infer from the cases in Bracton's Note Book. On 18 July, 1822, a writ was sent to Ireland, fixing Richard's death as the period for the Mort d'Ancestor,

in order to assimilate Irish to English law. See Sweetman's Calendar of Irish Documents, p. 160.

[2]Bracton's Note Book, vol. i., p. 106; vol. iii., p. 230. Compare the Irish writ given in Statutes of the Realm, i., p. 4. The Statute of Merton in its printed form mentions not Brittany, but Gascony.

[3]As regards the Novel Disseisin the change, if any, was but nominal; the "first voyage into Gascony" of the Statute of 1275 was "the voyage to Brittany" of the ordinance of 1237. In 1230 Henry went to Brittany, and thence to Gascony.

[1]The "Cursitores," or "Clerici de cursu," were the clerks who issued the writs of course. The name of Cursitor street still marks the site of their ancient home. As to their duties, see Fleta, p. 78.

[2]Thus, f. 3 b, "quaere comment le brief serra fait ou si le brief gyst;" f. 6 b, "quibusdam videtur quod debeat scribi in istis brevibus etc.;" f. 9, "sapientes et jurisperiti dicunt;" f. 10 b, "secundum quosdam . . . sed alii dicunt;" f. 16, "et est contra registrum;" f. 27 b, "secundum quosdam fiant duo brevia;" f. 29 b, "secundum quosdam;" f. 97 b, "Nota quod non debet dici in brevi predicto *specialem auctoritatem ad hoc habentium* prout in quibusdam registris invenitur;" f. 108 b, "Nota per Thomam de Newenham; tamen alii clerici de cursu contradicunt;" f. 120 b, "Tamen quaere . . . per plusors sages dit est;" f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 133, "Nota quidam addunt in istis tribus brevibus, etc.;" f. 134 b, "Vide de breve Statutum W. 2. c. 14 pro ista materia quia hic male reportatur;" f. 183 b, "Nota secundum quosdam . . . et ideo quaere inde;" f. 172 b, "Je croye que son brief nest pas le pire;" f. 184 b, "Credo quod istud breve vacat;" f. 200, "Ascuns gents dirent;" f. 208 b, "In breve de post disseisina non dicatur *tam de illis,* etc., secundum Escrick;" f. 243 b, "Mes le brief . . . est le meillour come cest register voet;" f. 269, "Ista clausula . . . non continetur in statuto sed additur per quosdam jurisperitos."

[1]The necessity for specialized writs is often noticed in the endorsements on petitions to Parliament; *e. g.,* in those of 14 Edw. II., Ryley's Placita, p. 408, "Habeat breve novæ disseisinæ in suo casu;" p. 409, "Adeat Cancellarium et habeat ibi breve in suo casu;" p. 412, "Habeat breve de conspiratione formata [conformatum] in suo casu;" p. 423, "Habeat breve de conspiratione in Cancellaria in casu suo formandum;" p. 421, "Habeant brevia suis casibus conveniencia." So in the Register we find writs issued by order of the Council; *e. g.,* f. 64, "per consilium;" f. 114, a writ founded on a Parliamentary petition; f. 124, "per consilium;" f. 125, "per consilium."

[2]F. 64 b, "Istud attachiamentum est notabile valde;" f. 224, "Nota quod istud breve sigillatum fuit et quassabille ut dicebatur pro veritate."

[3]Parning appears on f. 13 b, 16 b, 35, 69, 99 b, 100 b, 132, 136; in some other cases, though he is not named, we can tell, from the date of the writ, that it belongs to his chancellorship. He is the only Chancellor that appears prominently. A certain Herleston appears in three places, f. 49, 80 b, 261; f. 261, "Hoc breve concessum fuit .

. . per cancellarium Lescrop et W. de Herleston,"—*i. e.* (as I understand it) this writ was granted by the Chancellor, G. le Scrope, the Chief Justice, and W. de Herleston; the date of this writ seems to be 19 Edward III. Herleston was a Master in Chancery under Edward III. So, again, one Thomas of Newenham gets mentioned as a maker of writs; he seems to have been a Master under Edward III. and Richard II.; apparently we owe to him a writ against a vendor of a blind horse, who warranted it sound; see f. 108, 108 b, 151 b.

[1]Reg. Brev. Orig. f. 78 b, "Et les maistres W. de Aym. [Ayremine, Master of the Rolls?] et autres" expressed an opinion about a writ which does not commend itself to the annotator; f. 121 b, "Les Maistres de la Chancerie ne voudrient agreer a cest clause;" f. 131 b, "Ceux brefs furent enseales per tants les sages de la chancerie, per assent des serjeants le Roy et autres sages asses" [Nota quod hoc verbum *asses* non est verbum Anglicum sed verbum Franciscum]; f. 200, "Istud breve fuit concessum de assensu W[illelmum] de T[horpe] capitalis justiciarii et aliorum justiciorum de banco et clericorum de cancellaria."

[1]Reg. Brev. Orig. f. 32, 69 b.

[1]Reg. Brev. Orig., f. 129.

[2]Brunner, Enstehung der Schwurgerichte, p. 78, compares the *breve de recto* with the Frankish *indiculus communitorius.*

[1]Originally a Writ of Right is so called, because it orders the feudal lord to do full right to the demandant, *plenum rectum tenere;* and in this sense, the *Præcipe quod reddat* is no Writ of Right. But when possessory actions have been established in the King's court, "right" is contrasted with "seisin," and all writs originating proprietary actions for land, including the *Præcipe in capite,* come to be known as Writs of Right. This has been remarked by Brunner, Schwurgerichte, p. 411.

[1]This must be a blunder; it should have been "post ultimam transfretacionem patris nostri de Hibernia in Angliam."

[2]Here again there must have been some carelessness. The date referred to is the coronation of Henry II., the present king's grandfather. The mistake would seem to be due not to the monastic copyist, but to the Chancery clerk who drew up the document sent to Ireland, and was not careful to change into "avi" the "patris" which stood in a formula of John's reign, from which he was copying. See Sweetman's Calendar of Irish Documents, pp. 37, 160.

[1]This was a moot point in Bracton's day. Pateshull allowed the layman the assize, but afterwards changed his mind. Bracton thinks this a change for the worse. Bract., f. 285 b.

[1]I believe that this writ would have been antiquated after 1229.

[2]These writs seem older than 1237.

[1]This seems a reference to an eyre of 1222.

[1]The development can be seen in Palgrave's Rot. Cur. Reg., i., 341, "in quam non habuit ingressum nisi quia predicta B. er commisit ad terminum qui preteriit;" ii., 37, "quam pater A. invadiavit B. ad terminum qui preteriit;" ii., 211, "quam ipse invadiavit C. patri predicti B. ad terminum qui preteriit," etc.

[2]Rot. Pat. i., 32, contains a writ of this kind, with the note: "Hoc breve de cetero erit de cursu." Even from Richard's reign we have "in quam ecclesiam nullam habet ingressum nisi per ablatorem suum." Rot. Cur. Reg., i., 391.

[1]The privilege of having a jury instead of a grand assize was granted to the Kentish gavelkinders in 1232. Statutes of the Realm, i., 225.

[2]The form seems older than 1237.

[1]This form seems older than 1237.

[2]This form seems newer than 1237.

[3]This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times.

[1]This form seems newer than 1237.

[1]Bracton, f. 220, notices this writ as a newly invented thing. He recommends, however, another form, which is a Precipe quod reddat; but the above is the form which ultimately prevailed. Reg. Brev. Orig., f. 227.

[2]Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's Note Book, pl. 92.

[3]Given by Stat. Mert., cap. 3.

[4]This is given by Bracton, f. 159.

[1]This will hereafter be attracted into the "Writ of Right group" by the Little Writ of Right for men of the Ancient Demesne.

[1]In 1258-9 suit of court was a burning question. The Provisions of Westminster (cap. 2) laid down the rule, that when a tenement which owes a single suit comes to the hands of several persons, either by descent or feoffment, one suit and no more is to be due from it. This writ deals with the converse case in which several parcels of land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

[2]Bracton's Note Book, pl. 1215.

[3]The printed Registrum, f. 86, says, "istud breve fuit inventum secundum provisiones de Merton." But the Provisions of Merton, as we have them, contain nothing about distress.

[1]I am happy in being able to refer to what is said on this point by "J. B. A." in Harvard Law Review, ii., 292. [See also Harvard Law Review, iii., 29.—Ed.] Of course Trespass (transgressio) was well enough known in the local courts. "Trespass" and "Debt" were the two great heads of their civil jurisdiction.

[1]Glanv., xii., 18; xiii., 39.

[2]Bracton, f. 179 b. "Item ad officium (vicecomitis) pertinet quod faciat tenementum reseisiri de catallis, etc., quod hodie aliter observatur, quia quaerens omnia damna post captionem assisae recuperabit."

[3]Rot Cur. Reg., ii., 34, "A. optulit se versus B. de placito transgressionis." Ibid., 51, "A. queritur quod B. vi sua asportavit bladum de sex acris terre quas disracionavit in curia Dom. Regis (but here the recovery of the land in the king's court is a special reason for its interference). Ibid., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam, et quadrigas suas cum forcia in bosco suo de W. capit et adhuc unam illorum habet et detinet injuste." Ibid., 169, "A queritur quod B. et C. intraverunt in terram suam de X. vi et armis et in pace Regis et averia sua ceperunt et ten" (*corr.* contra.) "vadium et plegium tenuerunt." Ibid., 260, "A. queritur quod Episcopus Donelmensis cepit eum et imprisonavit et eum retinuit injuste quousque ipsum redemit et eum contra vadium et plegium retinuit."

[4]Rot. Cur. Reg., i., 38.

[1]Selden Society, vol. 1, pl. 35, "appellum de pratis pastis non pertinet ad coronam regis."

[2]Bracton's Note Book, pl. 85.

[3]Rot. Cur. Reg., ii., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam . . . B. dicit quod A. non tenet vel tenere debet boscum illum de eo . . . A. ponit se in magnam assisam utrum ipse jus majus habeat tenendi de eo boscum vel ipse in dominico. Et B. similiter." Bracton's Note Book, pl. 835, "A. queritur quod B., C., et D. vi et armis et contra pacem Dom. Regis fuerunt in piscaria ipsius A. . . . et E. (vocatus ad warrantiam) venit . . . et dicit . . . quod ipse debet piscari in eadem piscaria cum ipso A., et dicit quod antecessores sui ibi piscari solent et debent et piscati sunt scil. tempore Henrici Regis avi. . . . A. dicit quod predecessor suus fuit seisitus de piscaria illa que fuit separabile suum . . . E. ponit se in magnam assisam."

[4]Bracton, f. 413.

[5]Placit. Abbrev. 142 (38 Hen. III.), "Et quia uterque dicit se esse in seisina de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri." Ibid., 162

(1 Ed. I.), “Et quia liberum tenementum non potest per hoc breve de transgressione terminari.”

[6]Placit. Abbrev. 346 (17 Ed. II.), “In hujusmodi brevi de transgressione secundum legem,” etc., “dampna tantum adjudicari et recuperari debeant.”

[1]The reason why Waste gets enclosed in this ecclesiastical group is obvious; the action of Waste is, or has lately been, an action on a prohibition.

[1]A. has complained that he is threatened by B. therefore “prefato A. de prefato B. firmam pacem nostram secundum consuetudinem Anglie habere facias, ita quod securus sis quod prefato A. de corpore suo per prefatum B.” etc. It is a writ directing the sheriff to take security of the peace.

[1]The occurrence of this word which may be a corruption of “avi” is not sufficient to make us doubt that in substance this Register belongs to Edward I.’s reign; though possibly a feeble attempt to “bring it up to date” may have been made at a later time.

[2]Walter of Merton seems here to get the credit which on older evidence belongs to William of Raleigh.

[3]Here again Merton seems to be obtaining undue fame at the expense of Raleigh.

[1]“Praecipe R. quod juste,” etc., “reddat H. unam virgatam terre . . . quam W. dedit M. et que post mortem ipsius M. ad prefatum H. descendere debet per formam donacionis quam prefatus W. inde fecit predicto M. ut dicit, et nisi fecerint,” etc. What I have seen in this and other Registers favors the belief that there was a Formedon in the Descender before the Statute de Donis. See Co. Lit. 19a; Challis, Real Property, 69.

[1]Reg. Brev. Orig. f. 12, 31, 58, 288, 289 b, 291, 308, show work of Henry VI.’s reign.

[1]Reg. Brev. Orig. f. 109 b, a writ against one who has “assumed” to erect a stone cross and has not done it.

[1]This essay was first printed in the Harvard Law Review, vol. VII, pp. 266-280 (1894), under the title “An Action at Law in the Time of Edward III.”

[2]Barrister at Law, and Editor of the Year-Books of the Reign of Edward III (Rolls Series). Oxford University, M. A., 1861.

Other Publications: A History of Crime in England, 1873-76, A Constitutional History of the House of Lords, 1894; The Public Records and the Constitution (Oxford Lecture, 1907); article “Crime” in the Encyclopedia Britannia, 9th ed., etc.

[1]Placita de Banco, Mich. 15 Edward III., Ro. 457 d.

[1]H. 16 E. 3, No. 3.

[2]Placita de Banco, Hil. 16 Edward III., R°. 64 and R°. 181.

[1]Y. B. M. 13 E. 3, No. 15.

[2]Mich. 13 Edward III. R°. 107 d.

[1]Rol. Parl., 124 *b,* as printed.

[1]2 Rol. Parl., 123, as printed.

[2]Placita coram Rege, Hilary, 15 Edward III. R°. 41.

[1]H. 14 E. 3, No. 38.

[1]T. 12 E. 3, p. 603.

[2]E. 12 E. 3, pp. 443-5.

[1]No. 2, p. 291.

[2]No. 24, p. 223.

[1]This essay was first published as Part II of an article entitled "The Year Books," in the Law Quarterly Review, vol. XXII, pp. 360-382 (1906), and has been revised by the author for this Collection; it will form a part of the author's History of English Law, vol. II, to appear in 1908.

[2]Lecturer in St. John's College, Oxford. A biographical notice of this author is prefixed to Essay No. 9, in volume I of this Collection.

[1]P. & M. ii. 589, 590.

[1]Articuli ad Novas Narrationes (Tottel's ed. 1561), ff. 77 b, 78: 'Igitur in omni casu primo opus est videre ac intellegere casum. Casuque bene notato et intellecto, tunc impetrare breve iuxta casum, et deinde super breve bene narrare secundum naturam actionis in forma superius recitata. Quia ubi non habetur bonum et certum breve, quod est omnium actionum fundamentum et originale, impossibile est manutenere bonum placitum, neque facere narrationem congruam, iuxta naturam brevis super quo narraturus est.'

[2]xxii. L. Q. Rev. p. 371, n. 6.

[3]P. & M. ii. 590, 591.

[4]e. g. Y. B. 1, 2 Ed. II (S. S.), 19.

[5]3 Ed. I, c. 43; 6 Ed. I, st. 1, c. 10; Reeves, H. E. L. ii. 36, 37.

[6]1 Y. B. 19 Ed. III (R. S.), 12; as Mr. Pike says, Introd. xxvi, "We see the defendants after seven years of successful fourching, left fourching *in infinitum.*"

[1]e. g. Y. B. 2, 3 Ed. II (S. S.), 141; early Roman civil procedure seems to have recognized something like the view, Greenidge, Civil Procedure in Cicero's Time, 55, 56.

[2]Reeves, H. E. L. ii. 632.

[3]e. g. Y. B. 12, 13 Ed. III (R. S.), 316—a case which shows that this was so even when there were several defendants, and the protection was cast for one only; Reeves, H. E. L. ii. 615.

[4]For a hard case of this kind, see Y. B. 1, 2 Ed. II (S. S.), 150.

[5]See e. g. Rot. Parl. iii. 594 (7, 8 Hy. IV, no. 112), justice was delayed because the judges were 'en divers opinions et ambiguities' owing to the fact that on the panel a juror's name was *C*ongrove, while in the writs of Habeas Corpus and Distringas he was called *G*ongrove.

[6]1 Y. B. 18, 19 Ed. III (R. S.), 152.

[7]Real Actions 115, and the case there cited; cp. ibid. 157 for similar remarks as to process upon the writ of Formedon.

[8]Reeves, H. E. L. ii. 93.

[1]P. & M. ii. 591-3; Reeves, H. E. L. i. 452-6.

[2]Holdsworth, H. E. L. i. 87-9, 105, 106.

[3]Y. B. 30, 31 Ed. I (R. S.), 258.

[4]Y. B. 36 Hy. VI, pl. 21 (pp. 25, 26): 'Sir la Ley est come j'ay dit et ad este tout dits puis la Ley fuit commence, et nous avons plusors courses et forms qui sont tenus pour Ley, et ont este tenus et uses per cause de reason, nient obstant que modo le reson ne soit prest en memory.'

[1]'The law servyth of nought ellys in these days,' ran Cade's proclamation in 1450, 'but for to do wrong, for nothyng is sped almost but false maters by colour of the law for mede drede and favour.'—Three Fifteenth Century Chronicles (C. S.), 96.

[2]P. & M. ii. 605.

[3]P. & M. ii. 605-12.

[4]Pleading (5th ed.), 137, 138.

[1]P. & M. ii. 599-600; Thayer, Evidence, 9, 10; Holdsworth, H. E. L. i. 136, 137.

[1]See e. g. Bracton’s Note Book, case 1115.

[2]P. & M. ii. 663-5; cp. Holdsworth, H. E. L. i. 296 for a survival of this idea in the Channel Islands; for a similar idea in Roman Law, see Sohm, Institutes (tr. G. Ledlie), ed. 1892, 153. Greenidge, Legal Procedure in Cicero’s Time, 84, speaking of the civil law formulae, says: ‘Nor is it at all likely that these *civil* “formulae” were preceded by any ruling in law, by any promise of an action, or in fact by anything of the nature of an edict. For the praetor could not promise where he could not refuse, and the ruling was not his, but that of the *ius civile.* So far the praetor professes to be only an exponent of something beyond and behind him.’

[3]Holdsworth, H. E. L. i. 155, 156.

[4]For an analogy in Roman Law cp. Girard, 952: ‘Il (le magistrat) donne simplement par son concours une sorte d’authenticité indispensable aux actes des parties spécialement à ceux du demandeur . . . son rôle est un rôle d’assistant sinon purement passif au moins un à peu près mécanique’; Greenidge, Legal Procedure in Cicero’s Time, 84.

[1]See e. g. Y. B. 3 Ed. II (S. S.), 187.

[2]P. & M. ii. 627, 628.

[3]Y. B. 20, 21 Ed. I (R. S.), 280, Louther said *arguendo,* ‘Every word spoken in court is not to be taken literally; they are only *paroles de la court’;* 3 Ed. II (S. S.), 35, 167; Y. B. 17, 18 Ed. III (R. S.), 584, Shardelowe says, ‘Many matters are counted by way of form which are not traversable’; P. & M. ii. 606; cp. the gradual disuse of the formal words of the Legis Actio; Cicero, Pro. Mur. 11, 25 (cited Greenidge, Legal Procedure in Cicero’s Time, 163, n. 1), says: ‘Primum dignitas in tam tenui scientia non potest esse. Res enim sunt parvae, prope in singulis literis atque interpunctionibus verborum occupatae. Deinde, etiamsi quid apud maiores nostros fuit in isto studio admirationis, id enuntiatis vestris mysteriis totum est contemptum et abiectum.’

[4]P. & M. ii. 609.

[1]P. & M. ii. 623, 655, 656.

[2]Pleading, 29.

[1]See *The King* v. *Cooke* (1824) 2 B. & C. 871 for a curious survival of this reason for certainty in pleading.

[1]Y. B. 3 Ed. II (S. S.), lxxi, and 69.

[2]Cp. xxii L. Q. Rev. p. 284, n. 10; Y. B. 3 Ed. II (S. S.), 197, information seems to have been supplied to the reporter by the clerk.

[3]Y. B. 3 Ed. II (S. S.), 31-6, 97, 116-8.

[4]Ibid. 16.

[5]For some account of this, see Greenidge, Legal Procedure in Cicero's Time, 179-81.

[1]Y. BB. 21, 22 Ed. I (R. S.), 148, 242; 33-5 Ed. I (R. S.), 476.

[2]Y. B. 36 Hy. VI, pl. 21, p. 26, Fortescue sums up the points of the case for the benefit of the apprentices, serjeants, and others of his company; Y. B. 3 Ed. II (S. S.), 36, Bereford C. J. says to Westcote, 'Really I am much obliged to you for your challenge, and that for the sake of the young men here, and not for the sake of us who sit upon the bench. All the same you should answer over.'

[3]Y. B. 3 Ed. II (S. S.), lxvi-lxviii.

[1]Thayer, Evidence, 114, 115.

[2]Y. B. 2, 3 Ed. II (S. S.), 136, 137.

[3]Y. B. 18 Ed. III (R. S.), 152, Sharshalle J.: 'For that matter I should hold him to be a foolish pleader if he pleaded to the demandant's action within the liberty, but he would say that he ought not to answer there because the tenements are outside the liberty, and upon that he ought to abide judgment, whereupon, if judgment were rendered against him, he would have the Assize.'

[1]Y. B. 11, 12 Ed. III (R. S.), 88, *Trewith,* after some pleading, seeing that the Court was against the writ, demanded that it should abate. 'You shall not get to that,' said *Parning;* 'you have pleaded higher, and thereby affirmed the writ as good.' 'I vouch the record of the roll,' said *Trewith,* 'that it was not of my own accord, but by the advice of the Court.'

[2]Y. B. 14 Ed. III (R. S.), 60, 'Scrope was on the bench and said: "What you say as to two bastards you say well, but, in God's name, you might have saved yourself against her by way of replication . . . and this replication must have been entered on the roll." '

[3]Y. B. 11, 12 Ed. III (R. S.), 42, *Trewith,* 'Whatever thing a party may plead and pass over without regard of the Court and join issue on a plea, then nothing shall be recorded except the issue; for of that which was spoken and pleaded before and waived without award, nothing shall be entered on the roll'; Hillary J., 'You say wrong'; Y. B. 3 Ed. II (S. S.), 129, Bereford C. J., 'You did not demur there. So you cannot take advantage of that.' Cp. Y. B. 19 Ed. III (R. S.), 332, a counsel is allowed to amend his count before exception has been taken to it.

[4]Y. B. 3 Ed. II (S. S.), 129, and Introd. lxvi, lxvii.

[5]H. E. L. ii. 223.

[1]Y. B. 3 Hy. VI, Pasch. pl. 10, Formedon against *J* and *A* his wife; the demandant counted against them on a gift in tail made by deed to the ancestor of the demandant. Paston by mistake said by virtue of which the *donor* was seised, whereas he should have said *donee;* the husband made default then and at the petite cape; the wife prayed to be received to defend her title, and relied on the faulty count. Paston offered to plead anew, and he and Martin argued that this could be done; Babington contra; Cokain agreed with Paston and Martin, putting the case of a protection and a resummons, 'Mettons que apres le count le parol uste este mis sans jour per protection, et ore le demandant ust sue resummons envers le tenant, ne duist le demandant or count de novel? jeo dis que si pur ceo que parol serra my sans jour pur ceo fuit le premier count alle et determine: et en resommons il serra pris sicome nul count ust jamais, et sicome il n'est jamais eu nul auter breve devant eyant regard al count; Sic hic'; cp. Y. B. 5 Hy. VII, Trin. pl. 4—this shows how conceivably rules of process might be used to save the consequences of an otherwise fatal error.

[2]Thayer, Evidence, 125-9.

[3]Holdsworth, H. E. L. i. 155, n. 9.

[4]Y. B. 14 Ed. III (R. S.), 248.

[5]Y. B. 38 Hy. VI, Pasch. pl. 13.

[6]Y. B. 14, 15 Ed. III (R. S.), 346.

[1]See Longo Quinto, 58, cited Thayer, Evidence, 133, 134.

[2]For this doctrine, see Thayer, Evidence, 118, 119; Reeves, H. E. L. ii. 629-32. 'Suppose,' says Reeves, '*A* enfeoffed *B* of land, and an assize was brought by a stranger against *B, B* could not plead these facts simply, as such plea would amount only to the general issue; he would be obliged to plead the general issue, and the case would be left to the jury. He, therefore, by a wholly fictitious averment, gave the plaintiff *colour,* i. e. a prima facie cause of action. Thus, after pleading that *A* had enfeoffed him, he would further plead, "that the plaintiff claiming by colour of a deed of feoffement made by the said feoffor, before the feoffement made to the said tenant (by which deed no right passed) entered, upon whom the said tenant entered," this left a point of law for the Court, i. e. the validity of the alleged first deed, and thus the case was withdrawn from the jury'; see Y. B. 3 Ed. II (S. S.), 156.

[3]This is explained by Eyre C. J., delivering the opinion of the judges to the House of Lords, in *Gibson and Johnson* v. *Hunter* (1793) Dougl. 187, at p. 206: 'If the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is to take from the jury, and to refer to the judge, the application of the law of the fact.'

[1]Pleading, 27, 28.

[2]Early Law and Custom, 357.

[3]Holdsworth, H. E. L. i. 159, 160.

[1]Gilbert, Origins of the King's Bench (ed. 1763), 315.

[2]H. E. L. ii. 398, 399.

[3]H. E. L. ii. 619-53; at p. 620, he says: 'Almost everything substantial in pleading . . . was settled by judicial determination in the reigns of these kings.'

[4]Y. B. 39 Hy. VI, Mich. pl. 43.

[5]Longo Quinto, p. 22; for another case, see ibid. p. 23, and Y. B. 33 Hy. VI, Mich. pl. 40; for cases in which the clerks either ask or give advice in matters of process or pleading, cp. Y. BB. 11, 12 Ed. III (R. S.), 426, 434; 13, 14 Ed. III (R. S.), 258, 310; 14, 15 Ed. III (R. S.), 74—rule noted as contrary to the opinion of the clerks.

[6]Longo Quinto, 35.

[7]Y. B. 39 Hy. VI, Mich. pl. 32; Y. B. 2 Ed. IV, Mich. pl. 14.

[1]H. E. L. ii. 621, 622; cp. Y. B. 16 Ed. III (R. S.), i, 64: 'And note that after the adjournment the roll was amended on the prayer of the tenant, when the demandant had gone with his day, because the justices recorded that the roll did not accord with the plea.'

[1]Cp. Y. B. 21 Ed. IV, Mich. pl. 4 (p. 43): 'Lendemain le pleintif en breve d'Error vient in propre person et pleda ce plee en le forme ensuant "ye have here, &c."—en Englois [then follows the Latin entry on the roll giving the effect of the plea], A auter jour Catesby monstra tout le plee que il ad plede n'est pas bon.'

[2]Y. B. 38 Hy. VI, Pasch. pl. 13.

[3]'Pourquoi il ala a Comberford protonotary et pria que il voille faire a luy papier de ceo matter; que fait issint; et puis il vint ove le papier et la prist a Choke a le barre, et luy pria a getter ceo en le Court, et issint il fist per son commandement sans pleder ou sans voier que fuit deins le papier, et cest papier, demour ove Copley un auter protonotary pur ceo que il avoit l'entrie de le matter a devant.'

[1]'Prisot dit a eux. N'aures unques worship per tiels matters, issint faux et suspecious, car ceo matter n'aura nul favour icy, ne nul tiel; et il n'ad este use cy a mettre eins tiels papiers quand le party ad Consail ove luy sans eux pleder al barre overtement; car si cest point serra suffre nous aurons plusors tiels papier en temps avenir, que viendra eins desous un cloak, et il puit estre dit suspecious matter que son Consail ne veut pleder. Purquoi il dit a eux, si voules pleder cest matter, pledez, ou autrement il servira pur rien. Et ils respondent qu'ils n'osent pleder, ne ils ne scavent unques de le matter, mais come il avait dit; et disoient qu'ils ne voillent pluis mesler ove ceo.'

[2]'Quand le party fuit icy, et son presence record, et command a pleder, et il vient ove sa matter a son Consail et ils ne voillent pleder le matter pur le suspecion, que poit il donques faire, mes va al' protonotary et fait un papier et le mist eins pur son excuse, n'ad il donques bien fait?'

[1]Y. B. 11, 12 Ed. III (R. S.), 66: 'And because the plaintiff was a poor man, and the Court itself had spoken the declaration, the defendant was driven to answer.'

[2]Holdsworth, H. E. L. i. 160.

[3]*Stavern* v. *Bouynton,* Cal. i, xix, petition to the Chancellor for a subpoena to the witness, 'for the cause that he shuld noght be haldyn parciall in the same matier'; cp. Select Cases in Chancery (S. S.), No. 126.

[4]5 Eliz. c. 9, § 6.

[1]De Republica, Bk. 2, c. 18.

[2]In the Praxis Utriusque Banci (ed. 1674), 28, an order of Prisot C. J. and the other judges of the C. B. of Trin. 35 Hy. VI is cited as to the fees of the prothonotaries; for every 'comen declaracyon, comen Plee en barre, comen replycacyon, and comen rejoinder in Plees personel,' whether the defendant appear in person or by attorney the sum is 13*s.* 4*d.;* for personal pleas pleaded by a serjeant 2*s.* Does this show that the prothonotaries drew ordinary common form pleadings at this date? Smith, Republic, Bk. 2, cc. 1 and 14, talks of the prothonotaries settling the pleadings.

[3]Bk. 2, c. 12, he tells us that the judges 'heare the pleading of all matters which do come before them: and in civill matters where the pleading is for money, or land, or possession, *part by writing, and part by declaration and altercation of the advocates the one with the other,* it doth so procede before them till it do come to the issue which the Latines do call *statum causae.*'

[4]9 Co. Rep. 9 b.

[5]Dyer C. J. (Praxis, &c. 42), in his charge in 1567 to a jury of attorneys appointed to inquire into misdemeanours in his court, says that he had himself acted as such a clerk.

[6]Praxis, &c. 40, Orders of the Judges of the C. B. Mich., 15 Eliz. No. 10, to the effect that no prothonotary's clerk who is an attorney is to draw up 'any paper or book of the office' wherein he is a clerk, in a case in which there is special pleading, and in which he is the attorney of the plaintiff or defendant, unless the other side consent. See Rot. Parl. iii. 306 (16 Rich. II, No. 28), for a complaint of abuses arising from this practice; ibid. 642 (11 Hy. IV, No. 63), a petition that no prothonotary or filacier of either bench shall be an attorney is declined; and cp. ibid. 666 (13 Hy. IV, No. 49).

[1]Praxis, &c. 113, Orders of Hill. 8, Car. I, separated the office of clerk to the prothonotaries and the attorney. The former were to draw the pleadings; the latter prosecuted and defended actions for clients. We may note that the clerks were to serve

six years in the office, and belong to an Inn of Chancery. Did this lead to the rise of the separate class of special pleaders?

[2]Smith, Republic, Bk. 2, c. 18, assumes that the trial is distinct from the pleadings; in fact the trial as he describes it has all the modern incidents.

[3]Smith, ibid., Bk. 2, c. 1, puts into one class the judges, serjeants, and counsellors, in another the prothonotaries, the attorneys, and solicitors; Greenidge, Legal Procedure in Cicero's Time, 148, tells us that at Rome the pleaders (*advocati*) tended to fall apart from the eloquent *patroni.*

[1]Holdsworth, H. E. L. i. 160, 161.

[2]Ibid. 165, 166.

[3]Black Books of Lincoln's Inn, i. 315 (Order of 1556); Dugdale, Orig. Jurid. 310.

[4]Manning, Serviens ad Legem, 125; Y. B. 32, 33 Ed. I (R. S.), xxxii; P. & M. i. 190, 191; cp. Greenidge, Legal Procedure in Cicero's Time, 146, for a somewhat analogous distinction between the cognitor and the patronus; when a litigant is represented by a cognitor he does not intervene at all; but the patronus does not represent him; if he is not himself present he is undefended; 'the patronus cannot take his place; he is only an able interpreter, intervening for the purpose of illustrating the law and marshalling the proofs in his client's interests.'

[1]See Y. B. 3 Ed. II (S. S.), lxviii. Professor Maitland says of the introduction of written pleadings that, 'It forced our common law into a prison-house from which escape was difficult. Instead of being able to ascertain the opinion of the judges about the various questions of law that are involved in the case, the pleader, without any help from the Court, must stake his reputation and his client's fortune upon a single form of words.'

[2]Life of Lord Keeper Guilford (Jessopp's ed.), i. 27, 28: 'Now the pleadings are all delated in paper, and so pass the offices, and the Court knows nothing of much the greater part of the business that passeth through it: and when causes which they call real come on and require counting and pleading at the bar, it is done for form and unintelligibly; and whatever the serjeant mumbles it is the paper book that is the text: and the Court as little meddles with as minds what is done of that sort at the bar; but the questions that arise are considered upon the paper book. All the rest of the business of the Court is wrangling about process and amendments, whereof the latter had been mostly prevented, if the Court (as formerly) had considered the first acts of the cause at the bar when offered by the serjeants.'

[1]See xxii L. B. Rev. p. 278.

[1]Ancient Law, 19, 20.

[1]These extracts are from a treatise of the same title, published in 1897 (Cincinnati: W. H. Anderson & Co.).

[2]Professor of law in the University of Indiana, since 1904. Davidson College, A. B. 1878, University of Virginia, LL. B. 1880; admitted to the Cincinnati Bar 1881; professor of law in the University of Cincinnati, 1897-1904.

Other Publications: Cases in Code Pleading, 1901.

[3]Cf. Burrill's Law Dictionary, 2d ed., "Code."

[1]The Civil Code (Code Napoleon), appeared in 1804; Code de Procédure Civile in 1806; Code de Commerce in 1807; Code d'Instruction Criminelle in 1808; Code Pénal in 1810.

[2]Cf. Bentham's letter to President Madison, 1811; Bentham's letter to the Governor of Pennsylvania, 1814; the latter's message to the Pennsylvania legislature, 1816; Bentham's communications to the governors of the several States, June, 1817; and his address to the citizens of the United States, July, 1817; see papers relative to Codification, 4 Bentham's Works (Bowring ed., 1843), 451 et seq.

[3]With "code" came also "codify," "codification," etc. The latter are of Bentham's extensive coinage.

[1]Then, as now, however, the word was ambiguous (cf. sec. 5, Hepburn's Development of Code Pleading). Austin, for instance, points out that the term *code,* as signifying a body of law, "expressed in general formulæ arranged systematically, and complete, and the term *codification,* as meaning the reduction of an existing body of law into such a code, are not expressive." . . . "We want," said he, in 1832, "a term to denote a complete body of statute law being, or intended to be, the only positive law obtaining in the community." (2 Austin's Juris., 1061, 671.) But to express this idea, he could find no word so well suited as "code."

[1]Maine, however, is sometimes included among the "code states" (So Dillon, Laws and Jurisprudence, 260*n,* and Phillips, Code Pleading, 166*n,* both quoting from Mr. David Dudley Field's paper for the Columbian Exposition); but the published statutes of Maine fail to bear this out. It is rather a common law state with statutory modifications.

[2]It will be observed that Louisiana stands by itself in this classification; its system of pleading arises out of the civil law. The rules of civil pleading in Texas also had a different origin from the common law, but their statutory enactment has approximated the form of rules found in the "code states" generally.

[1]Such were the stock phrases, in use but yesterday. The introduction of Tyler's Stephen on Pleading affords a good illustration. See also McFaul v. Ramsey, 20 How. (U. S.), 523, 525 (1857).

[1]Hale, Hist. Com. Law, 212, Runnington's note.

[1]Cf. remarks of Pollock, in 3 Law Quar. Rev. 344 (1887).

[2]How clearly this little book struck the keynote of Bentham's opposition to Blackstone, appears in the preface to the first edition. "If," says Bentham, "it be of importance and of use to us to know the principles of the element we breathe, surely it is of not much less importance, nor of much less use, to comprehend these principles, and endeavor at the improvement of our *laws,* by which alone we breathe it in security. If to this endeavor we should fancy any author, especially any author of great name, to *be,* and as far as could in such case be expected, to *avow himself,* a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence which these works might, under whatever title, have acquired. Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least, I saw, in the author of the celebrated *Commentaries on the Laws of England:* an author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable) than any other writer who on that subject has ever yet appeared. It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the *antipathy to reformation.*"

[1]It is a curious coincidence that the year of Bentham's death is the year of the flood tide of the movement towards common law reform in England.

[2]See the note in Dillon's Laws and Jurisprudence, 337.

[1]Maine, Early Hist. Institutions, 397. "If the analytical jurists [Bentham and his school] failed to see a great deal which can only be explained by the help of history, they saw a great deal which, even in our day, is imperfectly seen by those who, so to speak, let themselves drift with history." Ib.

[2]Hepburn, Development of Code Pleading, sec. 76.

[1]7 Am. Jurist, 80.

[1]They were framed by the judges in pursuance of the statute of 3 & 4 Wm. IV., *c.* 24—an elaborate act which is as remarkable for its latitude in some questions as for its restrictions in others.

[1]Act of April 10, 1805. In many respects this code anticipated the codes of half a century later. "Under it, all suits were commenced by petition, addressed to the court and filed with the clerk, stating the names and residence of the parties, the cause of action, with places and dates, without prolixity, scandal, or impertinence, and concluding with a prayer for relief. The defendant was brought into court by citation, issued by the clerk, and served by the sheriff. On proof of service, and of failure to answer, judgment was entered in favor of the plaintiff. The defendant appearing and answering, either party could demand a jury." Hunt, Life of Livingston, 117.

[2]Act of February 10, 1821.

[1]"You have done more in giving precision, specification, accuracy, and moderation to the system of crimes and punishments than any other legislator of the age, and your name will go down to posterity with distinguished honors." Chancellor Kent to Livingston, in February, 1826. Hunt, Life of Livingston, 281.

[2]See 11 Bentham Works (Bowring ed.) 23, 51; Hunt, Life of Livingston, 96*n.*

[3]Cf. remarks of David Dudley Field, 25 Am. Law. Rev. 515, 519 (1891).

[1]Art. XIV., § 5, Art. VI, § 3, N. Y. Const. of 1846.

[2]N. Y. Const. of 1846, Art. VI, § 27.

[3]N. Y. Const. 1846, Art. I, § 17.

[4]Act of April 8, 1847, N. Y. Laws, ch. 59, § 8.

[1]Act of April 8, 1847, N. Y. Laws, ch. 59, § 8.

[2]"Whenever any considerable amelioration has been obtained, either in the form or in the substance of the law, in procedure or in doctrine, it has come from a minority of lawyers supported by the voices of laymen. I do not complain of this. It is the nature of the profession. The lawyer becomes wedded to old things by the course of his daily avocations. He reposes upon the past. He is concerned with what is, not with what should be. The rights he defends are old rights, grounded, it may be, in the ages that have gone before him. Nor is this conservative tendency altogether to be regretted. Rooted in the past, and covered with the branches of many generations, the legal profession may be said to stand like the oak as a barrier and shelter in many an angry storm, though it may at the same time dwarf the growth beneath. With its innumerable traditions and its sentiments of honor, it is one of the strong counteracting forces of civilization, and we should hold fast to it, with all its good and in spite of its evil, though we may have occasion to combat and overcome its resistance to reforms as often as new wants and altered circumstances make them necessary." David Dudley Field, 1 Jurid. Rev. 18, 20 (1889).

[1]New York Laws, 1848, ch. 371, Act of April 12.

[1]Hepburn's Development of Code Pleading, § 66.

[2]Which state, however, presently receded from this advanced position.

[1]Note his suggestion, that every code should contain a "perpetual provision for its amendment." Juris. 697. Cf. Gibson, J., in Pennock v. Hart, 8 S. & R. (Penn.), 368, 378 (1822). Cf. Provision under English Code for alteration without resort to the legislature.

[2]The original code, that of 1848, remained in force until May 1, 1849, when it was reënacted with a host of amendments and supplements (N. Y. Laws, 1849, ch. 438, Act of April 11), the new act running to four hundred and seventy-three sections. In a

little over two years this amended code was greatly changed by the amendatory act of July 10, 1851 (N. Y. Laws, 1851, ch. 479). Presently the latter act was itself amended in a large number of its sections (N. Y. Laws, 1852, ch. 392, Act of April 16). Other amendments followed, but in less volume, until the "revision" referred to in the text.

[1]Up to this point the history of the New York code is significant as being that of many codes, and not of the New York code alone; but from this on the story is rather a prophecy of what may happen in other codes if the noble art of statutory revision goes mad.

[2]N. Y. Laws, 1870, ch. 33, p. 100.

[3]N. Y. Laws, 1876, chs. 448, 449; N. Y. Laws, 1877, ch. 416, § 1. The term "Civil Code" may also be used; cf. Laws of 1892, p. 1491, Statutory Construction Law.

[1]"When we get into court on a motion to vacate an attachment, or an order of arrest, or an order for an examination before trial, five out of six of the orders we obtain are set aside because they do not state something that the code says they should state—for instance, we have failed to put in the address of the attorneys. All this is procedure run mad." Wm. B. Hornblower, 53 Alb. Law Journ., 152 (1896).

[2]See remarks of Irving Browne, 3 Green Bag, 51 (1891).

[3]N. Y. Laws, 1880, ch. 178. Another chapter was added in 1890.

[4]Cf. 53 Alb. Law Journ., 151 (1896).

[1]N. Y. Laws, 1895, ch. 1036, Act of June 15.

[2]For the report in detail see 52 Alb. Law Journal, 390, 408, (1895); 53 Ib. 6 (1896).

[1]Cf. Article in 54 Alb. Law Journ., 202 (1896).

[2]As to which see infra.

[1]54 Alb. L. J., 193.

[2]In 53 Alb. Law Journ., 151 (1896).

[1]N. Y. Laws, 1857, ch. 266, Act of April 6.

[2]N. Y. Laws, 1881, ch. 676, Act of July 26. Cf. ch. 680. The same session of the legislature established, after a delay of thirty-one years, the New York Code of Criminal Procedure, reported by the first Commission on Practice and Pleadings; see N. Y. Act of June 14, 1881, ch. 504.

[3]This first operating civil code in America would make an octavo volume of some three hundred and eighty pages, including its short schedule of forms for deeds to land, bills of lading, etc. It numbers two thousand and thirty-four sections. It went into

effect from the date of its approval, January 12, 1866. The Penal Code, an act of seven hundred and eighty-eight sections, went into effect a year earlier.

[1]The official designations of these codes and the order of their enactment are as follows: "The Penal Code of California," Feb. 14, 1872, numbering with the amendments of the next year 1,614 sections; "The Code of Civil Procedure of California," March 11, 1872, numbering 2,104 sections; "The Political Code of the State of California," March 12, 1872, numbering 4,460 sections; "The Civil Code of the State of California," March 21, 1872, numbering 3,543 sections.

[2]During the first ten years of Dakota's existence as a Territory scarcely a session of its legislative assembly was passed, and the sessions were annual, without one or more codes being introduced and adopted out of hand. "These codes were taken either from those prepared by the New York Commissioners, or from other states in which codes based on the work of the New York Commissioners had been adopted." (Cf. Preface of "Revised Codes of North Dakota, 1895.") To make room for these activities it was found necessary now and then to *repeal* a code in short order.

[3]"Codes and Statutes of Montana in force July 1, 1895." The work is complete in four volumes, even to a translation of Magna Charta.

[4]Cal. Laws, 1849-50, ch. 119, Act of April 20, 1850. The statute runs to 746 sections.

[5]Cf. 25 Am. Law Rev., 515, 526 (1891); 1 Jurid. Rev., 18, 22 (1889); 35 Am. Law Rev. and Reg. (N. S.), 548, 549 (1896); Anderson's Dict., "Codifier."

[1]See article by Sir Frederick Pollock, 3 Law Quart. Rev., 344 (1887).

[2]14 Law Magazine, N. S. (London), 1, 2, 17, 18 (1851).

[1]A good illustration of this conservative temper is found in 12 Solicitors' Journal and Reporter (London), 643, 645 (1868). A leading article on pleading advocates "the giving up of the whole theory of the science of pleading," as it then existed in England, for a system in which "the plaintiff should state in concise and simple language the facts upon which his claim arises," and the defendant should state his defense in a like simple manner; but at the same time it is declared to be unnecessary to make "any sudden or violent change" in order to introduce these radical alterations. "New common law procedure acts," says the writer, "might be passed modifying the procedure by degrees. It is now eight years since the last act upon this subject was passed, and it is full time that another step was taken along the path which has been already so successfully commenced." It may be, however, that a course less bold than that which was taken by the New York reformers in 1848, would have been fatal to the reform in America.

[1]15 & 16 Vict., c. 76; 17 & 18 Vict., c. 125; 23 & 24 Vict., c. 126.

[2]15 & 16 Vict., c. 86; 15 & 16 Vict., c. 87; 21 & 22 Vict., c. 26; 25 & 26 Vict., c. 42.

[3]36 & 37 Vict., c. 66; 38 & 39 Vict., c. 77; cf. 39 & 40 Vict., c. 59: 40 & 41 Vict., c. 9; 42 & 43 Vict., c. 78; 44 & 45 Vict., c. 68; 47 & 48 Vict., c. 61; 53 & 54 Vict., c. 44; 54 & 55 Vict., c. 53; 57 & 58 Vict., c. 16.

[4]15 & 16 Vict., c. 76, "The Common Law Procedure Act, 1852."

[5]17 & 18 Vict., c. 125, "The Common Law Procedure Act, 1854."

[6]23 & 24 Vict., c. 126.

[1]15 & 16 Vict., c. 76, § 41. But the section did not extend to replevin or ejectment, and a court or judge had "power to prevent the trial of different causes of action together, if such trial would be inexpedient."

[2]15 & 16 Vict., c. 76, § 49.

[3]Cf. 15 & 16 Vict., c. 76, § 51.

[4]Cf. 17 & 18 Vict., c. 126, §§ 83, 84.

[1]Report on Civil Code of Iowa, 1860.

[2]"Here was a case where all the necessary facts were before the court, and were sufficiently stated in the declaration, but the case could not be heard because these facts were not pleaded in the proper way. Because the plaintiff complained on those facts of a wrong done him independent of contract, he was not entitled to argue that there appeared upon the declaration a wrong done him by a breach of contract. If the arrangement of the words had been a little altered, and the plaintiff's charge had been for breach of contract instead of for negligence, no difficulty would have occurred. If the plaintiff's cause of action had been stated in plain and ordinary language instead of in a technical form, this difficulty would not have arisen." 12 Solicitors' Journ. and Rep., 643, 644 (1868), referring to the pleadings in Readhead v. Midland Ry., Q. B., 15 W. R., 831. The difficulties alluded to were finally avoided by the parties agreeing to take the judgment of the exchequer chamber on a special case without pleadings; cf. Law Rep., 4 Q. B., 379, 380 (1869).

[1]15 & 16 Vict., c. 86.

[2]15 & 16 Vict., c. 87.

[3]21 & 22 Vict., c. 26.

[4]25 & 26 Vict., c. 42.

[5]15 & 16 Vict., c. 86, § 39.

[6]21 & 22 Vict., c. 27, §§ 2, 3, 4.

[1]36 & 37 Vict., c. 66, "Supreme Court of Judicature Acts, 1873."

[2]38 & 39 Vict., c. 77, "Supreme Court of Judicature Act, 1875."

[3]Cf. 37 & 38 Vict., c. 83, extending the time of the act of 1873.

[4]12 Ir. Law Times, 528 (1878).

[5]The paper referred to, on "The Uses of Legal History," appears in full in 54 Alb. Law Journ., 136 (Aug. 29, 1896).

[1]Hepburn's Development of Code Pleading, §§ 225 et seq.

[2]36 & 37 Vict., c. 66, § 68.

[1]When the rules, then thirty-three in number, were promulgated in 7 Wheaton, pp. x-xiii.; cf. Act of May 8, 1792, c. 37, s. 2.

[2]Here also the federal equity rules afford a line of illustrations. The thirty-three rules of 1822 give place to a code of ninety-two rules framed by the Supreme Court in 1842 (see appendix to 17 Pet., pp. lxi-lxxvii). And the latter have been amended or added to on several occasions since. The facility with which this code is adapted to new conditions is illustrated in 1 Wall., v (1864); 7 Otto, viii (1878), 14 Otto, ix (1882); 144 U. S., 689-691 (1892); 149 U. S., 793 (1893); 152 U. S., 709-710 (1894).

[3]Cf. 38 & 39 Vict., c. 77, s. 17.

[1]36 & 37 Vict., c. 66.

[2]Co. Lit., § 372.

[1]Austin, Juris., p. 697.

[1]The price which has to be paid for alterations is indicated by the fact that between 1875 and 1890 the English courts handed down four thousand decisions on the judicature rules, and the principles intended to be worked out by them. See 34 Solic. Journ. and Rep., 244 (1890).

[1]Lord Coleridge, address at a reception by the New York Bar Association in 1883.

[1]For a brief comparison by Mr. David Dudley Field see 25 Am. Law Rev., 515, 525 (1891). The London Law Magazine and Review for 1879, Vol. 5 (4th Series), 59, 62, begins a somewhat elaborate comparison between the New York Code of 1848 and the Judicature Acts and Rules; but the writer concludes "that it is unnecessary to continue the comparison; anyone who has any knowledge of the two systems knows how closely the latter system follows the former (the New York Code) in theory, nomenclature, and substance." But this may be a little misleading. The Judicature Acts and Rules, while in accord with the New York Code of 1848, do not copy its provisions.

[2]The codification of English law, both substantive and adjective, began in India as far back as 1829. It has resulted in several codes of great value to American and English students of the law, enactments which are now accessible in “The Anglo-Indian Codes,” edited by Mr. Whitely Stokes.

[3]16 & 17 Vict., c. 95, s. 28.

[1]A “Code of Civil Procedure of the Courts of East India Company” had been drafted, eo nomine, in 1853 and 1854, but was not enacted.

[2]A paper prepared in June, 1893, for the Columbian Exposition at Chicago, by Mr. David Dudley Field, gives the following as the list of the English colonies which at that date had followed the Judicature Act of 1873: “Victoria, Queensland, South Australia, Western Australia Tasmania, New Zealand, Jamaica, St. Vincent, the Leeward Islands, British Honduras, Cambia, Grenada, Nova Scotia, Newfoundland, Ontario and British Columbia.” This list is quoted in the form given above by Mr. Dillon (Laws and Jurisprudence, page 260 (1894),), and by Judge Phillips (Code Pleading, § 166 (1896),). I do not attempt to verify it, although it is apparently open to modification in some particulars. See also 1 Juridical Review, 22 (1889); 25 Am. Law. Rev., 524, 525 (1891).

[1]“I do not claim finality for Mr. Field’s code, or any other form of words. To adopt the perfect code at the first or second movement is to expect impossibilities. Moreover it is not certain that the absolutely perfect code can be framed until the book of the experience of society has been closed, and our civilization entered upon its decadence. It was so in Rome, and may be so with us. For, as new emergencies arise, and new wants appear, any code of human origin will require repairs, amendment, enlargement. The codes of civil procedure have not yet had their final touches. What I hope and claim is that before many years a code of rights as well as remedies, the same in substance, though very likely differing in detail, will be in force in every American state, and within the limits of its powers be adopted by federal legislation.” Hon. George Hoadly, in an address before the Yale Law School in 1884, 12 W. Law Bulletin, 106, 127.

[1]This passage forms § 8 of chapter I in “A Treatise on the System of Evidence in Trials at Common Law,” 1904-5 (Boston: Little, Brown & Co.)

[2]Professor of law in Northwestern University since 1893, and dean of the faculty of law in the same, since 1901. Harvard University, A. B. 1883, A. M., LL. B., 1887; admitted to the Boston Bar, 1887; professor of law in Keiogijuku University, Tokyo, 1889-1892.

Other Publications: Digest of the Decisions of the Massachusetts Railroad Commission, 1888; The Australian Ballot System, 1889; Notes on Land Tenure and Local Institutions in Old Japan, 1890; Materials for the Study of Private Law in Old Japan, 1892; sixteenth edition of Greenleaf on Evidence, vol. I, 1899; and articles in legal periodicals.

[3]The authorities for the ensuing statements will be found cited in detail in the historical sections under the various Chapters.

[1]This is indeed elaborately denied by Declareuil, in Nouvelle revue hist. du droit fr. et etr. 1898, XXII, 220 ff.; but all prior students have assumed the contrary. It is no doubt difficult to replace ourselves in the primitive mental attitude.

[1]Hawkins, in 1716, and Hale, in 1680, in their treatises on the criminal law, had had short chapters on evidence at these earlier dates.

[1]"As to rules of law and evidence, he did not know what they meant; . . . it was true, something had been written on the law of Evidence, but very general, very abstract, and comprised in so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes" (1794, Hastings' Trial, Lords' Journal, Feb. 25).

[1]Compare Campbell's account of the conditions when he began to report in 1807 (Life, I, 214).

[1]"The great controversy now [1851] is upon the Evidence Bill, allowing the parties to be examined against and for themselves. . . . If it passes, it will create a new era in the administration of justice in this country" (Campbell's Life, II, 292). "Our new procedure (which is in truth a juridical revolution) is now [1854] established, and people submit to it quietly" (Ib., II, 328).

[1]Lumpkin, J., in 33 Ga. 306.

[2]Rationale of Judicial Evidence, b. X, conclusion. Bentham never failed to preach the impropriety of not furnishing reasons. " 'I think, therefore I exist,' was the argument of Descartes; 'I exist, therefore I have no need to think or be thought about,' is the argument of jurisprudence" (b. II, c. X, § 12; so also in b. III, c. IV, note).

[1]Mr. Justice Holmes, quoted in the motto prefixed to the preface of Wigmore on Evidence, vol. I.

[1]This essay was first published in the Law Quarterly Review, vol. I, pp. 162-174 (1885), and has been revised by the author for this Collection.

[2]Associate Justice of the Supreme Court of the United States, since 1902. Harvard University, A. B. 1861, LL. B. 1866, LL. D. 1895; Yale University, LL. D. 1886. Member of the Boston Bar, 1866-1882; editor of the American Law Review, 1870-1873; professor of law in Harvard University, 1882; associate justice of the Supreme Court of Massachusetts, 1882-1899, and chief justice of the same, 1899-1902.

Other Publications: The Common Law, 1881; twelfth edition of Kent's Commentaries, 1873; and articles in legal periodicals.

[3]4 Rot. Parl. 84 (3 Hen. V. pt. 2. 46, no. xxiii).

[4]See writ addressed to sheriff, Rot. Claus. 16 Hen. III. m. 2 dorso in 1 Royal Letters, Hen. III. (Rolls ed), 523. Proc. Privy Council (Nicholas) passim. Stat. 20 Ed. III. c. 5. The penalty was usually money, but might be life and limb; 1 Proc. Priv. Counc. (21 R. II. ad 1397). The citation of Rot. Parl. 14 Ed. III. in 1 Roll. Abr. 372, which misleads Spence (1 Eq. 338 n.) and earlier and later writers, should be 14 Ed. IV. (6 Rot. Parl. 143), as pointed out already by Blackstone, 3 Comm. 52 n. We also find the writ *Quibusdam certis de causis,* a writ in the form of the subpoena except that it omitted the penalty; Palgrave, King's Council, pp. 131, 132, note X; *Scaldewell* v. *Stormesworth,* 1 Cal. Ch. 5.

[5]See *Audeley* v. *Audeley,* Rot. Claus. 40 Ed. III, '*sur peine* de sys mill livres au paier au roy,' cited Palg. King's Council, 67, 68; 2 Cal. Ch. x. See prayer in 3 Rot. Parl. 61 (2 R. II. 26). Imprisonment for contempt again is older than the Chancery, e. g. Mem. in Scacc. 27 (M. 22 Ed. I) in Maynard's Y. B. part 1.

[1]Glanvill, Prologus, Bracton, fol. 23*b;* ib. 3 *b,* 'Aequitas quasi aequalitas.' Fleta, ii. c. 55, § 9. Petition of Barons, c. 27 (ad 1258), in Annals of Burton (Rolls ed.), 443, and Stubbs, Select Charters, for remedy *ex aequitate juris* by writ of entry or otherwise. Dictum de Kenilworth, pr. (ad 1266) Stat. of Realm, 51 Hen. III, and Stubbs, Select Charters; Close Rolls of Hen. III, cited in Hardy, Int. to Close Rolls, xxviii. n. 5 (8vo. ed. p. 111). So 'right and equite,' letter missive of Hen. V. to Chancellor, I Cal. Ch. xvi.

[2]Supervisory powers of Council over the Court, 1 Gesta Hen. II. (Ben Abbas, Rolls ed.), 207, 208; Assize of Northampton, § 7, ib. 110; and in Stubbs, Select Charters. Jurisdiction of Curia Regis over pleas of land, not coming there as a matter of course, acquired by special order: 'Quod debeat *vel dominus Rex velit* in curia sua deduci;' Glanv. i. c. 5. Jurisdiction of actions of contract *de gratia;* Bracton, fol. 100 *a;* Case referred by Chancellor to Curia Regis, 38 Ed. III., Hardy, Int. to Close Rolls, xxix (8vo. ed. 113 n.). Grants of jurisdiction *de gratia* in the form of Special Commissions of oyer and terminer complained of, Palgr. King's Council, §§ 12, 13, pp. 27-33; Stat. Westm ii (13 Ed. I.) c. 29; 1 Rot. Parl. 290 (8 Ed. II. no. 8); Stat. Northampton (2 Ed. III.), c. 7; 2 Rot. Parl. 286, 38 Ed. III. 14, no. vi; 3 Rot. Parl. 161 (7 R. II. no. 43).

As to cases terminated before the Council, see Rot. Claus. 8 Ed. I. m. 6 dorso, in Ryley, Plac. Parl. 442, and in 2 Stubbs, Const. Hist. 263. n. 1; 2 Rot. Parl. 228 (25 Ed. III. no. 16; cf. no. 19). 3 Rot. Parl. 44 (3 R. II. no. 49) seems mistranslated by Parkes, Hist. Ct. of Ch. 39, 40. Matters at common law and of grace to be pursued before the Chancellor; Rot. Claus. 22 Ed. III. p. 2. m. 2 dorso, cited Hardy, Int. to Close Rolls, xxviii. (8vo. ed. 110), and Parkes, Hist. Court of Ch. 35, 36, n. See Stat. 27 Ed. III. st. 1. c. 1; Stat. 36 Ed. III. st. 1. c. 9. All the reported cases in Chancery through Henry V., with the exceptions which have been mentioned, are trespasses, disseisins, and the like. And the want of remedy at law is generally due to maintenance and the power of the defendant, or in one instance to the technical inability of the plaintiff to sue the defendant (2 Cal. Ch. viii.), not to the nature of the right invoked. The object of the repeated prayers of the Commons from Richard II. to Henry VI. directed against the Council and the Chancellor, was that common law cases should be tried in the regular

courts, not that the ancient doctrine might prevail over a younger and rival system. See Adams, Equity, Introduction, xxxiii-xxxv.

[3]Beseler, i. §§ 15, 16; Heusler, Gewere, 478. Compare 2 Cal. Ch. iii.; 1 id. xlviii. and passim. 'Pernancy of profits, *execution of estates,* and defence of the land, are the three points of the trust' or use. Bacon, Reading on Stat. of Uses, Works (ed. Spedding), vii. p. 401; 1 Cruise, Dig. Title XI. ch. 2. § 6; see Tit. XII. ch. 1. § 3; ch. 4. § 1. Some of the first feoffments to the use (*ad opus*) of another than the feoffee which I have found mentioned by that name seem to have been a means of conveying property to the *cestui que use* in his absence, very like the earliest employment of the salman. But as the conveyances are supposed to be made to servants of private persons (Bract. fol. 193 *b*) or officers of the king, it may be doubtful whether any inference can be drawn from them; 1 Royal Letters, Henry III. pp. 122, 420; cf. 421 (ad 1220, 1223). Compare Provisions of Oxford (Oath of guardians of king's castles) in Annals of Burton (Rolls ed.), 448, and Stubbs, Select Charters. And it seems doubtful whether the expression *ad opus* was used at first in a technical sense, e. g. 'castellum Dofris . . . ad opus meum te facturum,' Eadmer (Rolls ed.), 7. 'Ad opus ejusdem mulieris,' 2 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 160, 161; Y. B. 3 Ed. III. 5. pl. 13; 2 Rot. Parl. 286 (38 Ed. III. 14, no. vi).

But as early as 22 Ass. pl. 72. fol. 101, in the case of a gift alleged to be fraudulent, we find the court inquiring who took the profits, and on the inquest answering that the donor did, Thorp declares that the gift only made the donee guardian of the chattels to the use of the donor. See further St. 7 R. II. c. 12.

[1]Adams, Equity, Introd. xxxv.

[2]Beseler, Erbverträgen, i. § 16. pp. 277 et seq., 283, 271.

[1]Beseler, i. § 16. pp. 277 et seq.; Heusler, supra. Nearly every feoffment mentioned in the Calendars of Proceedings in Chancery down to the end of Henry VI. is for the purpose of distribution after death. 1 Cal. Ch. xxi. xxxv. xliii. liv. lv. lvi; 2 id. iii. xix. xx. xxi. xxii. xxxiii. xxxvi. etc. Abbrev. Plac. 179. col. 2, Norht. rot. 15 do.; ib. 272, H. 9 Ed. I, Suff. rot. 17. Fitz. Abr. *Subpena,* pl. 22, 23; Littleton, § 462.

[2]Beseler, i. p. 283; 2 Cal. Ch. iii.

[3]Beseler, i. p. 271.

[4]Beseler, i. p. 267; 'Fidei suae committens,' ib. 286. Compare the references to good faith in all the bills in Cal. Ch.

[5]Beseler, i. pp. 265-267; 2 Cal. Ch. iii. xxviii.; 1 id. lv.

[1]Beseler, Erbverträgen, i. pp. 284-288; Brunner in 1 Holtzendorff, Encyclop. (3rd ed.), 216; cf. Littleton, § 168.

[2]Glanv. vii. c. 8; see xiii. c. 15; Dial. de Scaccario, II. 18; Regiam Majestatem, II. c. 39.

[3]Glanv. vii. c. 6-8.

[4]As to the functions of the executor in the time of Bracton, see The Common Law, 348, 349, and further, Bracton, fol. 407 *b,* 'Et sicut dantur haeredibus contra debitores et non executoribus ita dantur actiones creditoribus contra haeredes et non contra executores.' Ibid. fol. 98 *a,* 101 *a,* 113 *b;* Stat. 3 Ed. I. c. 19. The change of the executor to universal successor upon the obvious analogy of the haeres was inevitable, and took place shortly after Bracton wrote. It was held that debt lay against and for executors; Y. B. 20 & 21 Ed. I. 374; 30 Ed. I. 238. See further, Stat. Westm. ii. 13 Ed. I. cc. 19, 23 (ad 1285); Fleta, ii. c. 62. §§ 8-13; c. 70. § 5; and c. 57. §§ 13, 14, copying, but modifying, Bract. fol. 61 *a, b,* 407 *b* supra. As to covenant, see Y. B. 48 Ed. III. 1, 2. pl. 4. The heir ceased to be bound unless named; Fleta, ii. c. 62. § 10; The Common Law, 348; cf. Fitz. Abr. *Dett.* pl. 139 (P. 13 Ed. III.). Finally, Doctor and Student, i. c. 19, ad finem, speaks of 'the heir which in the law of England is called the executor.' In early English, as in early German law, neither heir (Y. B. 32 & 33 Ed. I. 507, 508) nor executor was liable for the parol debts of ancestor or testator (Y. B. 22 Ed. I. 456; 41 Ed. III. 13. pl. 3; 11 Hen. VII. 26; 12 Hen. VIII. 11. pl. 3; Dr. and Stud. ii. c. 24), because not knowing the facts they could not wage their law: Y. B. 22 Ed. I. 456; Laband, Vermögensrechtlichen Klagen, pp. 15, 16.

[1]Cf. Bract. fol. 407 *b.*

[2]Abbr. Plac. 284, 285 (H. 19 Ed. I. Devon. rot. 51). Note the likening of such tenements to chattels, Bract. 407 *b;* 40 Ass. pl. 41; Co. Lit. 111 *a.*

[3]39 Ass. pl. 6, fol. 232, 233, where there is no question of the executor, but special custom determines whether the devisee shall enter, be put in by the bailiff, or have the writ. In Littleton's time the devisee's right of entry was general; § 167; Co. Lit. 111. As to the writ, see 40 Ass. pl. 41. fol. 250; F. N. B. 198 L. et seq.; Co. Lit. 111. The only writ mentioned by Glanvill seems to be given to the executor, or if there is no executor to the *propinqui;* lib. vii. cc. 6, 7. Of course I am not speaking of cases where the executors were also the devisees, although even in such cases there was a tendency to deny them any estate, if there was a trust; 39 Ass. pl. 17; Litt. § 169.

[4]Abbrev. Plac. 179. col. 2; Norht. rot. 15 in dorso.

[5]4 Matt. Paris, Chron. Maj. (Rolls ed.) 605, ad 1247.

[1]Cal. Ch. xliii.; S. C. Digby, Hist. Law of Real Prop. (2nd ed.), 301, 302. Cf. Heusler, Gewere, 478, citing Meichelbeck (1 Hist. Fris Pars instrumentaria), no. 300; 'Valida egritudine depressus traditionem in manus proximorum suorum posuit, eo modo, si ipse ea egritudine obisset, ut vice illius traditionem perfecissent.'

[2]3 Rot. Parl. 60, 61 (2 R. II. nos. 25, 26).

[3]*Babington* v. *Gull,* 1 Cal. Ch. lvi.; *Mayhewe* v. *Gardener,* 1 Cal. Ch. xcix, c.

[4]Y. B. 8 Ed. IV. 5. pl. 12. In *Mayhewe* v. *Gardener,* 1 Cal. Ch. xcix, c, the defendant, who had received all the property of a deceased person by gift in trust to pay debts, etc., was decreed to pay dilapidations for which the deceased was liable.

[5]Glanv. vii. c. 1. § 3; Annals of Burton (Rolls ed.), 421 (ad 1258); Bracton fols. 38 *a, b,* 39 *b,* 169 *b,* 194 *b,* 213 *b,* § 3, 214 *b;* Abbr. Plac. 272 (H. 9 Ed. I.), Suff. rot. 17; 1 Cal. Ch. liv. lv.; Beseler, Erbvertragen, i. § 15, p. 261; § 16. pp. 277 et seq.; Heusler, Gewere, pp. 1, 2; Sohm, Eheschliessung, p. 82; Schulte, Lehrb. d. Deutsch. R. u. Rechtsgesch. § 148 (5th ed.), pp. 480 et seq.

[6]Annals of Burton (Rolls ed.), 421 (ad 1258).

[1]*Graysbrook* v. *Fox,* Plowd. 275, 280, 281.

[2]Stat. 50 Ed. III. c. 6; 1 R. II. c. 9 ad fin.; 2 R. II. Stat. 2, c, 3; 15 R. II. c. 5; 4 Hen. IV. c. 7; 11 Hen. VI. cc. 3, 5; 1 Hen. VII. c. 1; 19 Hen. VII. c. 15; *Rothenhale* v. *Wychingham,* 2 Cal. Ch. iii. (Hen. V.); Y. B. 27 Hen. VIII. 8; Plowden, 352; Litt. §§ 462, 464; Co. Lit. 272 *b.* So 1 Cruise, Dig. Tit. 12. ch. 4. § 9: ‘if the trustee be in the actual possession of the estate (which scarce ever happens).’

[3]Heusler, Gewere, 51, 52, 59; Brunner, Schwurgerichte, 169, 170; Laband, Vermögensrechtlichen Klagen, 160; 1 Franken, Französ. Pfandrecht, 6.

[4]Jackson, Real Actions, 348 and passim. See Statutes last cited, and Stat. 32 Hen. VIII. c. 9. sect. 4.

[1]1 Franken, Französ. Pfandr. 6.

[2]Heusler, Gewere, 126, 423, 424.

[3]Heusler, Gewere, 424.

[4]See Statutes before cited, p. 167, n. 3, 1 L. Q. Rev. and 1 R. III. c. 1; 27 Hen. VIII. c. 10.

[5]E. g. *Rothenhale* v. *Wychingham,* 2 Cal. Ch. iii.

[6]The Common Law, 400. See further, Ll. Gul. I. c. 23; Statutum Walliae, 12 Ed. I, ‘Breve de conventione, per quod petuntur aliquando mobilia, aliquando immobilia;’ ‘Per breve de conventione aliquando petitur liberum tenementum.’ Fleta, ii. c. 65. § 12; Y. B. 22 Ed. I. 494, 496, 598, 600; 18 Ed. II. (Maynard), 602, 603; Fitz. Abr. *Covenant,* passim. This effect of covenant was preserved in the case of fines until a recent date; 2 Bl. Comm. 349, 350, and App. iv. § 1. As to a term of years, see Bract. fol. 220 *a,* § 1; Y. B. 20 Ed. I. 254; 47 Ed. III. 24; (cf. 38 Ed. III. 24); F. N. B. 145 M.; *Andrews’ Case,* Cro. Eliz. 214; S. C. 2 Leon. 104; and as to chattels, see Y. B. 27 Hen. VIII. 16. As to the later raising of uses by way of covenant, see Y. B. 27 Hen. VIII. 16; Bro. Abr. *Feoffements al Uses,* pl. 16; Dyer, 55 (3); ib. 96 (40); ib. 162 (48); *Sharington* v. *Strotton,* Plowd. 298, 309.

[1]Heusler, Gewere, 479 et seq. See Glanv. vii. c. 9. where the Church is shown to have the settlement of the question whether the will was reasonably made. Cf. ib. c. 1. § 3.

[2]Glanv. vii. c. 6 & 8.

[3]Decret. Greg. III. Tit. 26. cap. 19. ad 1235.

[4]Bract. fol. 407 *b,* 61 *a, b.*

[1]*Nurse* v. *Bormes,* Choyce Cases in Ch. 48. See further *Glen* v. *Webster,* 2 Lee, 31. As to common law, see *Deeks* v. *Strutt,* 5 T. R. 690; *Atkins* v. *Hill,* Cowper, 284, and cases cited.

[2]Petition of Barons, c. 25 (Hen. III. ad 1258), Annals of Burton (Rolls ed.), 422; id. Stubbs, Select Charters; Irish Stat. of Kilkenny, 3 Ed. II. c. 4; Stat. 50 Ed. III. c. 6; 1 R. II. c. 9; 2 R. II. Stat. 2, c. 3; 7 R. II. c. 12; 15 R. II. c. 5; 4 Hen. IV. c. 7. See also Statute of Marlebridge, 52 Hen. III. c. 6.

[3]2 Rot. Parl. 79 (3 R. II. nos. 24, 25); ib. 60, 61 (2 R. II. nos. 25, 26).

[4]3 Rot. Parl. 511 (4 Hen. IV. no. 112, ad 1402).

[1]*Dodd* v. *Browning,* 1 Cal. Ch. xiii; *Rothenhale* v. *Wychingham,* 2 Cal. Ch. iii.

[2]2 Rot. Parl. 60, 61 (2 R. II. nos. 25, 26).

[3]Co. Lit. 272 *b;* Bacon, Reading on Stat. of Uses, Works (ed. Spedding), vii. p. 398.

[4]The Common Law, ch. xi; see especially pp. 399, 407-409, and, in addition to the books cited on p. 408, notes 1 and 2; Fitz. Abr. *Subpena,* pl. 22; *Dalamere* v. *Barnard,* Plowden, 346, 352; *Pawlett* v. *Attorney-General,* Hardres, 465, 469; Co. Lit. 272 *b;* W. Jones, 127.

[1]Somma, ii. c. 26, §§ 2, 3, in 7 Ludewig, Reliq. Manuscript. pp. 313, 314; Grand Coustumier, c. 88 & 90; Statutum Walliae, 12 Ed. I: 'Si vero Debitor venerit, necesse habet Actor exprimere petitionem, et rationem sue petitionis, videlicet, quod tenetur ei in centum marcis, quas sibi accommodavit, cujus solutionis dies preteriit, vel pro terra, vel pro equo, vel pro aliis rebus seu catallis quibuscunque sibi venditis, vel pro arreragiis redditus non provenientis de tenementis, vel de aliis contractibus,' etc. Y. B. 39 Ed. III. 17, 18, 'issint il est *quid pro quo;*' 3 Hen. VI. 36. pl. 33; 7 Hen. VI. 1. pl. 3; 9 Hen. VI. 52 pl. 35; 11 Hen. VI. 35. pl. 30 at fol. 38; 37 Hen. VI. 8. pl. 18. See also 'Justa debendi causa' in Glanv. x. c. 3; Dial. de Scacc. ii. c. 1 & 9; Fitz. Abr. *Dett.* pl. 139; Y. B. 43 Ed. III. 11. pl. 1. Form of Count given by 1 Britton (ed. Nichols), 161, 162. pl. 12, Y. B. 20 & 21 Ed. I. App. 488, 'Marchandise' ground of debt. Sohm, Eheschliessung, p. 24; 1 Franken, Franzos. Pfandr. § 4. p. 43; Schulte, Reichs- u. Rechtsgesch. § 156 (4th ed.), p. 497. Consideration is first mentioned in equity in 31 Hen. VI., Fitz. Abr. *Subpena,* pl. 23; Y. B. 37 Hen. VI. 13. pl. 3, and by

the name *quid pro quo.* So in substance as to assumpsit: Y. B. 3 Hen. VI. 36. pl. 33.

The interpretation of Fleta, ii. c. 60. § 25 by the present writer in The Common Law, 266, is rightly criticised in Pollock, Contr. (3rd ed.), 266, as appears by comparing the more guarded language of Bracton, 15 *b.*

[2]Somma, i. c. 62, ii. c. 24; 7 Ludewig, 264, 309; Grand Coustum, c. 89 (cf. Bract. fol. 149 *b.* § 6; The Common Law, 260, 264. See, beside authorities there cited, F. N. B. 122 K; ib. I in marg., 137 C; Y. B. 43 Ed. III. 11. pl. 1; 9 Hen. V. 14. pl. 23. Car. M. Cap. Langob. ad 813, c. 12, 'Si quis pro alterius debito se pecuniam suam promiserit redditurum in ipsa promissione est retinendus,' cited Loning, Vertragsbruch, 62, n. 1.

In 2 Gesta Hen. II. (Ben. Abbas, Rolls ed.), 136, sureties make oath to surrender themselves if the agreement is broken. Sohm, Eheschliessung, 48, goes so far as to argue that the oath was simply one substitute for the Salic formal contract. But I find no evidence that the oath was necessary in England, unless for ecclesiastical jurisdiction. 2 Gesta Hen. II. p. 137.

[1]See, e. g., 1 Franken, Französ. Pfandr. § 16. pp. 209-216; § 18. pp. 241 et seq.; ib. 261-266.

[2]Germ. 24.

[3]Y. B. 18 Ed. III. 13. pl. 7; 44 Ed. III. 21. pl. 23; 43 Ed. III. 11. pl. 1. So warranty, which had been merely an incident of a sale (Lex Salica, c. 47; Glanv. x. c. 15 & 17). came to be looked at as a covenant, Y. B. 44 Ed. III. 27. pl. 1; and at a later date bailment was translated into contract. By way of further illustration, I may add that in modern times Consideration has still been dealt with by way of enumeration (see e. g. 2 Bl. Comm. 444; 1 Tidd's Practice, ch. 1, as to assumpsit), and only very recently has been resolved into a detriment to the promisee, in all cases.

[1]Cary, Rep. in Ch. 5; Choyce Cases in Ch. 42.

[2]Y. B. 8 Ed. IV. 4. pl. 11; Fitz. Abr. *Subpena,* pl. 7.

[3]*Whalen* v. *Huchynden,* 2 Cal. Ch. ii.

[4]Compare Letter of Gregory IX. to Henry III., Jan. 10, 1233, in 1 Royal Letters, Henry III. (Rolls ed.), p. 551, 'Possessiones . . . fide ac juramentis a te praestitis de non revocandis eisdem, sub litterarum tuarum testimoniis concessisti,' with Sententia Rudolfi Regis, ad 1277, Pertz, Monumenta, Leges ii. p. 412; 'Quaesivimus . . . utrum is qui se datione fidei vel juramento corporaliter prestito, vel patentibus suis litteris, ad obstagium vel solutionem alicujus debiti ad certum terminum obligavit, nec in ipso termino adimplevit ad quod taliter se adstrinxit de jure posset . . . per iudicium occupari? Et promulgatum extitit communiter ab omnibus, quod is, qui modo predicto . . . promisso non paruit, valeat, ubicumque inveniatur, auctoritate iudiciaria conveniri.'

[1]Lex Salica (Merkel), c. 50; Lex Ripuaria, c. 58 (60). § 21; Sohm, Eheschliessung, 48, 49, notes; 1 Franken, Französ. Pfandr. 264 n. 2.

[2]Eadmer (Rolls ed.), 7, 8, 25; Dial. de Scacc. ii. c. 19; 2 Gesta Hen. II. (Ben. Abbas), 134-137; 3 Roger Hoved. (Rolls ed.), 145; Glanv. vii. c. 18; x. c. 12; 1 Royal Letters, Henry III. (Rolls ed.), 308; Bract. 179 *b.* Cf. id. 175 *a,* 406 *b,* &c.; Reg. Majest. ii. c. 48. § 10; c. 57. § 10; Abbrev. Plac. 31. col. 1 (2 Joh. Norf. rot. 21); 22 Ass. pl. 70. fol. 101.

[3]Glanv. x. c. 8; Bract. 100 *a.*

[4]The fluctuations of the struggle may be traced in the following passages: 'Item generaliter omnes de fidei laesione vel juramenti transgressione quaestiones in foro ecclesiastico tractabantur.' ad 1190. 2 Diceto (Rolls ed.), 87; 2 Matt. Paris, Chron. Maj. (Rolls ed.), 368. 'Placita de debitis quae fide interposita debentur vel absque interpositione fidei sint in justitia Regis.' Const. Clarend. c. 15; Glanv. x. c. 12; Letter of Thomas a Becket to the Pope, ad 1167, 1 Rog. Hoved. (Rolls ed.), 254. Agreement between Richard and the Norman clergy in 1190, Diceto and Matt. Par. ubi supra. As to suits for breach of faith, outside of debts, in the Courts Christian, circa 1200, Abbrev. Plac. 31. col. 1 (2 Joh.), Norf. rot. 21. 'Prohibetur ecclesiasticus judex tractare omnes causas contra laicos, nisi sint de matrimonio vel testamento.' ad 1247, 4 Matt. Paris (Rolls ed.), 614. Resistance to this, Annals of Burton (Rolls ed.), 417, 423; cf. ib. 256. But this prohibition fixed the boundaries of ecclesiastical jurisdiction.

[1]22 Lib. Ass. pl. 70. fol. 101. Cf. Glanv. vii. c. 18, 'propter mutuam affidationem quae fieri solet.' Bract. fol. 175 *a,* 406 *b,* 407, 412 *b;* Y. B. 38 Hen. VI. 29. pl. 11. But covenant was the only remedy if the contract had been put in writing; Y. B. 45 Ed. III. 24. pl. 30.

[1]This essay was first printed in the Law Quarterly Review, vol. I, pp. 443-454 (1885).

[2]A biographical notice of this author is prefixed to Essay No. 37, *ante,* p. 597.

[1]This is an independent translation, differing slightly both from that given in the 'Statutes of the Realm' and from that given in the 'Statutes at Large,' but will, it is believed, be found to agree with the original Latin as printed in 2 Inst., 405.

[1]This case exists among the class of documents known in the Public Record Office as 'County *Placita,*' and generally supposed to belong to the Common Law side of the Court of Chancery (County *Placita,* Essex, No. 75). It was found by chance, during a search made with the object of illustrating, by the corresponding record, a report in the Year Books of a *Scire facias* in the Chancery. It is, however, but one of innumerable instances in which the legal historian might find altogether new material among the Public Records, and in which the value of the Public Records might be brought into greater prominence by careful study from a legal point of view.

[1]It will be perceived that the form of a writ of *Scire facias* has served as a precedent for this part of the Bill.

[2]The distinction between a Plea and an Answer in Chancery was not recognised until a much later period.

[1]1 Spence, 345.

[2]Rot. Parl. 17 Ric. II. No. 10 (printed, vol. iii. pp. 310-313).

[1]1 Spence, 345; Moore, Rep. 554.

[1]'A grant arerisment de lesploit de voz communes leys de vostre roialme.' Original Parliament Roll, 2 Hen. IV., No. 95. The passage is not quite correctly printed in 3 Rot. Parl. 474 b.

[2]Fol. 65 b.

[1]The Year Book, Trinity, 14 Edward IV, No. 8.

[2]Fol. 77.

[3]Again the Year Book, Trinity, 14 Edward IV, No. 8.

[1]This essay was first printed in the Harvard Law Review, vol. xxi, pp. 261-274 (1908).

[2]Professor of law (Bussey and Dane professorships) in Harvard University, since 1877, and dean of the Faculty of law, since 1895. Harvard University, A. M. 1871, LL. B. 1872, LL. D. 1904; Universities of the City of New York, Wisconsin, Pennsylvania, Northwestern, Williams, Cincinnati, LL. D.; instructor in history, Harvard University, 1872-1873; associate professor of law in the same, 1873-1877.

Other Publications: Cases on Common Law Pleading, 1875; Cases on Partnership, 1881; Cases on Torts, 1881; Cases on Bills and Notes, 1881; Cases on Trusts, 1888; Cases on Admiralty, 1901; Cases on Equity Jurisdiction, 1901-1903; Cases on Suretyship, 1901; and numerous articles in the Harvard Law Review.

[3]1 L. Quar. Rev. 162.

[4]Adams, Equity, Introd. xxxv.

[1]In the action of account, although the final judgment is that the plaintiff recover the amount found due by the auditors, the interlocutory judgment, it is true, is personal, that the defendant account (*quod computet*). It is significant that this solitary exception in the common law is a judgment against a fiduciary, a trustee of money who by the award of the auditors is transformed into a debtor.

[1]Bief *v.* Dier, 1 Cal. Ch. XI (1377-1399); Brampton *v.* Seymour, 10 Seld. Soc., Sel. Cas. Ch. No. 2 (1386); Grymmesby *v.* Cobham, *ibid.,* No. 61 (Henry IV?); Flete *v.* Lynster, *ibid.,* No. 119 (1417-1424); Stonehouse *v.* Stanshawe, 1 Cal. Ch. XXIX, (1432-1443).

[2]Bernard *v.* Tamworth, 10 Seld. Soc., Sel. Cas. Ch. No. 56 (Henry IV?); Appilgarth *v.* Sergeantson, 1 Cal. Ch. XLI (1438); Gardyner *v.* Keche, 4 The Antiquary 185, s. c. 3 Green Bag 3 (1452-1454).

[3]Wheler *v.* Huchynden, 2 Cal. Ch. II (1377-1399); Wace *v.* Brasse, 10 Seld. Soc., Sel. Cas. Ch. No. 40 (1398); Leinster *v.* Narborough, 5 The Antiquary 38, s. c. 3 Green Bag 3, 4 (cited 1480); James *v.* Morgan, 5 The Antiquary 38, s. c. 3 Green Bag 3, 5 (1504-1515).

[4]Farendon *v.* Kelsey, 10 Seld. Soc., Sel. Cas. Ch. No. 109 (1407-1409); Harleston *v.* Caltoft, 10 Seld. Soc., Sel. Cas. Ch. No. 116 (1413-1417).

[5]In Brampton *v.* Seymour (1386), 10 Seld. Soc., Sel. Cas. Ch. No. 2, in the writ, *Quibusdam certis de causis,* the defendant is ordered "to appear and answer and further to do whatever shall be ordained by us." In Farendon *v.* Kelsey (1407-1409), *ibid.,* n. 4, the decree was that the defendant "should deliver them [title deeds] to him." In Appilgarth *v.* Sergeantson (1438), *ibid.,* n. 2, the prayer of the bill is "to make him do as good faith and conscience will in this part." See similar prayers in Bernard *v.* Tamworth (1399-1413), *ibid.,* n. 2; Stonehouse *v.* Stanshawe (1432-1443), *ibid.,* n. 1.

[1]In 1 Nich. Britt. 70 n. (*f*) the annotator, a contemporary of Britton, says that the king has of necessity jurisdiction of customary devises of land as of a thing annexed to freehold. "For though the spiritual judge had cognizance of such tenements so devised, he would have no power of execution, and testament in such cases is in lieu of charter."

[2]Early Eng. Eq., 1 L. Quar. Rev. 168.

[3]In an undated but early petition, Horsmonger *v.* Pympe, 10 Seld. Soc., Sel. Cas. Ch. No. 123, the *cestui que use* under a feoffment prays that the feoffee to uses be summoned to answer in the King's Chancery, "which is the court of conscience," since he "cannot have remedy by the law of the Holy Church nor by the common law."

[1]Y. B., 10 Hen. IV, f. 3, pl. 3.

[2]In a valuable "Note on the Phrase *ad opus* and the Early History of the Use" in 2 Pollock and Maitland, Hist. of Eng. Law, 232 *et seq.,* the reader will find the earliest allusions to uses of land in England. See also Bellewe, Collusion, 99 (1385); Y. B., 12 Ed. III (Rolls ed.), 172; Y. B., 44 Ed. III, 25 b. pl. 34; Y. B., 5 Hen. IV, f. 3, pl. 10; Y. B., 7 Hen. IV, f. 20, pl. 1; Y. B., 9 Hen. IV, f. 8, pl. 23; Y. B., 10 Hen. IV, f. 3, pl. 3; Y. B., 11 Hen. IV, f. 52, pl. 30. The earliest statutes relating to uses are 50 Ed. III, c. 6; 1 Rich. II, c. 9; 2 Rich. II, St. 2, c. 3; 15 Rich. II, c. 5; 21 Rich. II, c. 3.

[3]3 Rot. Parl. 511, No. 112.

[4]The earliest bills of which we have knowledge are the following, arranged in chronological order to the end of the reign of Henry VI: Godwyne *v.* Profyt, 10 Seld.

Soc., Sel. Cas. Ch. No. 45 (after 1393); Holt *v.* Debenham, *ibid.,* No. 71 (1396-1403); Chelmewyke *v.* Hay, *ibid.,* No. 72 (1396-1403); Byngeley *v.* Grymesby, *ibid.,* No. 99 (1399-1413); Whyte *v.* Whyte, *ibid.,* No. 100 (1399-1413); Dodd *v.* Browing, 1 Cal. Ch. XIII (1413-1422); Rothenhale *v.* Wynchingham, 2 Cal. Ch. III (1422); Messynden *v.* Pierson, 10 Seld. Soc., Sel. Cas. Ch. No. 117 (1417-1424); Williamson *v.* Cook, *ibid.,* No. 118 (1417-1424); Huberd *v.* Brasyer, 1 Cal. Ch. XXI (1429); Arundell *v.* Berkeley, 1 Cal. Ch. XXXV (1435); Rous *v.* FitzGeffrey, 10 Seld. Soc., Sel. Cas. Ch. No. 138 (1441); Myrfyn *v.* Fallan, 2 Cal. Ch. XXI (1446); Felbrigge *v.* Damme and Scoles *v.* Felbrigge, 2 Cal. Ch. XXIII and XXVI (1449); Saundre *v.* Gaynesford, 2 Cal. Ch. XXVIII (1451); Anon., Fitzh. Abr. Subp., pl. 19 (1453); Edlyngton *v.* Everard, 2 Cal. Ch. XXXI (1454); Breggeland *v.* Calche, 2 Cal. Ch. XXXVI (1455); Goold *v.* Petit, 2 Cal. Ch. XXXVIII (1457); Anon., Y. B., 37 Hen. VI, f. 35, pl. 23; Walwine *v.* Brown, Y. B., 39 Hen. VI, f. 26, pl. 36; Furby *v.* Martyn, 2 Cal. Ch. XL (1460).

[1]Myrfyne *v.* Fallan, 2 Cal. Ch. XXI.

[2]The beneficiary had no action to compel the performance of the duty of the continental Salman. Schulze, Die Langobardische Treuhand, 145; 1 L. Quar. Rev. 168. Caillemer, L'Exécution Testamentaire, c. IX, expresses a different opinion. But it is certain that nothing corresponding to the English use was developed on the Continent.

[1]The earliest decree that we have directed the defendant to make a conveyance. Myrfyn *v.* Fallan, 2 Cal. Ch. XXI (1446). See the prayers in the following cases: Holt *v.* Debenham, *ibid.* (1396-1403), "to do what right and good faith demand"; Byngeley *v.* Grymesby, *ibid.* (1399-1413), "answer and do what shall be awarded by the Council"; Whyte *v.* Whyte, *ibid.* (1399-1413), "to restore profits of the land"; Williamson *v.* Cook, *ibid.* (1417-1424), "to oblige and compel defendant to enfeoff plaintiff"; Arundell *v.* Berkeley, *ibid.* (1435), "to compel them to make a sufficient and sure estate of said manors to said besecher."

[2]By the middle of the fifteenth century subpœna was used in the sense of a bill or suit in equity. Fitzh. Abr. Subp. 19 (1453), "I shall have a subpena against my feoffee"; Y. B., 37 Hen. VI, f. 35, pl. 23 (1459), "An action of subpena," &c.; Y. B., 39 Hen. VI, f. 26, pl. 36 (1461), "A subpena was brought in chancery."

[3]Bailment of chattels to the use of a third person. Y. B., 18 Hen. VI, f. 9, pl. 7. Delivery of money to the use of a third person. Y. B., 33 & 35 Ed. I, 239; Y. B., 36 Hen. VI. f. 9, 10, pl. 5; Clark's Case, Godb. 210; Harris *v.* de Bervoir, Cro. Jac. 687. The count for money had and received by B to the use of A is a familiar illustration of this usage.

[4]Y. B., 34 Ed. I, 239 (*semble*); Y. B., 39 Ed. III, f. 17 *a;* Y. B., 3 Hen. VI, f. 43, pl. 20, and several other cases cited in Ames, Cas. on Trusts, 2 ed., 52, n. 1.

[5]Fitzh. Abr. Acct. 108 (1359); Y. B., 41 Ed. III, f. 10, pl. 5 (1367); Bellewe, Acct. 7 (1379); Y. B., 1 Hen. V, f. 11, pl. 21; Y. B., 36 Hen. VI, f. 9, 10, pl. 5; Y. B., 18 Ed.

IV, f. 23, pl. 5, and several other cases cited in Ames, Cas. on Trusts, 2 ed., 4, n. 1, n. 2.

[1]Anon., Y. B., 21 Hen. VII, f. 18, pl. 30.

[2]Bro. Ab. Feff. al Uses, pl. 54 (1533); Anon., Y. B., 27 Hen. VIII, f. 5, pl. 15 (1536), *per* Shelley, J.; Anon., Y. B., 27 Hen. VIII, f. 8, pl. 22 (1536). See also Bro. Ab. Conscience, pl. 25 (1541); Bro. Ab. Feff. al Uses, pl. 16 (1543).

[3]Doct. & St., 18 ed., Appendix, 17; Harg. L. Tr. 334.

[1]The word covenant was used at this time not in the restricted sense of undertaking under seal, but meant agreement in the widest sense. See 2 Harv. L. Rev. 11, n. 1, and also Wheler *v.* Huchynden, 2 Cal. Ch. II; Wace *v.* Brasse, 10 Seld. Soc., Sel. Cas. Ch. No. 40; Sharrington *v.* Strotton, Plowd. 298, *passim;* s. c. Ames, Cas. on Trusts, 2 ed., 109.

[2]Bro. Ab. Feff. al Uses, 54, March’s translation, 95.

[1]2 Harv. L. Rev. 56.

[2]Sharrington *v.* Strotton, Plowd. 298 (1565), was the first case of the kind.

[3]Rowe’s ed., 13, 14; 7 Spedding’s Bacon, 1879 ed., 403, 404.

[1]By the courtesy of the publisher the second part of this article is reprinted from 4 Green Bag 81, in which it first apeared under the title: Tyrrel’s Case and Modern Trusts.

[2]Digby, Prop., 2 ed., 291.

[3]Cornish, Uses, 41, 42.

[4]Sugden, Gilbert, Uses, 347, n. 1.

[5]Williams, Real Prop., 13 ed., 162.

[1]Hopkins *v.* Hopkins, 1 Atk. 581, *per* Lord Hardwicke. See also Leake, Prop. 125; 1 Hayes, Convey., 5 ed., 52; 1 Sanders, Uses, 2 ed., 200; 1 Cruise, Dig., 4 ed., 381; 2 Bl. Comm. 335; 1 Spence, Eq. Jurisp., 490.

[2]Bro. Ab. Feff. al Uses, 40; *ibid.,* 54; Gilb. Uses, 161 *accord.*

[3]Benl., 1669 ed., 61.

[4]Dyer 155, pl. 20.

[5]1 And. 37, pl. 96.

[6]1 And. 313. See also 2 And. 136, and Daw *v.* Newborough, Comyns, 242: "For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use."

This notion of repugnancy explains also why, in the case of a conveyance to A, to the use of A, to the use of B, the statute does not operate at all. The statute applies only to the chancery use, which necessarily implies a relation between two persons. But A's use in the case put is obviously not such a use, and therefore not executed. The words "to the use of A" mean no more than for the benefit of A. But it is none the less a contradiction in terms to say in the same breath that the conveyance is for the benefit of A and for the use of B. B's repugnant use is therefore not executed by the statute. Anon., Moore 45, pl. 138; Whetstone *v.* Bury, 2 P. Wms. 146; Atty.-Gen. *v.* Scott, Talb. 138; Doe *v.* Passingham, 6 B. & C. 305. The opinion of Sugden to the contrary in his Treatise on Powers, 7 ed., 163-165, is vigorously and justly criticized by Prof. James Parsons in his "Essays on Legal Topics," 98.

[1]Bro. Ab. Feff. al Uses, pl. 54: Anon., Moore 45, pl. 138; Dillon *v.* Freine, Poph. 81; Stoneley *v.* Bracebridges, 1 Leon 5; Read *v.* Nash, 1 Leon. 148; Girland *v.* Sharp, 1 Cro. Eliz. 382; Hore *v.* Dix, 1 Sid. 25; Tippin *v.* Cosin, Carth. 272.

[2]F. 54, a; s. c. Cary 19, where the reporter adds: "And such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel."

[1]1 And. 294.

[2]Lewin, Trusts, 8 ed., 819.

[3]Bacon, Stat. of Uses, Rowe's ed., 8, 9, 30; 1 Sanders, Uses, 5 ed., 2, 3; 1 Coke 139 *b,* 140 *a.*

[4]Fourth Inst. 86.

[5]2 Rolle 105. See also Crompton, Courts, 58, 59.

[6]Moore 761, pl. 1054.

[7]2 Bulstr. 336, 337.

[1]Digby, Prop., 3 ed., 328. See 1 Spence, Eq. Jurisp., 491.

[2]Page 188; s. c. Shep. Touch. 507.

[3]Page 265. Compare also pages 507 and 510 of Shep. Touch.

[4]1 Ch. Cas. 114.

[1]Gilbert, Uses 162. But in 1700 the limitation of a use upon a use seems to have been one of the regular modes of creating a trust. Symson *v.* Turner, 1 Eq. Cas. Abr.

220. The novelty of the doctrine is indicated, however, by the fact that, even in 1715, in Daw *v.* Newborough, Comyns 242, the court, after saying that the case was one of a use upon a use, which was not allowed by the rules of law, thought it worth while to add: "But it is now allowed by way of trust in a court of equity."

[2]2 Eden 60.

[1]This essay forms §§ 1-35, 46-52, of "A Summary of Equity Pleading," 1877 (Cambridge: C. W. Sever).

[2]1826-1906. Harvard University, A. B. 1849, LL. B. 1853, LL. D. 1875; Beloit College, LL. D. 1875; member of the New York Bar. 1853-1870; Dane professor of law in Harvard University, and dean of the faculty of law in the same, 1870-1895; emeritus professor in the same, 1895-1906.

Other Publications: Cases on the Law of Contracts, 1871; Cases on Sales, 1872; Summary of the Law of Contracts, 1880; Cases in Equity Pleading, 1875; Summary of Equity Pleading, 1877; and articles in the Harvard Law Review.

[1]C. 3, 3, 2.

[1]"In libello tria debent esse scripta: res quae petitur, et causa petendi, et nomen actionis. Res autem petitur singulariter, ubi est singularis: putà, peto codicem. Item universaliter, si est universalitas: ut haereditas. Item generaliter, si generalitas petatur: ut peto rationem meorum negotiorum gestorum, quae administrasti. Causa autem est inserenda: ut dicam, quia emi: vel similem causam dicam Item actio: ut actio ex empto, vel similis actio. Forma ergo petitionem in hunc modum: Peto Codicem, quia emi: et hoc per actionem ex empto. Et omnia quae plura ponuntur superflua sunt, nisi sint ad specificationem rei." Gloss upon the word *libellum,* in Novel. 53, c. 3, § 1. "Debet libellus esse ita clarus, ut reus possit ex eo deliberare an velit cedere vel contendere." Maranta, Ordo Judiciorum, Pars VI., tit. De libelli oblatione, nu. 2. "In primis igitur, reo in assignato termino comparente, judici libellum actor offert, et illum ita clarum et planum, ut ex ejus inspectione deliberare reus valeat, utrum cedere velit, an contendere; atque ut, si contendum sit, despicere valeat judex, quemadmodum à re concipienda sit sententia. Nihil enim aliud est libellus quam brevis scriptura, claram actoris intentionem continens, et contra adversarium necessariò concludens." Lancelotti, Inst. Jur. Can. Lib. 3, tit. 7.

[1]"Non utique existimatur confiteri de intentione adversarius, quo cum agitur quia exceptione utitur." D. 44, 1, 9. And see Stephen on Pleading, Appendix, Note 54.

[1]Oughton, Ordo Judiciorum, tit. 61, note (c), § 2.

[2]"Super exceptionibus non necesse litem contestari." 2 Brown's Civil and Adm. Law (2d ed.), 359, note.

[1]"En résumé, on voit que l'*intentio,* l'*exceptio,* la réplique, la duplique, etc., forment une chaîne de propositions subordonnées les unes aux autres: si le demandeur ne prouve pas son *intentio,* le juge doit absoudre, sans s'inquiéter des exceptions; si

l'intention est prouvée, le juge, avant de condamner, doit examiner l'exception. Si l'exception n'est pas prouvée, il doit condamner sans avoir à s'occuper de la réplique qui devient inutile; si, au contraire, l'exception est vérifiée, le juge doit absoudre à moins qu'il n'y ait une réplique, et ainsi de suite; de telle façon qu'à chaque anneau de la chaîne, se reproduit l'alternative de la condamnation ou de l'absolution." Bonjean, Traité des Actions (2nde éd.), I., 440.

[1]This statement must be qualified; for, when the action sounds in damages, if the jury find in favor of the plaintiff, they must assess his damages; and they do this upon the basis of what is stated in the declaration.

[1]This does not include any allegations in the declaration affecting the amount which the plaintiff is entitled to recover, *i. e.* the amount of his damages; which the plaintiff must always prove. See § 10, n. (2).

[2]Maranta, Ordo Judiciorum, Pars VI., tit. De exceptione, nu. 7; Oughton, Ordo Judiciorum, tit. 60.

[1]Oughton, tit. 60, note (*l*).

[2]It does not follow that these examinations were conducted by the judge who heard and decided the cause; for by the civil law a judge could delegate his authority to an assistant. Of this nature are surrogates in the ecclesiastical courts, and masters in the court of chancery.

[1]As to positions and articles generally, see Maranta, Pars VI., tit De positione, seu articulorum productione; Gaill, Pract. Obs. 79.

[1]Oughton, tit. 61; Conset's Practice, Part III. c. 2, sect. 4 (2d ed. p. 95). It appears from Gaill (Obs. 79, nu. 3) that the same practice prevailed in the imperial court of Germany.

[1]In the Decretals of Pope Clement V., Lib. 5, tit. 11, c. 2, it is said (circ. 1307): "Positiones ad faciliorem expeditionem litium propter partium confessiones, et articulos ob clariorem probationem, *usus longaevus* in causis admisit." And the Glossator (John Andreae, the most celebrated canonist of the fourteenth century), in commenting upon this passage, says, positions and articles had been in use from the time of Pope Gregory IX. (ad 1227-1241). See 2 Brown's Civil and Adm. Law (2d ed.), 374, note.

[2]About the middle of the twelfth century, Gratian completed his codification of all the canon law then existing. This is known as Decretum Gratiani, and constitutes the first part of the "Corpus Juris Canonici." As it makes very little reference to procedure, it is evident that that subject had not yet attracted the attention of churchmen. The second part of the "Corpus Juris Canonici" consists mainly of Decretal Epistles, issued by various Popes from the middle of the twelfth to the end of the thirteenth century, though there are some of a later date. During this period the Papal power was at its height; and, as the spiritual courts were one of the chief instruments for maintaining and extending this power, the subject of procedure in

these courts received great attention. Accordingly, procedure assumes a very conspicuous place in the Decretals (as they are commonly called). There are three principal collections of these (viz., those of Gregory IX., those of Boniface VIII:, and those of Clement V.), each of which is divided into five books; and the second book of each is devoted wholly to procedure. One of the earliest and most celebrated treatises upon procedure was written in the thirteenth century by a canonist (William Durand), and it followed the arrangement of the Decretals. The title of the treatise was "Speculum Juris," and so great was its celebrity that its author was commonly known by the name of Speculator.

[1]This ordinance will be found at large in Ancient Laws and Institutes of England (8vo ed.), i. 495; 2 Burn, Eccl. Law (Phillimore's ed.), 33; Stubbs, Select Charters (2d ed.), 85. And for a commentary on it. see Coote, Eccl. Pr. pp. 6-17.

[2]Appeals to the Pope were abolished by the statutes of 24 Henry VIII., c. 12, and 25 Henry VIII., c. 19.

[3]Coote, Eccl. Pr. 10.

[4]The best sources of information upon the procedure of the ecclesiastical courts are the following: Oughton, Ordo Judiciorum (1738); Report of Commissioners upon the Ecclesiastical Courts (1832); Burn, Ecclesiastical Law (Phillimore's ed.), tit. Practice (1842); Coote, Ecclesiastical Practice (1847). Of the foregoing works, the first is much the most celebrated; but the second will, it is believed, be found the most instructive by those who are unacquainted with the subject; while the third and fourth are particularly valuable for the forms which they contain. Oughton is in Latin; but the first part of it has been translated by James T. Law, and published with notes, under the title of "Forms of Ecclesiastical Law."

[1]For the mode of doing this, see Coote, 331, 334.

[1]This ceremony is thus described by Oughton, tit. 61: On the day assigned to the defendant to answer the libel, the plaintiff's proctor shall say to the judge, in the presence of the defendant's proctor: "I pray an answer to the libel according to the terms of your lordship's assignation." Defendant's proctor: "Protesting against the said libel for its too great generality, ineptitude, obscurity, nullity, and undue specification, for answer thereto, I say, for the purpose of contesting suit negatively, that the statements contained in said libel are not true, and, therefore, that the prayer thereof ought not to be granted." Plaintiff's proctor: "The libel is articled, and I therefore repeat the same in the quality of positions and articles (*in vim positionum et articulorum*), and I pray that it may be so repeated by your lordship, and admitted." Judge: "We repeat the libel in the quality of positions and articles, and it shall be considered as so repeated; and we admit it in the quality of positions and articles." Plaintiff's proctor: "The libel is articled, and repeated in the quality of positions and articles, and I therefore pray an answer to the positions of the same from the defendant or his proctor." Defendant's proctor: "I do not believe the positions to be true." Plaintiff's proctor: "I allege that I shall be more aided by the answer of the principal party than by that of his proctor appearing in the cause. May it therefore

please your lordship to decree the principal party to be cited to answer personally the positions of said libel." Judge: "We decree the principal party to be cited to answer personally the positions of the said libel [on such a day]." Defendant's proctor: "I dissent; and I pray a term to be assigned to the plaintiff to prove the libel." Judge: "We assign for proof three [or as the case may be] court days." Defendant's proctor: "I dissent, on account of the length of the term."

[1]"Nemo prohibetur pluribus exceptionibus uti, quamvis diversae sint." D. 44, 1, 8. "Is, qui dicit se jurasse, potest et aliis exceptionibus uti cum exceptione jurisjurandi, vel aliis solis; pluribus enim defensionibus uti permittitur." D. 44, 1, 5.

[1]3 Burn, Eccl. Law, 190, 191.

[2]Ibid.

[3]Ibid.

[4]Kaufmann's Mackeldey, 211.

[1]"In libello non attenditur quid, quale, et quantum narretur, sed quantum ex narratis concludatur, quia conclusio libelli restringit narrata ad ea, quae expressè in conclusione dicuntur." Gaill, Pract. Obs., Lib. 1, Obs. 61, nu. 15.

[2]Boileau *v.* Rutlin, 2 Exch. 665.

[3]Maranta, Pars VI., tit. De Positione, etc., nu. 6; Gaill, Lib. 1, Obs. 79, nu. 6; 3 Burn, Eccl. Law, 264; Greville *v.* Tylee, 7 Moo. P. C., 320, 330.

[1]Oughton, tit. 54, note (c), § 4.

[1]Specimens of minutes will be found in 3 Burn, 209, 221, in Coote, 845-855, 921-924, and in Floyer's Proctor's Practice, 143-172. Any order or direction of the court, made or given orally, is technically termed an *assignment, e. g.,* the court *assigns* the plaintiff's proctor to bring in a libel the next court day. Hence, the clerk's minutes are frequently called *assignations,* and the book in which they are entered the assignation book. The minutes, being memorials of the *acts* of the court, they are also frequently themselves called acts and the book in which they are entered the book of acts. When an act of court, or an act of a party, is done orally in open court, and entered in the minutes, it is said to be done *apud acta, i. e.,* in the acts or minutes.

[1]There is a seeming exception to this when the court sits for the trial or argument of causes; for there is then a list made of all causes ready for trial or argument, and they are taken up in the order in which they stand in the list; and, while causes remain in this list, they are under the active supervision and control of the court for the purpose for which the list was made, namely, that of regulating the order in which, and the time when, the causes shall be respectively tried or argued.

It should be observed, also, that in New England (and perhaps in some other of our States), the common-law system, as regards the particulars now under consideration,

has never been adopted, but there is instead a practice in substance like that of the civil law, though without any of its nomenclature. The clerk of the court keeps a docket in which every cause is entered when it is begun, and in which it remains until it is ended. This docket is very analogous to the assignation book of a civil-law court, as it contains a minute by the clerk of every step in the cause; but the minutes consist merely of short contemporaneous memoranda, which are never extended or written out, so as to present an intelligible and connected history of the cause.

[1]It seems, however, that this was not so in early times; for in a collection of orders, of the time of Henry V. (Sander's Orders in Chancery, 7 c.), it is made the duty of the registrars to write all the acts of the court, placing the names of the parties and of their attorneys at the head of all acts, as is done in the ecclesiastical courts. (Compare Floyer, 143-172). They are directed also to enter the dates when all pleadings are exhibited and placed on file. They are styled *"notarii sive tabelliones."* and all the terms which are applied to them accord entirely with the ecclesiastical practice. It seems that the registrar's book, in which all orders and decrees in chancery are entered, was originally the assignation book of the ecclesiastical courts; and this may explain the fact that all orders and decrees (*i. e.,* all acts of court) are drawn up by the registrar and entered in his book. In the ecclesiastical courts, when an act of court is in writing (*e. g.,* a definitive sentence), it is drawn up by the proctor of the prevailing party, and presented to the judge for his approval and signature, and, having been signed, it is filed, not entered in a book.

In the same collection of orders, it is directed that, in the absence of the chancellor, one of the masters may (*inter alia*), *assign terms* for answering, replying, rejoining, producing witnesses, &c.

[1]This is obvious upon inspection; but there is also authority to show that all suits in chancery were regarded as summary from the earliest times. In summary causes the judge was said by the canonists to proceed "simpliciter et de plano, ac sine strepitu et figura judicii." (Constitutions of Clement V., B. 5, tit. 11, c. 2.) And in a report made to the chancellor in the time of Elizabeth, by two masters in chancery, who were also doctors of civil law, it is said: "The judge [in chancery], may and ought to proceed summarily, 'de plano sine figura judicii.' " Acta Cancellariae, 613.

[1]A similar state of things formerly existed in all the common-law courts.

[2]See *Ex parte* The Six Clerks, 3 Ves. 589.

[1]This essay was first printed in the American Law Review, vol. XVIII, pp. 226-255 (1884).

[2]Legal adviser to the land department of the Chicago and Northwestern R. Co. Admitted to the New Hampshire (Exeter) Bar, 1877, to the Illinois (Chicago) Bar, 1881.

Other Publications: Sundry articles in legal periodicals.

[1]Washburne's Jud. His. of Mass. 26.

[2]Maverick *v.* Phillips, 4 Mass. Col. Records, pt. 1, p. 187.

[3]Hues *v.* Rogers, 4 *ibid.,* pt. 11, p. 292.

[4]Case of Roxbury Free School, 4 *Ibid.,* pt. 11, p. 434.

[5]Sloan *v.* Bosworth, 5 *Ibid.* 36.

[6]Patch *v.* Patch, 5 *Ibid.* 39.

[7]Goss *v.* Callecot, 5 *Ibid.* 150, 247, 273.

[8]Thatcher *v.* Thatcher, 5 *Ibid.* 245.

[9]Sears *v.* How., 5 *Ibid.* 379; Dedham *v.* Natick Indians, 4 *Ibid.* 49.

[1]Each County Court consisted of one assistant, or magistrate, residing in the county, or of one specially appointed by the General Court, aided by commissioners, nominated by the freemen, and appointed by the General Court.

[1]Charters and General Laws of Colony and Province of Mass. Bay, 93-94.

[2]Washburn, 35.

[3]Belknap's History of New Hampshire, 185.

[4]Quincy's Mass. Rep. 1761-1772, p. 538.

[5]It was early enacted in Plymouth, "that the Bench shall have power to determine such matters of equity as cannot be relieved at common law; as the forfeiture of an obligation, breach of covenants without great damage, or the like matters of apparent equity." The General Laws and Liberties of New Plymouth Colony, 260.

[1]Washburn, 98.

[2]Washburn, 166-7.

[1]2 Chalmer's Opinions, 182-3.

[1]Quincy, 538-9.

[2]Quincy, 539.

[3]New Hampshire Law, its Source, etc., by Farmer, 202.

[4]Sanborn's History of New Hampshire, 81.

[1]Belknap, 140.

[2]Wells *v.* Pierce, 27 N. H. 512.

[3]1 Belknap, 162-3.

[4]Wells *v.* Pierce, 27 N. H. 512.

[5]Sanborn, 81.

[6]Judge Bell in Wells *v.* Pierce, 27 N. H. 512.

[1]1 R. I. Col. Records, 14.

[2]Charter.

[1]III. Col. Rec., 550-551.

[2]III. *Ibid.* 550-551.

[1]IV. *Ibid.* 136-137.

[2]V. *Ibid.* 23.

[1]V. *Ibid.* 76.

[2]New Haven Colonial Records, vol. 1, p. 191.

[3]Blue Laws of Conn. (Smucker) 22.

[1]New Haven Colonial Records, 113-114.

[2]Smucker, 33.

[3]Colonial Records of Conn. 3-413.

[1]Connecticut Colonial Records, 6 vol., pp. 444-5.

[2]Chancery in Pennsylvania (Rawle), 4.

[3]Docs. Relating to the Colonial History of New York, 721.

[4]*Ibid.* 834.

[5]*Ibid.* 844.

[6]V. *Ibid.* 882.

[7]*Ibid.* 252.

[1]*Ibid.* 298.

[2]Mag. Am. His'y, March, 1879.

[3]Macauley, 446.

[1]Lamb's History of New York City, 536-7-8.

[2]II. Smith's History of New York, 5.

[3]II. Lamb, 54.

[1]II. Smith, 13.

[2]*Ibid.* 24.

[3]*Ibid.* 227.

[4]New Jersey Archives, 3.

[5]*Ibid.* 8-9-10.

[6]Mulford's History, 131.

[7]*Ibid.* 147.

[1]III. New Jersey Archives, 4.

[1]IV. *Ibid.* 70.

[2]*Ibid.* 114.

[3]*Ibid.* 168.

[4]Rawle's Equity in Pa. 4.

[5]*Ibid.* 8.

[6]1 Col. Record, 98.

[7]*Ibid.* 102.

[1]*Ibid.* 142.

[2]*Ibid.* 159.

[3]Laws of 1690, ch. 7, sect. 197.

[4]II. Col. Rec. 23, etc.; Brightly, 29-30.

[1]Bradford’s Laws, 120.

[2]Rawle, 18.

[1]III. Col. Rec. 100.

[2]*Ibid.* 106.

[1]*Ibid.* 281.

[2]*Ibid.* 687.

[1]15 American Jurist, 253.

[2]1 Bland, 624.

[3]1 Bozman, 291.

[4]II. Bozman, 132.

[1]1 Bland, 609.

[2]1 Bland, 624-625.

[1]1 Bland, 625.

[2]1 Bland, 625.

[3]*Ibid.* 648-649.

[1]Campbell’s History of Virginia, 353.

[2]Henning, 125.

[3]Campbell, 352.

[4]Henning, 273.

[5]Henning, 303.

[6]Henning, 59.

[7]Henning, 320.

[8]Henning, 501.

[1]Lodge, 133.

[2]Wheeler’s History of North Carolina, 30.

[3]Moore's History of North Carolina, 1-16.

[4]II. Hawk's History of North Carolina, 203.

[1]*Ibid.* 203.

[2]Durant *v.* Hawkins, *Ibid.* 133.

[3]*Ibid.* 204.

[4]Rivers' Hist. of South Carolina, 959.

[5]Ramsay Hist. of South Carolina, 128; Il. Bozman's Maryland, 132.

[6]*Ibid.* 156.

[1]Brevard's Digest, preface.

[2]II. Ramsay, 154.

[3]Chalmer's Opinions, 70.

[4]II. Ramsay, 156.

[5]Stevens' Hist. of Georgia, 63-64.

[6]*Ibid.* 65.

[7]*Ibid.* 217.

[8]*Ibid.* 218.

[1]*Ibid.* 387.

[2]*Ibid.* 388.

[1]This essay was first published in the Law Quarterly Review, vol. I, pp. 455-465 (1895).

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Other Publications: The Evolution of the Constitution of the United States, 1897; Pennsylvania, Colony and Commonwealth, 1897; Men, Women, and Manners in Colonial Times, 1897; The True Benjamin Franklin, 1898; The True William Penn, 1899; The True History of the American Revolution, 1902; and various articles in legal periodicals.

[1]1 Proud's Hist. Pa. 175.

[2]Ibid. 255, 262.

[3]Duke of Yorke's Laws, &c. 167, 168; Rawle, Essay Eq. in Penna. 9.

[4]McCall, Judicial Hist. of Pa. 21, 27; Lewis, Courts of Pa. in Seventeenth Cent. 6; Brightly, Eq. in Pa. 29.

[1]Duke of Yorke's Laws, &c. 184, 225.

[2]Rawle, Essay Eq. in Pa. 11, 12; 1 Carey and Bioren, Laws of Pa. 33.

[3]1 Carey and Bioren, Laws of Pa. 79.

[4]1 Carey and Bioren, Laws of Pa. 110.

[5]Rawle, Essay Eq. in Pa. 19-53.

[1]Rawle, Essay Eq. in Pa. 59-61.

[2]McCall, Judic. Hist. Pa. 25.

[3]There was also from the very first a small party which disapproved on principle of Chancery powers. Lewis, Courts of Pa. in Seventeenth Cent. 7.

[4]2 Col. Rec. 312.

[1]Chief Justice Gibson, in *Torr's Estate* (2 Rawle, 253), said, 'As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit.'

[2]Brightly, Eq. in Pa. 5.

[3]*Swift* v. *Hawkins,* 1 Dallas, 17.

[4]In the report of this case it is stated that the defendant offered to prove *want* of consideration, but it has always been considered as a misprint for 'failure.' Rawle, Essay Eq. in Pa. 57.

[5]1 Dallas, 72.

[1]Ibid. 125.

[2]1 Dallas, 212.

[3]Laussat, Essay Eq. in Pa. 89.

[4]Address to the Philadelphia Bar.

[5]3 Pa. 451.

[6]16 Serg. and R. 448.

[1]Wharton's note to 1 Dallas, 126; *Peebles* v. *Reading,* 8 S. & R. 484; *Kuhn* v. *Nixon,* 15 S. & R. 118; *Hawthorn* v. *Bronson,* 16 S. & R. 269; *De France* v. *De France,* 34 Pa. 385; *Church* v. *Ruland,* 64 Pa. 432; *Robinson* v. *Buck,* 71 Pa. 386; *McGinity* v. *McGinity,* 63 Pa. 38; *Todd* v. *Campbell,* 8 Casey, 252; *Faust* v. *Haas,* 73 Pa. 295; *Ballentine* v. *White,* 77 Pa. 20.

[2]Laussat, Essay Eq. in Pa. 66. Allowing the defendant at law to set up an equitable defence was adopted in England by the Common Law Procedure Act long after it had become the custom in Pennsylvania. 17 & 18 Vic. sec. 125; *Royal Society* v. *Magnay,* 10 Exch. 489.

[3]*McCutchen* v. *Nigh,* 10 S. & R. 344.

[1]Laussat, Essay Eq. in Pa. 43.

[2]*Commonwealth* v. *Coates,* 1 Yeates, 2.

[3]*Lang* v. *Keppelé,* 1 Binney, 125; *Jordan* v. *Cooper,* 3 S. & R. 564.

[4]3 Term Rep. 151.

[5]Austin, Jurisprudence, 636.

[1]*Hawn* v. *Norris,* 4 Binney, 78; *Peebles* v. *Reading,* 8 S. & R. 484.

[2]*Weaver* v. *Lawrence,* 1 Dallas, 157; *Mead* v. *Kilday,* 2 Watts, 110.

[3]Purdon's Digest. 1465; *Byrne* v. *Boyle,* 37 Pa. 260.

[4]Purdon's Digest, 482.

[5]Mitchell, Motions and Rules, 76.

[6]*Steele* v. *Phoenix Ins. Co.,* 3 Binney, 312.

[7]*Anwerter* v. *Mathiot,* 9 S. & R. 402.

[8]Laussat, Essay Eq. in Pa. 105; Purdon's Digest, 1103.

[1]1 Yeates, 92; Anon., 4 Dallas, 147; *Walker* v. *Butz,* 1 Yeates, 575; *Moody* v. *Vandyke,* 4 Binney, 43; *Kauffelt* v. *Bower,* 7 S. & R. 81.

[1]Co. Litt. 100, a.

[2]An *Assize of Nuisance* as a substitute for an injunction was brought in Pennsylvania in 1809. *Livezey* v. *Gorgas,* 2 Binney, 194.

[3]Laussat, Essay Eq. in Pa. 126, 139.

[4]3 Pittsburgh Leg. Journal, 2.

[1]Bispham, Equity, sec. 14.

[1]Rawle, Essay Eq. in Pa. 70; Purdon's Digest, 589; Sixth Rep. of Com. to Rev. Civil Code.

[2]*Aycinena* v. *Peries,* 6 W. & S. 243; *Biddle* v. *Moore,* 3 Pa. 161; *Church* v. *Ruland,* 64 Pa. 432; *Corson* v. *Mulvany,* 49 Pa. 88.