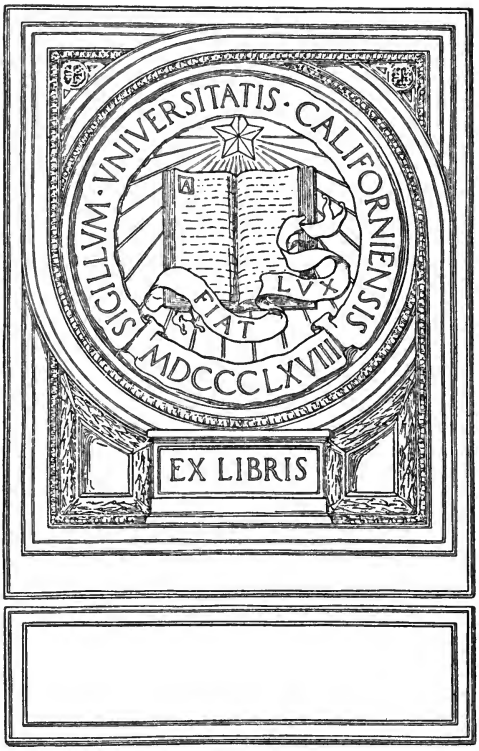
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THE STUDENT'S LEGAL HISTORY

FOURTH EDITION

THE STUDENT'S
LEGAL HISTORY

BY

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My thanks are due to my friend Mr. de Freitas for his assistance in the preparation of this edition.

R. STORRY DEANS.

3 Elm Court,
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1921.

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THE HISTORY

OF

LAW, LEGAL PROCEDURE, AND THE LAW COURTS IN ENGLAND.

INTRODUCTION.

In considering the Legal History of England, it will be convenient to deal with the subject in seven periods, outlining as concisely, and at the same time as correctly, as possible the leading features of each era. The division will be as follows:—

1. Before the Norman Conquest (—1066).
2. William I. to Henry III. (1066—1272).
3. Edward I. to Richard III. (1272—1485).
4. Henry VII. to Elizabeth (1485—1603).
5. James I. to James II. (1603—1688).
6. William III. and Mary to George IV. (1688—1827).
7. George IV. to the present day (1827—1921).

This will form the first part of the book.

I shall next treat with more particularity the history of certain branches of the subject which seem to be of special importance, and this will form the second part of the volume.

CHAPTER I.

Before the Norman Conquest (—1066).

Of this period very little is certainly known. There is a plentiful lack of authority, and an immense amount of conjecture. There is no book which contains indisputable internal evidence of genuine contemporary knowledge of the Saxon laws; and such learning as we possess is constructed from ancient chronicles and from tradition. It is not always easy to distinguish between law of Norman origin and law that had its beginnings before the Conquest. This is because the Normans and the Saxons, being of kindred origin, had, doubtless, much the same legal system at the time when the one people settled in France and the other in South Britain. They developed on different lines; because the Normans came in contact with the Feudal System of Europe, and the Franco-Roman law; while the Saxons developed their institutions almost entirely from within. At the same time, it must not be forgotten that the people were essentially the same, and their institutions similar in origin. The facts visible, more or less plainly, through the mists of time are, shortly, these. Our Anglo-Saxon ancestors had very rude ideas of law and legal procedure. The Courts of Justice were local, consisting of the Shire-moot, the Sheriff's Tourn, the Hundred-moot, and the Tûn-moot. Of these the Hundred-moot was the principal. These Courts had jurisdiction over all kinds of cases, and were presided over by the reeves of the shire, hundred, and town respectively, assisted, as to the shire, by the bishop. The Courts were essentially popular, verdict

(and probably sentence) being awarded by the popular vote. As to the law therein administered, it seems to have been mostly customary, varying, especially in civil causes, in different localities.

From the "Dooms," as the laws of the Saxon kings were called, it can be gathered that the jurisdiction of the Courts was local—Alfred hanged a judge for trying and sentencing a man for a crime committed in another jurisdiction—that there was an appeal to the king on a denial of justice (Æthelstane); that the sheriff's tourn was held once a month; that tithes were enforceable at law; that all those attending the Shire Court were sworn to do justice; that compurgation and ordeal (see pp. 7 *et seq.*, *infra*) were the modes of trial; that certain land (bocland) was transferable by written charter; that wills were established; that all legal transactions were to be done before some sworn men of the hundred, so that they might be ready to try any subsequent disputes. The last provision is, by some, thought to be the remote ancestor of the jury system. If necessity arose, these witnesses were sworn in the Hundred or Shire Court, and practically decided the dispute on their own knowledge.

In addition to these matters, there was established (by Alfred) a system of **frankpledge,** by which all persons within the law (*i.e.* not outlaws) were compelled to band together as mutual pledges. Every ten men formed a tithing, mutually responsible to deliver up to justice any of the number charged with a crime; and ten of these tithings formed a hundred, under the same kind of responsibility. If a member of a hundred committed crime, and his fellow-members could not produce him to take his trial at the Shire Court, the whole hundred was amerced in a fine.

Besides the Courts already mentioned, there were others of a private nature, held by thanes within their own land. Within such land, the administration of justice was abso-

lutely in the hands of the lord; though, possibly, the Shire Court had a kind of appellate jurisdiction. It appears, however, from the laws of Æthelstane,[1] that there was an appeal to the king; but whether this right was first established by that king, or whether it was merely an assertion of existing law, is not known.

It is stated, by Blackstone, Reeve, and others, that Edward the Confessor compiled a code; but this is doubtful (Finlason's note to Reeve, vol. i. p. 44, 2nd edition). It is certain that William the Conqueror, Henry I., and Stephen promised to adhere to "the Confessor's laws"; but this may mean merely the laws which obtained in the Confessor's time—not any body of law promulgated by him.

Treason.—One piece of legislation to be found amongst the Dooms of the great Alfred is of considerable historical value. It is an enactment on the subject of treason, and by it any one who "plots to take the king's life either himself, or by harbouring the king's men" (*i.e.* those outlawed by the king), is declared liable to forfeit "his life and all that he has." The word "treason" is of Norman origin, but the foundation of the present law was thus laid as early as the reign of Alfred.

The Saxon Land Laws.—We discover, from a study of such records as still remain to us, that the *Saxon system of land laws* was a simple one. Opinions differ as to whether tenures (see *post*, p. 11) were known to the Saxons. Coke, Selden, and others think that they were. The opinions of Hale, Spelman, and the *auctores diversæ scholæ* are on the other side. Blackstone adopts a middle opinion, and says that there were no real tenures, but only holdings very like tenures, before the Conquest. This much may with certainty be said, that the land was subject to the *trinoda necessitas*

[1] It is very doubtful whether these are genuine.

(threefold burden) of *military service, construction of fortresses for the defence of the country,* and *construction of bridges.* Some land, called *bocland* (bookland), *i.e.* land granted to the grantee by written instrument, called *gewrite,* was hereditary; but probably no other kind. It is submitted that the *trinoda necessitas* has been confounded with the *services* to the lord, which are the keynote of the feudal system of tenures.

Socage.—Undoubtedly freeholders, or socmen, existed in Saxon times, but their socage right was one of absolute ownership of the land, and the Norman kings, as will be shown hereafter,[1] retained only the name of socage, but altered the substance.

Modes of Conveyance.—It is the general opinion amongst legal historians,[2] that the Saxons used deeds of conveyance of land; the use of the word "*boc*-land" certainly indicates something of the sort; and as very few people could write in those days, in all probability the sealed deed came early into use. *Indentures—i.e.* deeds written in duplicate on the same parchment, and then cut through with a knife, so as to make two parts, each with an indented edge—were also known, but the word "indenture" does not seem to have been used. Sealing deeds with wax is said to have been introduced by Edward the Confessor from Normandy. At all events, it is a legal custom existing in the country before the Conquest.

Livery.—But land could be conveyed without charter or writing, so long as "lawful men" of the hundred were present as witnesses. From this verbal conveyance, no doubt, is to be traced "livery of seisin," which was a symbolical ceremony accompanied by words of gift in the presence of witnesses. The conveyer (afterwards called the

[1] *Infra*, p. 12.
[2] See Reeves' Hist. of Eng. Law, vol. i. p. 21 (2nd edition).

feoffor) put into the hand of the conveyee (feoffee) a clod of earth or a twig, and said words to this effect:—"I liver this to you in the name of seisin of Whiteacre [*describing it*] to have and to hold to you and your heirs for ever [*or* heirs of the body, *or as the case may be*]." The name *livery of seisin* is Norman.

Dower.—It is probable that *dower* was a Saxon institution. As we know it, it is the right of the wife in her husband's estates of inheritance after his death; but the Saxon institution was in the form of an express gift by the husband to the wife immediately before or after the marriage. If the husband did not specify any particular part of his lands as dower, the wife took one-third. (See p. 13 for development of the law of dower.)

Curtesy, or the interest of a widower in his deceased wife's lands, may have been of Saxon origin also. It is always called *tenens per legem Angliæ,* or tenancy by the curtesy of *England,* and this would seem to indicate for the custom an English origin.

The King's Peace, a term extensively used by early criminal lawyers, and even to the present time, comes to us from the Saxons. The origin of it is to be traced to the notion that a stranger who broke the peace of a house must make atonement to the head of that house. We find the same idea even now current in society; for it is considered a gross social offence for a guest to insult his host; and an injury is thrice aggravated if done to you in your own home. In Saxon times, he who offered violence to another in the king's house was considered so gross an offender, that his life was forfeit to the king; and it was only by the royal grace that he escaped by paying a *wite,* or fine.

The first extension of the *Pax Regis* beyond the royal residence was by a proclamation that the king's peace

should be observed in all the land during the week of the coronation, and at Christmas, Easter, and Whitsuntide every year. The next step was, that the king could proclaim his peace in any particular locality. Offences against the king personally, *e.g.* treason, were always breaches of his peace.[1]

Modes of Trial.—The Saxon modes of trial were **Compurgation** and the **Ordeal. Compurgation** was this: any one sued in a civil action, or accused of crime, could bring eleven men of the hundred to swear on his behalf that they believed his account of the case. In matters of contract or conveyance, as I have indicated (*supra*, p. 6), witnesses were necessary to the validity of the transaction, and probably these, or some of these, formed some of the compurgators. In cases of tort or crime, it is probable that the witnesses of the affair (if any) would be included in the number of the compurgators called by the complainant or the defendant; but save to this extent, they seem to have been very much like witnesses to character.

Ordeal was the essentially Saxon method of proving facts, and it consisted, after the manner of those times, in an appeal to the supernatural. The person accused first solemnly swore to his innocence. He then had to undergo one of three tests, the ordeal by water, the ordeal by fire, or the "accursed morsel." One put to the fire ordeal had either to grasp with his hand a red-hot iron, or to walk barefoot over burning plough-shares. The scarred and blistered members were bound up by a priest, with some ointment consecrated for the purpose; and if the scars were healed at the end of three days the sufferer was innocent. If not, he was guilty. Of the water ordeal there were also two forms: hot water, when the accused plunged his arm into boiling water, and was treated in the same manner as in the ordeal

[1] "The King's Peace" is dealt with more fully *infra*, Chap. X.

by fire; and cold water, when he was tied hand and foot and thrown into a pond or river. If he floated he was guilty; if not, he was innocent.

The **accursed morsel** was a piece of hard, dry bread, specially consecrated by the priest. The accused first called on the Deity to make the bread stick in his throat if he were guilty; and then proceeded to eat the morsel slowly If he swallowed it freely he was innocent; but should he choke in any way he was guilty. Numerous instances are cited by old writers of the efficacy of this mode of trial, and it is not improbable that a perjured man, extremely superstitious, would find the "accursed morsel" very hard to swallow. The great Earl Godwin is said to have been choked in this way.

Wager of Law.—Compurgation was never formally abolished; and survived, under the name of Wager of Law, in actions of debt until 1833, when it was abolished by 3 & 4 Will. IV. c. 42.

Punishments and Penalties. —No account of the Saxon jurisprudence would be even approximately complete without some description of their system of punishments and penalties for crimes and wrongs. Let us first explain the phraseology of the time:—

Wer was the pecuniary value set on a man's life, increasing with his rank. It was also the measure of the fines payable by him for his own offences; for as the life of an earl was more precious than that of many choerls, so his offences were the more grave.

Wite is the usual word for a penal fine payable to the king for a breach of his peace.

Bot is a more general term, expressing compensation of any kind for a wrong done. By Alfred's Law of Treason that offence was made *bótléas* (=bootless), *i.e.* incapable of being compounded for by a money payment. In a special sense, *bót* was used to mean the compensation to be paid to

the injured party; as distinguished from the *wite* payable to the king.

Outlawry.—The early English punished crime by outlawry, which was a negative, not a positive, punishment. The offender was merely declared to be outside the protection of the laws he had broken; and being "out of the law" he became a "wolf's head" whom any one could kill. To outlawry succeeds

The blood-feud.—Here the offender was only left unprotected by the law as against those who had suffered by his misdeed—not as against the world at large as in outlawry; and to blood-feud succeeds

The Bot, the Wite, and the Wer.—It is a notable feature of the Anglo-Saxon law, this assessment of all criminal wrongs at a price in money. A complicated tariff was formed—every wound had its price: for a broken arm so much, for a damaged leg so much; even life had its price, for the slayer must pay to the relative the *wer* of the slain man. The *wite* was a compensation to the king for having broken his peace; and only in rare instances did the majesty of the law demand punishment instead of compensation.

SUMMARY.

1. **Property :—**
   (a) In the law of property there seems to have been little distinction between land and moveables.

Property in land was *allodial*, that is, in full ownership.

   (b) The inheritance was divided amongst *all* the children.
   (c) A kind of dower and curtesy were in vogue.

2. **Criminal Law :—**
   (a) The king's peace was established in a limited form.
   (b) Distinction between crime and tort was not well established. A fine must be paid to the king for breaches of his peace. All injuries to private persons could be compounded for by paying *bót*.

3. **The Courts of Justice** were all local.

4. **Procedure :—**
   (a) Sworn recognitors "presented" criminals for trial.
   (b) All issues of fact were tried by compurgation or ordeal.

CHAPTER II.

William I. to Henry III. (1066—1272).

From this time more records of legal progress are extant; but during the whole time the country was in an unsettled condition, and it is difficult, therefore, to be exact.

Tenure of Land.—The first thing to be noted is the **introduction of the theory of tenure of land,** and of the feudal system. *By theory of Law in England to this day all land is holden either directly or indirectly of the Crown.* The theory may be described thus: all lands belongs to the king; no subject can be the *owner* of a single acre, but he can be a *tenant* (holder); the king grants land to his tenants, who are called tenants *in capite,* and the tenants *in capite* owe him services in return; the sovereign's tenants may now subinfeudate to other tenants who hold on similar terms of their immediate lord, but *all owe allegiance and homage to the king as lord paramount.* Hereditary tenures were made the rule, and tenure by knight-service was established.

As to the particular kinds of tenure established by the Conqueror, they can be divided into two classes, free and servile. The free tenures were again of two kinds, those held by the rendering of *certain,* and those by *uncertain* services. Servile tenants also held either by *certain* or *uncertain* services.

Military Tenure.—The **free but uncertain tenures** were knight-service, grand serjeanty, and petit serjeanty (see p. 193). Although the services here were *uncertain*, they were *not unlimited*. For instance, a tenant by knight-service was bound to serve the lord in war, for forty days a year, if called upon; he might never be called upon, so that his service in this respect was uncertain, and it was always uncertain when he would be called upon. But he was not compellable to serve more than forty days.

Socage.—Free and certain tenure was generally payment of a fixed rent in money. The Domesday Book, in the dog-Latin of the period, calls these tenants *socmanni*, or tenants in socage.

Villeinage: 1. Privileged.—Servile but certain tenure was called privileged villeinage. The tenants were bound to render services of such a kind as, for instance, ploughing or manuring the lord's land for so many days in the year. From this kind of tenure is descended the modern copyhold (see p. 42).

Servile and uncertain tenure was where the tenant was bound to do whatever the lord ordered him to do. In the words of an old writer, "he knew not at night what he should do in the morning," and was practically a serf. The tenant in villeinage, whether pure or privileged, was, during the whole of the period now under consideration, merely tenant at will of the lord. How he obtained fixity of tenure will be told in a subsequent page (p. 42).

Tenants in Capite.—The great land-holders held directly of the Crown, and they in their turn subinfeudated, that is, granted out the land to their various tenants. The lord was called mesne-lord, and the whole of his holding, together with the waste lands, manors, rights of jurisdiction over his tenants, and of advowson, &c., were comprised in

the term manor. The learned Editor of Reeves' History of English Law expresses a strong opinion that the manorial system existed before the Conquest; indeed, he goes so far as to say that the Saxons found it established here as it had been left by the Romans. This view is founded on the analogy between the Roman Colonia and the manor as we know it from Domesday Book; but the opinion is not of great value, and the analogy is remote.

Distress.—The right of distraining or impounding goods of a wrongdoer was known to the Saxons, but it is in Norman times that the right was restricted to that of distraining on the goods of a tenant for non-performance of the services upon which he held his tenements. The Statute of Marlebridge regulates the law of distress, and it is from this time that we must date the modern distress for rent. It should be noticed, however, that the goods distrained could not be sold, but only detained (see p. 104).

Dower.—The **subject of dower** in the time of the Saxons has been dealt with in a previous page (p. 6), and we have seen how at that stage of the law dower depended on express gift.

At the time of Glanville (Henry II.), dower still depended upon express gift, and was quite in the power of the husband, for he could sell or alien his wife's dower in any way he pleased with her assent. Moreover, she only took her *dos* in such lands as the husband had the seisin of at the time of the marriage, but the wife could not alienate her dower. If the widow was wrongfully deprived of her dower she had a real action called *writ of right of dower*. If she was kept out of the whole of it she had the *writ of dower unde nihil habet*. It is not certain when the wife obtained the right to dower independently of any endowment by her husband, but probably about the time of Henry III. the law on this subject was almost the same as it was in 1843,

namely: that a widow has the right to one-third of her husband's lands of which he was seised during the coverture, unless he provided for her by giving her a jointure or agreed part of his freeholds. Magna Charta, c. 7, declares "for her dower shall be assigned unto her the third part of all the lands of her husband which were his during the coverture, except she were endowed of less at the church door." Until the Statute of Marlebridge the dower was forfeited if the widow were unchaste, but that Act (52 Hen. III. c. 7) altered the law in this respect.

The Curtesy of England.—Tenancy by the curtesy appears to have been established law in the time of Bracton (Hen. III.), for he gives a summary of the law practically as it exists at the present time. He says, "if any one has married a wife who had an estate of inheritance, and they had children born of the marriage, and the wife predeceases the husband, the inheritance shall remain to the husband for life, whether any or all of the children are surviving or are dead."

Descent and Succession, and Testamentary Disposition.—To this period also belongs the origin of our present rules of descent, our law of testamentary disposition of personalty, and our rules of succession to personalty *ab intestato*.

Realty.—It is doubtful whether, before the Conquest, wills of land were legal. William I. declared all lands to be held *jure hereditario*, by hereditary right; and it seems to have been held upon this, that the tenant could not defeat the right of his heirs by alienation either *inter vivos* or by will. But the rules of descent, and particularly the rule of *primogeniture*, were of gradual introduction. It seems to have been common, before the reign of Henry II., for land to be divided equally amongst children, but in that reign it became settled law that the inheritance of feudal lands

should go in all cases to the eldest son, though, as it appears from the arguments put forward in support of John's claim to the Crown, the doctrine of representation (*i.e.* that the son of an elder son should succeed to the place of such elder son on the latter's decease) was not settled law. Glanville, writing in *temp.* Henry II., gives it as a doubtful point. There are numerous instances, more or less well authenticated, to show that before the time of Henry II. it was customary for the eldest son to take the principal fee of his deceased father, the next son taking the next best fee, and so on; and it was by an argument based on this view of the law that William II. succeeded to the English Crown, while his elder brother Robert took the dukedom of Normandy. The rule of the succession of all children to socage lands continued to the time of John, when it gave way in favour of the law of primogeniture.

Succession to Personalty.—By the Charter of Liberties (sect. 7) issued by Henry I. at his coronation (1100), it was enacted that testamentary disposition of personalty was not to be interfered with, showing that this was only a statutory confirmation of the common law. The same charter also declared that the personalty of an intestate should be divided amongst "his wife, or children, or kin, or lawful men." We find a similar provision in Magna Charta (cap. 26) as to the property of intestates. These rules are substantially the same as those of the present day, save so far as they were altered by the Statutes of Distribution (see pp. 86 *et seq.*) and by the Intestates Estates Act, 1890.

Alienation of Land.—It may also be noted that in the period under consideration it was a moot point whether or no a fee could be alienated *inter vivos*. The authorities seem to establish this point: A father could not alienate his land. According to some, he might alienate all his *purchased* land, but not a fee which he had inherited. According to

others, he must not alienate even all his purchased land, so as to leave his eldest son without any. Others, again, said that the father could alienate a reasonable part of his inherited land. Magna Charta (cap. 39 of the edition of 1217) prohibits alienation of land by a freeman, "but so that of the residue of the land he may sufficiently render to the lord the service due to him which appertaineth to the fee."

Mortmain.—Magna Charta also contains the germ of **the law of mortmain**[1] in the following passage: "It shall not be lawful . . . to give lands to any religious house. . . . Nor shall it be lawful to any religious house to take the lands of any and to lease the same to him. . . . If from henceforth any so give his lands . . . the gift shall be utterly void, and the land shall accrue to the lord of the fee." (Cap. 43.)

Centralized Justice.—William the Conqueror centralized the administration of justice. The English local Courts were left standing, nominally without curtailment of their former powers. But the king gave to his *Curia,* or Council, original civil and criminal jurisdiction over all matters, and suitors frequently preferred to come to the Curia because it was a body unbiased by local influence and prejudices: and it had, moreover, what the Hundred and County Courts frequently had not—the power to enforce a judgment against a powerful wrongdoer. (See also Chapter VIII.)

Rise of the Three Common Law Courts: Henry II.—Before the end of this period, **the three Common Law Courts** had been fully formed; and the members of the justiciary separated definitely from the main body of the Council. By Magna Charta, the Court of Common Pleas

[1] See also for law of Mortmain, *infra*, p. 40.

ceased to follow the King's Court, and became stationary at Westminster. (See Chap. VIII.)

Justices in Eyre: Assizes.—Another most important legal change, leading more, perhaps, than any other thing to uniformity of law throughout the kingdom, was the institution of a **system of itinerant justices.** (*Justices in Eyre*, from *Itinera.*) These travelling judges were first sent on circuit by William I. They were appointed from time to time by royal commission, and any person could be sent by the king; but as a rule, in order, it is supposed, to give greater authority, and that their decisions should command more respect, justices of the *Curia Regis* were sent. The *Eyre*, or journey, of each of the judges generally lasted for seven years! At first, the criminal jurisdiction of the local Courts (Sheriff's Tourn) was left untouched, save that when a Justice in Eyre was within the county, he and not the sheriff presided as judge. The circuits were, in the beginning, irregular. By the Assize of Clarendon (Henry II., 1166), the law relating to the itinerant justices was somewhat regulated. Inquests were to be held by twelve lawful men of each hundred and four of each township into robberies, murders, thefts, and other crimes; and the criminals to be presented to the Justices in Eyre and the sheriff for trial. The Assize of Northampton, ten years later, directs the itinerant justices to hold assizes of *mort d'ancestor* and *novel disseisin* (actions to try title to land), to exact the king's dues from half a knight's fee and under, and to make inquiry concerning escheats, churches, and lands in the gift of the king. From this it appears that **the Justices in Eyre had the same jurisdiction as the three Common Law Courts,** except that their Exchequer jurisdiction was limited to half a knight's fee.

Magna Charta (1216) still further altered and improved the law. By cap. 23, sheriffs, constables, coroners, and all bailiffs of the king were forbidden to hold pleas of the

Crown. In this manner Criminal jurisdiction was reserved almost exclusively in the hands of the justices. Moreover, circuits were fixed and made regular, for it was provided by sects. 18 and 19 that two justices should be sent to each county *four times yearly*, and should there hold assizes of novel disseisin, darrein presentment, and mort d'ancestor. While in the county on this business, they would, and did, try all criminals presented to them by the various presentment juries of the hundreds.

There is other legislation of this period relating to this subject: *e.g.* the Statute of Marlborough (1267) declares death by misadventure not cognizable by the justices, thus marking off their jurisdiction from that of the coroner.

Separation of Ecclesiastical and Civil Jurisdiction.—Immediately after the Conquest, the ecclesiastical and civil jurisdictions became separate. The County Courts ceased to decide matters of ecclesiastical law, the jurisdiction being vested in the archdeacon and the bishop of the diocese. The Ecclesiastical Courts took cognizance of suits affecting the validity of marriages, legitimacy, payment of church dues, wills (Henry II.), heresy and schism, validity of holy orders and the like, suits between clerks, and in the time of Henry II. usurped exclusive jurisdiction over all cases, whether civil or criminal, in which one of the parties was a clerk. The Constitutions of Clarendon (1164) regulated the jurisdiction of these Courts. Disputes as to advowsons and presentations were not to be decided there, nor disputes between clergy and laity as to the tenure of land, nor pleas of debt. The appeal to Rome was taken away; but this clause was entirely disregarded, and the appeal to the Pope continued down to Henry VIII. To this separation of the ecclesiastical and civil jurisdictions is due the fact that our law relating to wills of personalty, to divorce, and to validity of marriages, is, in the main, canon law, though it has been modified recently by statute. (See pp. 154 *et alia.*) One

thing in this connection is notable. The clergy wished to introduce into England the canon law of legitimation *per subsequens matrimonium*; but at a Great Council held in the reign of Henry III. the barons refused to alter the common law, which did not allow any child to be legitimate unless born in lawful wedlock. The spiritual Courts, having jurisdiction to pronounce upon the validity of testaments of personalty (there were no wills of realty), soon acquired the right to decide in cases of intestacy, and thus arose the power of granting letters of administration. Magna Charta, sect. 27, gives the personalty of intestates to the next-of-kin, under the supervision of the Church. In the reign of Henry III. they also established the right of pronouncing upon questions of legacies.

The Common Law is post-Norman. By the Common Law is meant the law administered by the King's Courts as distinguished from the various local customs administered by the older Saxon tribunals. It had its origin in the King's justices. What practically happened was this—a man who had a grievance applied to the Chancery, which was the official department of the *Curia*, for a writ to be directed to his adversary. If such a writ was granted the parties came before the justices, and the justices then decided whether or not they would grant relief. In such decision they really consulted their own notions of justice, or perhaps it would be better to say, equity, with a reference to the whole *Curia* when in doubt. In fact, the history of writs is the history of the Common Law, for the writ precedes the judgment, and the judgment is the law. As in every other business, custom was formed by practice: so that it is true to say, "The custom of the King's Court is the custom of England and becomes the Common Law." [1] To assist the determination of questions, the justices who knew the canon law and the law of Rome frequently applied its principles, where

[1] Pollock and Maitland, vol. i. p. 163.

such principles were not adverse to any assize or proclamation of the King and Council, or to any practice of the Court. Common Law is, in fact, judge-made. Some forms of writ soon became of general use, and were granted as of course (writs *de cursu*); and we find that in Henry III. (1258) it was resolved or enacted that the clerks in Chancery should only issue these writs *de cursu*, that is, that they should stop inventing new writs, which meant extending the law. The consequence was a crying evil, and the enactment of the statute *In Consimili Casu* a few years later.[1] The reader should, however, bear in mind the fact that every new writ practically meant an addition to the Common Law of England; and when we find, as in the Statute of Gloucester, that a writ of *waste* is to be granted against limited owners, it is only expressing in another way the fact that devastation of land by such owners was made a wrong as against remaindermen.[2] But from Edward I. the Common Law became less flexible.

The King's Peace.—The Saxon theory of the King's Peace was allowed to remain by the Conqueror, and was extended by him. Either at his coronation, or shortly after, the whole country was put under the *Pax Regis*. The consequences were very great and far-reaching, for it became an offence against the Crown for anyone to commit an act of violence within the realm. When such an act was committed the king was entitled to prosecute the offender, who could not in that case claim the combat, because he could not offer to fight the king his adversary. The term Pleas of the Crown was applied to these cases, and we find in Magna Charta a clause prohibiting sheriffs, bailiffs, and other inferior officers holding pleas of the Crown. It must not be thought that all criminal jurisdiction was taken away from these persons, because there were some crimes not

[1] *Infra*, p. 45. [2] *Infra*, p. 43.

breaches of the peace; and in any case the person injured had his remedy by "appeal," [1] in which the object was the recovery of *bót*.

Criminal Law.—The *criminal law* in Norman times was simple, and very much the same as now, except that there was a strong inclination to impose the capital penalty for offences now regarded as slight. The law of murder, and other kinds of homicide, of rape, assault, robbery and theft, were practically the same as the law of England to-day.

Treason. — There were very stringent laws known as "Forest Laws," imposing heavy penalties for killing the king's deer; and *the law of treason* was, by the subtle interpretation of Norman lawyers, and the introduction of the civil idea of *læse-majesté*, altered very much from the simple law of Alfred. Norman lawyers began with the idea of the feudal tie between the lord and his vassal, and, as the king was the overlord of everyone in the country, they were inclined to treat all offences personally distasteful to royalty as treason. One of them held, about the time of Henry II., that it was treason to kill the king's deer. It was also held treason to have illicit connections with the king's wife, or the wife of his eldest son; and, speaking generally, during the period under consideration, the law of treason varied very much according to the prejudices of the reigning sovereign and the sturdiness or flexibility of the judge who tried the case. Treason was then a very uncertain offence, and it remained so for a considerable period. (See p. 48.)

Criminal and Semi-criminal Procedure.—As in the Saxon period, the detection of crime and the arrest of the offender was left a good deal in private hands. Anyone who

[1] See p. 31.

captured a person accused of crime took him to the sheriff or hundred reeve, and the latter imprisoned him until the time of the next sheriff's tourn or the next visit of the justices. But it might happen that the sheriff would refuse to bring up the prisoner to be tried at the next tourn, or it might happen that between the visits of the king's justices a long interval will elapse. It was contrary to the principles of law maintained by our ancestors, and eloquently, though tersely, expressed in the Great Charter, for justice to be delayed. There were, it appears, four kinds of writs invented to protect the liberty of the subject by securing that in no case should he remain long in prison without being brought to trial. These writs were all invented during the period of the Norman and early Plantagenet kings. They were the writ *de odio et atia*, issued out of the king's bench to the sheriff, commanding him to hold an inquiry whether a prisoner in custody on charge of murder was committed upon reasonable suspicion or only for malice (*propter odium et atiam*), and if he found the latter, to admit him to bail. By the Great Charter (cap. 36), it is provided that the writ of inquest of life or limb shall be given gratis and not denied, a provision generally supposed to refer to the writ *de odio*.

Main Prize.—There was also a *writ of main prize* sent in like manner to the sheriff, directing him to take pledges for the prisoners; there was a difference between main prize and bail in that the former was always in a fixed sum, while the latter was not always so. Again, in the case of main prize, "he that is delivered is out of custody, but he that is bailed is in supposition of law still in custody."[1] The two other writs of this kind were *de homine replegiando*, which was a writ addressed to the sheriff commanding him to "re-pledge," or take bail, for a prisoner in his custody, and

[1] Hale, P. C. II. p. 125.

also the *high prerogative writ of habeas corpus cum causâ* (commonly called **habeas corpus**).

The effect of the last-mentioned writ was somewhat different from that of the other three. They were directed to the sheriff commanding *him* to accept bail or pledges. The *habeas corpus* was directed to the jailer, and ordered him to bring up the body of the prisoner, with the cause of his detention, to *the Court of King's Bench*, so that the judges might determine whether the imprisonment was lawful or no, and if it was lawful whether the prisoner ought or ought not to be allowed bail. No instance of a writ of *habeas corpus* is to be found until Edward I., but, as it is evident that the writ was then not a novel one, it is not unreasonable to suppose that the common opinion which traces the safeguard of liberty back to Magna Charta is the correct one. Tradition is often unreliable, especially in the study of legal history; but this one may claim the support of Coke, Mackintosh, and, indeed, of almost every respectable historian who has written on the subject.[1]

Bail.—But although in theory of law no free man could be long imprisoned without trial, in fact it was far otherwise. Bail was an indefinite term, and we have it on the authority of Glanville's *De Corona* that the sheriff had a discretion in regard to bailing accused persons, and there seems to have been no check upon him to prevent him demanding unreasonable or excessive bail.

Punishments: Crimes and Torts.—In the early days of the Norman kings the *wer*, the *wite*, and the *bót*,[2] ran side by side with punishments of death and mutilation; but from our earliest judicial records we find that *wer* had been altogether abolished, and that wrongs were looked on from two points of view: (1) the public wrong, or breach of the

[1] For a fuller account of the Law of Habeas Corpus, see *infra*, pp. 90 *et seq.*, 114 *et seq.*

[2] *Supra*, p. 8.

king's peace; and (2) the private wrong, or loss to the individual. As early as Glanville it was settled law that no compensation could be made by a homicide to the relatives of the slain. And from this time the distinction between crime and tort began. A crime was a breach of the king's peace, a disturbance of the order of good government, prosecuted by the Crown, and in the name of the Crown, though at the instance of a private accuser; hence criminal cases were called Pleas of the Crown. A tort was a wrong committed against an individual; the same act might be a crime, but not necessarily so; if it were, it must be tried separately, and any penalty imposed for the crime was quite distinct from the compensation payable to the individual sufferer. It is from Henry III. that we must trace the final separation of tort from crime, for in that reign was invented *the writ of trespass*, which issued either for an invasion of another's property or a violation of his right of personal security. Thus, to walk on your neighbour's land was trespass. To assault and batter him was trespass. To seize his goods wrongfully was trespass. And in the writ of trespass it was always stated that the defendant had acted *vi et armis*—by force and arms. Thus the old idea of a breach of the peace was still kept up, but although the plaintiff alleged force and arms, he was not obliged to prove that any force had been actually used.

Real Actions.—The period from William I. to Henry III. is the period when the "real actions" were established. Real actions were those in which the plaintiff claimed the *res*, and not merely damages for dispossession; and they were five in number, namely: Writ of right, writ of entry, assize of *mort d'ancestor*, assize of *novel disseisin*, and assize of *darrein presentment*.

Writ of Right.—The history of the writ of right, both as to its origin and and as to its exact use, is wrapped in

obscurity. It was, it appears, a writ issued out of the Curia Regis at a very early period, and is supposed to date from the reign of the Conqueror. It was of fairly long standing at the time of Magna Charta, by c. 34 of which it is enacted: "The writ called 'præcipe' shall not issue concerning any freeman's free tenement whereby he shall lose his own court." The writ of right was called "præcipe" because it was addressed to the sheriff in these terms: "Rex vicecomiti salutem. *Præcipe* A. (*the defendant*) quod sine dilatione," &c. By "his own Court" is meant the Court of the feudal lord. The lords were very jealous of the King's Writs, which deprived them of their power over their tenants. After 1216, tenants-in-chief only sued out the writ in the Common Pleas. Sub-tenants could only sue there either when the lord did not hold a court, or when he gave permission to his tenant to sue in the King's Court—a permission which was very often taken for granted by the judges of the Common Pleas. The writ of right was issued to try title to freeholds—not merely possessory title,—and trial thereon took place by duel or by sworn recognitors. It had an infinite number of variations to meet different cases.

Writ of Entry.—The writ of entry was similar to the writ of right, except that it was only a claim of *possession*, and this also was introduced before the time of Glanville (Henry II.). How long before is not known, but the writ is probably even older than the writ of right.

Assizes.—Besides the writ of entry, there were three other real actions, called assizes, to try the right of possession of freeholds. The assize of *mort d'ancestor* seems to have originated in 1176 by the assize of Northampton, cap. 4: "Si dominus feodi negat hæredibus defuncti saisinam ejusdem defuncti quam exigunt, justitiæ domini regis faciant inde fieri recognitionem per duodecim legales homines, qualem saisinam defunctus inde habuit die qua

fuit vivus et mortuus . . ." [1] The assize of *novel disseisin* (recent dispossession) is also mentioned in the assize of Northampton (cap. 5), but in terms such as to indicate that *novel disseisin* was then a known remedy, and not a new one. The assize of *darrein presentment* is not mentioned earlier than Magna Charta, but from the way it is spoken of there it is justifiable to infer that it was in existence before that time. It was a mode of determining the right of presentation to a living, and the inquiry was as to who made the *last presentment.* Magna Charta (cap. 18) orders the justices itinerant to hold assizes of novel disseisin, mort d'ancestor, and darrein presentment four times a year in each county. It will be observed that the assize takes the form of an inquest by "twelve lawful men."

Real and Personal Property.—It will be seen from this account that the only cases in which a real action would lie were those in which **freeholders** had been deprived of their land. Hence the term "real" property came to be applied to that kind of property which could be recovered by real action, *i.e.* to freehold interests only. It is because no real action would lie by a leaseholder to recover possession of his leasehold that leaseholds were regarded not as realty, but personalty. There can be little doubt that if long leases had been in vogue at that period of legal history, as they are now, real actions would have been given for their recovery; but the earliest "term" was usually only for a year or two, and it was not worth while to give a man such a great remedy for so small a thing. Our present distinction, then, between realty and personalty may be said to date from the Conquest.

Leaseholds.—But although the freeholder was the only person who had a right *in rem* in the land, the leaseholder,

[1] Translation: "If the lord of the fee deny the seisin to the heir of the deceased, let the king's justices make recognition by twelve lawful men what seisin the deceased had on the day of his death."

who held for a definite term of years, came in course of time to have his possession protected. At first, if he were turned out of possession, his only remedy was in an action for damages. But Bracton [1] records a change, evidently made in his own time, by which the lessee was allowed to have a writ out of the King's Court to recover the land itself. The action was in form personal, and not real, being for *forcible ejectment*; but the judges could order the wrongdoer to give up the land, and so the effect was the same as a real action. And the leaseholder had the advantage of a much quicker procedure, less expensive, and not so tedious. At this stage of the law a lease could be, and commonly was, by word of mouth, even though it might be for a long term.

Personal Actions.—Besides **real** actions there were **personal** actions and **mixed** actions, and in the time of Bracton the division of actions into real, mixed, and personal was fully established. Personal actions were, as far as can be gathered from a study of the text, *debt*, *detinue*, *trespass vi et armis*, *accompt*, and *covenant*.

Debet et Detinet.—In Glanville's time (Henry II.) debt and detinue were one and the same action, in the name of *debet et detinet*. The writ ran in this manner: "That the sheriff should summon A. B. to answer to X. Y. in the sum of 100 marks (*or*, for the two oxen), which the said A. B. ought to give him, and unlawfully detains." This action would lie not only where A. B. owed X. Y. a debt, as, for instance, for the price of goods sold, but also where A. B. was in possession of chattels belonging to X. Y., and refused to give them up, as, for instance, where A. B. had borrowed a horse from X. Y., and wrongfully refused to return it. In the time of Bracton the two actions were separated. **Debt** would lie in respect of a certain or liquidated amount in

[1] Bk. iv. c. 36, folio 220.

money, and was therefore an action of contract. **Detinue** was brought only when the defendant wrongfully detained the chattel belonging to the plaintiff, and refused to give it up after lawful demand made. The action is therefore primarily one arising out of *delict*, but it is easy to see how the minds of the early lawyers confused the causes of action. They did not see the difference between the man who had refused to pay a debt due and a man who refused to give up a horse that did not belong to him. They regarded the debtor, in fact, as though he had been a man with another person's money in his pocket, and refusing to give up that money to its proper owner. The difference between actions arising *ex contractu* and actions *ex delicto* was therefore not strongly marked in the early law of England, and the recognition of the difference by a separation of debt from detinue marks a distinct stage of progress in English legal history, and this distinction, as we have said, had been recognized as early as the time of Bracton, if not before.

Covenant: Trespass.—The **action of covenant** would lie to enforce any promise or obligation under seal, and in this case a defendant was not permitted to "wage his law," while the **action of trespass**, or trespass *vi et armis*, as it was called, was the proper remedy for a multitude of wrongs —such as trespass to land (trespass *quare clausum fregit*= trespass by breaking the close (enclosure)), the wrongful taking of goods, assault, battery, false imprisonment. All these were called trespass.

Account.—The writ of *Accompt* was issued in actions against agents to make them account for the goods or money received by them on the principal's behalf in the course of the agency. The Statute of Marlebridge gave the principal whose *bailiff* refused to account a summary remedy against the bailiff's person; but the judges, construing the statute strictly, refused to extend this process of committal to other agents not bailiffs. The procedure in the writ of *Accompt*

was peculiar to itself. The accounts were not investigated by the judge, but by auditors or compulsory arbitrators appointed by the Court—such auditors not necessarily being officials of the Court. It is probable that from this procedure the Chancellor in late times borrowed the idea of referring all matters of account, and questions involving long and minute inquiry, to his clerks and secretaries, the old Masters in Chancery; and, to come to times still more recent, the official referees of the High Court of Justice have very much the same functions as the *auditores* formerly appointed under the writ of *Accompt*.

Writ.—The **procedure** in both real and personal actions in the King's Courts was by writ (except in the cases tried by assize). The word "writ" is of English origin, but the thing is Norman, and seems to have been introduced immediately after the Conquest on the establishment of the *Curia Regis* as a central court of law. In the Saxon days of local courts, the plaintiff simply made a verbal complaint to the sheriff or hundred reeve, or other local judge; but when cases were taken up to the Central Court to be tried, the matter was very different. The king's justices were obliged to secure the attendance of the defendant by the help of the sheriff of the county where he lived; and as in travelling from the Court to the sheriff, which might be the whole length of England, a verbal message might easily have miscarried or been misinterpreted, there was issued by the chancellor (who then acted as a kind of secretary to the *Curia*), a document containing a *brief* statement of the case set up by the plaintiff, together with a command in the name of the king to summon the defendant to appear and answer the complaint made against him.[1] This document was officially called *breve* (from Latin = short), but it soon received the Saxon name of writ (writing), a name bestowed by the

[1] See p. 146.

English to distinguish it from the verbal complaints still in use in the local courts.[1]

Pleadings.—If we are to judge from Bracton, whose treatise indeed seems the only reliable source of information, in his time actions were tried in a roughly scientific way. The plaintiff came into court and by himself or his attorney, or advocate, stated his cause of action. To this the defendant replied—either taking objection on a point of law, or denying some or all the facts alleged. The plaintiff again answered, and the defendant again replied, and so on, until they had arrived at an *exitus* or *issue*,[2] an expression used to indicate the fact that the parties had definitely arrived at the point of difference between them—it was no longer a vague indefinite quarrel, but a dispute on a particular point. In Bracton's time the judges were very careful to separate issues of fact from issues of law, the former being triable by wager of law, or duel, or jury, and the latter by the judge alone. Moreover, in order that the issues might not be confused, a man was only allowed one, either of fact or of law. He could not say: "I deny the plaintiff's facts, but I say that, even if he is right in fact, he is wrong in law." He had either to say: "the plaintiff is wrong in law," or "the plaintiff is wrong in fact." He could not do both. These verbal altercations between the parties preliminary to the trial afterwards developed into a system of written pleadings.

Modes of Trial: Abolition of Ordeal.—William I. left standing the old Saxon **modes of trial** by ordeal and compurgation, though before the end of the period under consideration compurgation was beginning to fall into desuetude, and the ordeal was abolished in 1218, after being condemned by the Lateran Council in 1215.

[1] In the old Norman-French reports, "writ" is translated "*brief*."
[2] Literally meaning "way out."

Duel.—The Conqueror introduced from Normandy the Wager of Battle, or trial by duel, of which a spirited picture is given by Sir Walter Scott in his novels of *Ivanhoe* and *The Fair Maid of Perth.*

The Charter of William ran thus: "It is decreed that if a Frenchman appeals an Englishman of perjury, or murder, theft, homicide (manslaughter), or rape, the Englishman may defend himself as he shall elect, either by ordeal or the duel. But if the Englishman is infirm he may provide a substitute. The one who is vanquished shall pay sixty shillings to the king. If an Englishman appeals a Frenchman, and is unwilling to submit to the ordeal or the duel, the Frenchman must clear himself by oath" (compurgation?).

Appeal of Felony.—In cases of murder and manslaughter, any blood relation of the slain man could "**appeal**" against the slayer. The latter then threw down his glove and claimed the combat, and unless the accuser took up the challenge the accused went free. But if, as usually happened, the challenge was accepted, a speedy day was appointed for the trial of arms, and on that day, in lists presided over by the sheriff, or the itinerant justices, the combat took place with all due solemnity. The charge was read over, and the accuser (appellant) swore to his belief in it on gospels, while the accused in his turn avouched his innocence in the same manner. Then, armed in manner suited to their rank, the duellists began the encounter; the hour fixed for the commencement of proceedings was generally sunrise. If the accused could disable his adversary, or make him cry "craven," or prolong the fight until the stars appeared in the evening, he was declared guiltless of the charge, and the accuser was fined and declared infamous. But if the accused lost, he was, if still alive, hanged.

Wager of battle could not be claimed if the accuser was a woman, a priest, an infant, or an old man of over sixty.

By Magna Charta (s. 54), a woman could not bring

"appeal of felony," except for the death of her husband. The reason for this curious law is not known. In these cases the ordeal, or compurgation, or (after the reign of John) the jury, was the mode resorted to. "Appeal of felony" continued side by side with trial by jury until the Tudor period. It then fell more and more into desuetude, until in Stuart times it was practically lost sight of. In 1817 the wager of battle was claimed by a man named Thornton, accused of murder, and as the accuser declined the challenge, Thornton had to be acquitted. Two years later the appeal of felony was abolished (59 Geo. III. c. 6).

The wager of battle did not obtain in other criminal cases, except in "affairs of honour"; and these were under the control of the king, the constable, and the earl marshal.

Duel in Civil Actions.—There is no charter extant actually establishing the duel in civil cases; but it is known from the Conquest this was a mode of trying issues of fact in actions commenced in the *King's Court*. There was a difference between this and the case of crime, however, because in civil cases champions, or *procheins amys* (next friends), of the parties fought—a necessary precaution, for if either party to a civil action was slain, the suit was at an end. Before the end of Henry III.'s reign the wager of battle in civil actions had almost died out, giving way to trial by jury; but it was not formally abolished, and only fell into disuse because the writ of right itself ceased to be used. There is a case on record as late as Elizabeth. It may be remarked that, in England, amongst the native English, it never found favour; and many boroughs obtained, as a special favour from the Crown, exemption from wager of battle within their jurisdiction.

Trial by Jury: Grand Jury: Inquests.—As we have seen (pp. 3 *et seq.*), the Saxons had established the system of

frankpledge, *i.e.* of presentment of criminals for trial by sworn men of the hundred, and in that way the grand jury probably originated. But it is to the Normans that we owe trial by jury as we know it to-day. In compiling the Domesday Book, William I. introduced into England the **sworn inquest,** or inquiry by the oath of a certain number of men. A specimen of the Domesday inquest, given in Stubbs' Select Charters (p. 86), shows that the sheriff and certain selected men from each district had to hold a sworn inquiry into the local customs, tenures, and so on, and to take a kind of census. Sworn inquests (surviving to this day in the coroner's inquest) were utilized by all the Norman kings for fiscal and administrative purposes; *e.g.* by the assize of arms certain lawful men were to swear to all who possessed a certain amount of property (1181), and in 1188 it was enacted that four or six lawful men of each parish were to be sworn to assess the proper amount payable by each individual to the Saladin tithe. There was also the assize inquest, *per duodecim legales homines* (p. 26).

Trial by Jury in Criminal Cases: Peine Fort et Dure.—When the Lateran Council, in 1215, abolished the ordeal, there was no way left to try issues of fact, except wager of battle and of law. But wager of battle did not apply to pleas of the Crown, because the sovereign could not be challenged to fight. From this date trial by jury begins. But there is no way of compelling a man to be tried "by the country." He must consent to be so tried. But the jury at that time seems to have been composed of witnesses and other persons of the district who might be supposed to know something about the matter. If a man refused to be tried by his neighbours the practice seems to have differed. According to Prof. Maitland, he was in the earliest times, after 1215, tried by a second jury, something like the jury of presentment; but in later years he was asked to plead, and if he refused to do so he suffered *peine fort et dure*, that

is, a weight was put upon his body, and if he continued contumacious he was pressed to death. In the time of Bracton, when a prisoner put himself upon the country after he had been presented by the hundred-jury, a jury of twelve, which may be called an inquest-jury, was impanelled to try the question of guilt or innocence. They were sworn to tell all they knew, bringing in a verdict. At that time, also, the jurors, or some of them, were witnesses, and brought in a verdict of their own knowledge, and not on evidence adduced before them as they do now. They might be cross-examined by the judge as to their reasons for their verdict; and if these reasons were unsatisfactory, the verdict might be disregarded, and a new jury impanelled.

Whether these jurors were the same as those who presented the prisoner for trial is doubtful. Mr. Maitland thinks they were the same; Sir Fitzjames Stephen thinks otherwise. Instances have been found in the thirteenth century where a second jury has been impanelled after the first jury (of presentment) has found a verdict of guilty. This practice grew insensibly into the modern one of impanelling a second jury (petty jury) in every case. But it was not until a long time after, that the petty jury lost their character of witnesses and became judges who decided on evidence given in open court.

Jury in Civil Cases.—The sworn inquest, if it was not the direct ancestor of the petty jury in pleas of the Crown, is, at all events, the origin of the jury in civil causes.[1] The assize of mort d'ancestor and the other real assizes, raising the question of right to possession of land, were decided as to fact by twelve sworn recognitors, and the itinerant justice only decided points of law connected with the case. A writ of right might also be tried out by recognitors (jurymen) instead of by duel.

[1] Digby, Hist. of R. P., p. 95.

Functions of the Jury.—But it cannot be too strongly borne in mind that though these juries decided the facts, they did so *of their own knowledge*, and not according to evidence adduced before them by witnesses. Sir James Fitzjames Stephen says that trial by jury in civil cases, as we know it, was firmly established by the middle of the fifteenth century,[1] but how long before that is doubtful.

SUMMARY: *William I.—Henry III.* (inclusive).

1. **Real Property:**
   (a) The distinction between *realty* and *personalty* is made, founded on the difference between the remedies for dispossession.
   (b) *Tenure* takes the place of ownership, and the theory of tenure becomes the basis of the land laws.
   (c) Military tenures introduced.
   (d) Dower and curtesy made absolute legal rights of wife and husband respectively.
   (e) The law of primogeniture gradually introduced, and the rules of descent.
   (f) Alienation checked by Magna Charta.

2. **Personal Property** receives little attention.
   (a) Testaments of personalty freely allowed.
   (b) Intestates' effects to go to wife and relatives.
   (c) Intestates' effects to be administered by the ordinary, and ecclesiastical courts pronounce on the validity of testaments and legacies.

3. **Criminal Law:** The King's Peace is declared to extend over the whole realm.

[1] Stephen's Hist. Crim. Law, vol. i.

4. **The Courts of Justice:**
   (a) *Curia Regis* established, to some extent superseding and supervising ancient local courts.
   (b) The three Courts of Common Law are established separately, and the Common Pleas fixed at Westminster. The other Courts follow the king.
   (c) Justices in Eyre appointed.

5. **Procedure:**
   (a) *Real action* begins.
   (b) *Personal actions* are few, only four of the kind cognizable in the King's Courts, viz. trespass, debt, covenant, and detinue.
   (c) *Writs* in the King's Courts took the place of verbal complaints.
   (d) *Trial by duel* introduced from Normandy.
   (e) *Sworn inquest* also introduced in civil matters, leading up to trial by jury; but as yet the jurors are witnesses, and not, in the proper sense, judges.
   (f) *Habeas corpus* (perhaps) introduced.

6. **The law is nationalized,** and the common law of England obtains instead of most of the local customary laws, though the latter were not all superseded.

CHAPTER III.

Edward I. to Richard III. (1272—1485).

General.—Speaking of the reign of Edward I., Reeves, in his *History of the English Law*, remarks: "We now enter upon a period when the law made a very great and sudden advancement. It is generally agreed that this is, in no small degree, to be ascribed to the wisdom and activity of the prince on the throne, who, through his long reign, and, indeed, within the first thirteen years of it, laboured more than any of his predecessors to improve our judicial polity in all its parts. So successful were his endeavours, and so permanent have been their effects, that Edward I. has obtained with posterity the distinguished title of the English Justinian."

And, indeed, Edward I. fully deserved the eulogium of Chief Justice Herle, who pronounced him "the wisest king who ever was."[1]

The reign is marked in the history of the constitution. It is even more memorable in the history of law, as the enumeration of the statutes will show. *Quia Emptores*, the first and second Statutes of Westminster, *De Donis Conditionalibus*, the Statute of Acton Burnel, *De Mercatoribus*, and the Statute of Mortmain do not exhaust the list of important legal enactments of this reign.

After Edward I. there was little legislation of interest or value to the lawyer until after the Wars of the Roses. The legal history of the rest of the period we are now con-

[1] Year Book, 5 Edw. III. 14.

sidering consists for the most part of the development and interpretation of the law as it was left by the English Justinian. There is only one other piece of legal history of the first importance, and that is the evolution of the Court of Chancery, under Edward III.

Real Property: Statute De Donis: Estates tail.—Two important alterations were made in **the law of real property.** The first was, by the first chapter of the Statute of Westminster II., generally called the Statute *De Donis Conditionalibus* (Edw. I.), which created estates tail. It was a common form of gift of real estate "to the feoffee and the heirs of his body," by which limitation the donor sought to keep the land in the family of the donee, and if the donee had no family, for the land to revert to the donor. But the lawyers interpreted these words to mean that if the donee had an heir of the body born alive the estate became his in fee simple; in other words, the gift was a conditional fee simple. The Statute *De Donis* reversed the interpretation of the lawyers, declaring that in future "the will of the donor, according to the form manifestly expressed in the charter of gift, shall be observed," so that the donee should not be able to prevent the land going to his issue so long as there were any who could take under the charter; and on failure of such issue, the land should revert to the donor or his heir. Henceforth a limitation to "A. and his heirs of his body" gives an estate tail, absolutely alienable by the tenant.

Fines and Recoveries.—There was a method of conveyance known in very early times as a fine, which was a fictitious action used either to convey land or to strengthen the title of the holder by having his title recorded on the rolls of a court of justice. **Recoveries** were also fictitious actions used for alienation or for the *alteration* of titles and estates. A fine had the effect of a judgment by default on

a compromise, and it bound only the parties to the suit and their heirs and all who claimed through them; it did not bind any other person. A recovery, on the other hand, was a judgment in a real action, and, therefore, bound the land; nor could it be disputed by anyone whomsoever. Feigned recoveries were very much in use by the clergy to evade the mortmain laws, as is evidenced by the statute 13 Edw. I. c. 32, which was passed to prohibit the practice by "religious men." How far, or when first, recoveries and fines were used to evade the Statute *De Donis* is not precisely known,[1] but we know that in *Taltarum's Case*, recorded in the Year Book, 12 Edward IV., a tenant in tail converted his estate into a fee simple by this means. The process was this: A friendly plaintiff pretended that he had a better title to the land than the original donor in tail; he accordingly brought action by writ of right against the tenant in tail; the latter pleaded that the land had been given to him in tail by X., a person who had nothing at all to do with it, who had warranted his title. X. was made a party to the suit by a process called "vouching to warranty," and it became his duty to defend the action; but he was then "imparled" by the friendly plaintiff, that is, they went out of Court together and the "vouchee" did not return. The case was called on for trial, and as the vouchee did not return, judgment was given against him in this fashion, that the (friendly) plaintiff recover the land in fee simple, and that the tenant in tail recover against X. (supposed original donor of the estate tail) other land of equal value.

The whole proceeding was a series of transparent fictions, but it was allowed by the judges, it is said, at the instance of the king himself. The effect of the judgment against the tenant in tail was to bar his issue from claiming the land under the gift, and the special virtue of the "vouchee"

[1] In the reigns of Henry IV. and Henry V. some doubt began to be entertained whether a recovery suffered by a tenant in tail was not good against the issue: Reeves' Hist. Eng. Law, ii. 573.

seems to have been to destroy any claim by the real donor of the estate. It is to be noted that *Taltarum's Case* was not a recovery, nor was it an action brought to contest the validity of recoveries in general, but it established *by implication* the right of a *tenant in tail* to suffer judgment to go against him in one of these suits. Thus we see, that in the period under consideration, estates tail were created, and after remaining in full force for 200 years were allowed by the courts of law to be evaded.

Quia Emptores: Alienation of Land.—The second statute of cardinal importance is 18 Edw. I. c. 1, commonly called the Statute *Quia Emptores*,[1] so called because the statute begins with those two words. It has been elsewhere stated (p. 12) how a freeholder holding of the king or of any other lord might subinfeudate, *i.e.* enfeoff another freehold tenant to hold the land of him, and thus in turn to become a lord. It has also been shown (p. 15) how the right of alienation was doubtful, and what restrictions were placed upon it by Magna Charta. The statute now under consideration was simple but far-reaching. It enacted, (1) "It shall be lawful to every freeman to sell at his pleasure his own lands or tenements, or any part thereof," provided (2) that "the feoffee (purchaser) shall hold that land or tenement of the same chief lord, and by the same service and customs, as his feoffor held before." The effect of the first part of the Act is obvious; the effect of the second part is this:—A. is the tenant by knight service of X. A. sells to B. B. becomes the tenant of X., on the same terms that A. held by. Before *Quia Emptores* A. might enfeoff B., so that B. would hold of A. and A. would hold of X.

Mortmain.—Two statutes of Edward I. deal with mortmain. *Mortmain* (dead hand) was applied to the holding of

[1] Literally = "whereas purchasers."

lands by religious persons who were dead in law, and also by corporations, whether ecclesiastical or not. The reason of the dead-set made against allowing land to be given or even sold to religious houses was that these bodies were not liable for the services due to the lord of the fee, and we can understand the feeling of the great lords against allowing their "fees" to become the property of the Church. An attempt to check the practice had been made by Magna Charta, but this only applied to "religious men," and it had been plentifully evaded by means of recoveries. The Statute *De Viris Religiosis*[1] (7 Edw. I. st. 2, c. 13) mentions these evasions, and provides against colourable gifts and leases, and "craft or engines" to defeat the law. *No gift or sale in mortmain is to be made without the licence of the lord of the fee*, and the penalty is forfeiture of the land in the first instance to the immediate lord of the fee, or if he does not claim it, then to next chief lord and so on; and if none of the mesne lords claim, then to the Crown. But still the religious men found ways and means, especially by collusive actions, to "drive a coach and six" through the statute, until six years later, by the 32nd chapter of the Statute of Westminster II., the justices were ordered to impanel a jury whenever "religious men and other ecclesiastical persons" claimed land and the defendant did not appear to defend the suit. The jury were to try whether the "religious men" really had the title which they set up, or whether it was only a friendly and collusive suit. After this drastic measure the clergy had to try another tack, and in course of time they discovered Uses (see p. 54). The law as Edward I. left it, remained practically the same down to modern times.

Writ of Waste.—*By the Statute of Gloucester* (1278) owners of land not in possession were protected from waste

[1] Literally = "concerning religious men."

or destruction of the property by tenants who had only a limited interest. *Writ of Waste* was to be granted against tenants by the curtesy, tenants in dower, and tenants for life or for years; and the penalty to be exacted from them was threefold the amount of the damage done.

The Law of Real Property settled.—Beyond the statutes just referred to, there was no legislation of importance on the subject of real property until Henry VIII. Littleton's Tenures, written in the reign of Henry IV., is invaluable as showing the law of the time on this subject, and should be consulted by all who desire a true knowledge of English real property law.

Copyholds.—From it we learn that by decisions of the Courts—when is not precisely settled—the tenant in villeinage, who held purely at the will of his lord,[1] had become a **tenant by copy of court roll according to the custom of the manor.** Fixity of tenure had been secured to him so that, as it was forcibly put by Coke, "copyholders stand on sure ground; now they weigh not their lord's displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely; only having a special care of the main chance, to perform carefully what duties and services soever their tenure doth exact, *and custom doth require.*" In Littleton's time, indeed, far from being a mere tenant at will, the copyholder had an alienable interest in the land. In form, the vendor of a copyhold surrendered the land to the lord, but it was *to the use of the purchaser,* whom the lord was bound to admit, and if he did not he could be compelled by suit before the Chancellor. Littleton quotes Brian, C.J.: "His opinion hath always been and ever shall be, that if tenant by custom paying his services be ejected by the lord he shall have an action of trespass against

[1] *Supra*, p. 12.

him."[1] "And so was the opinion of Danby, C.J., in 7 Edward IV.,"[2] which seems to show that the opinions of these judges were delivered on points then not free from controversy.

Procedure.—The legislation of Edward I. was also directed to reform the procedure of the Courts. No suit for trespass to goods could lie in the King's Court for less than forty shillings damages: this was intended to prevent men being put to the expense of attending the Courts in Westminster to answer trifling charges (Statute of Gloucester, c. 8). To prevent collusion, whereby the ends of justice were defeated, inquests of murder are to be taken by lawful men chosen by oath, *and of no affinity to the prisoner.*

Prescription in Real Actions.—Periods of Prescription were prescribed for the real actions in order to defeat stale claims. The Writ of Right was not to issue where the claim was older than Richard I.; Novel Disseisin, where the claim arose before the first voyage of Henry III. to Gascoign, and so on; but there was no prescription or limitation of personal actions (Statute of Westminster I., c. 39).

Other Reforms.—The champion in the Writ of Right should not be compelled to swear that he or his father saw the seisin of his lord or his ancestor, and that his father commanded him to defend that right (Statute of Westminster I., c. 40). Penalties were imposed on sheriffs and defendants who caused delay in suits; and we find three or four clauses in the Statute of Westminster I. (cc. 45, 46 *et seq.*) evidently intended to check the law's delay. By c. 42, suitors were allowed to sue by attorney, thus obviating the necessity of personal attendance in court on each stage of the action.

[1] Year Book, 21 Edw. IV. [2] *Ibid.*, 7 Edw. IV.

Statute of Westminster II.—By the Statute of Westminster II. (1285), a long statute of fifty clauses, many other legal changes were made. By c. 15, an infant *may* sue by his next friend: a provision construed to mean that an infant *must* sue by next friend. By c. 19, when there is no executor to administer the deceased's effects, the Ordinary (an official of the bishop's court) must pay the debts, as the executor would have been bound to do. The *action of waste* may be maintained by one tenant in common against another (c. 22).

Land liable for Debts: Elegit.—But the more important clauses are 1, 18, 24, and 30. Cap. 1, generally called the Statute *De Donis*, has already been dealt with. The eighteenth clause gives to creditors who have obtained judgment for their debts the right to have the land of the debtor taken in execution to satisfy the judgment. The writ of execution against land was called *elegit*, because the creditor might *elect* to take the land, a remedy that has remained to the present day.

Actions on the Case.—A still more important change was made by cap. 24 of this famous statute. The common law, even at this early stage, was highly inflexible. The judges interpreted the maxim, "Where there is a wrong there is a remedy" into meaning that where there is no remedy there is no wrong. The clerks in Chancery, who issued the writs, at a very early period decided that where they could not find a precedent they would not grant a writ. Those who have had any experience of Government departments will at once recognize this trait of the official mind. The consequence was that an unfortunate suitor who could not bring his complaint within the four corners of an official writ had no redress. The evil was so great as to cry aloud for a remedy, and accordingly was dealt with by a clause of the Statute of Westminster II. "Whensoever from henceforth it shall

fortune in the Chancery that in one case a writ is found, and in *like case*,[1] under like law and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree; and let them refer themselves until the next Parliament, that by consent of men learned in the law a writ shall be made, lest it might happen after that the Courts should long time fail to minister justice unto complainants." From this time arose "actions on the case," so called because the writs were framed *in consimili casu*. If the Common Law Courts had taken full advantage of the powers given them by enactment, there would probably have been no need for the Court of Chancery; but they did not seize the opportunity, and more than once refused to allow the validity of new writs.

Nevertheless, many actions on the case were allowed. For instance, in the case of *trespass*, which was a malfeasance, or wrongful invasion of the plaintiff's property or person, the writ of trespass on the case extended the remedy to a misfeasance, or improperly or negligently performing what had been agreed to be performed. *E.g.* A. had agreed to carry B.'s horse across the Humber, and by overloading the boat the horse was lost. At common law B. had no remedy. He could not have the writ of trespass, because *A. had not taken possession of the horse wrongfully*. He could not have the writ of covenant, because *the agreement was not by deed*. There was, in fact, no common law writ to meet the case; but in 22 Edw. III. the judges allowed a writ of trespass on the case because the facts were similar to those of trespass. Out of this grew

The Law of Simple Contract.—Up to this time no action would lie for breach of a simple contract, *i.e.* a promise not

[1] The original Latin is "*in consimili casu.*"

contained in a sealed deed, except for debt.[1] But in the forty-second year of Edward III. we find a dictum to the effect that if A. promised B. £10 if B. married A.'s daughter, an action of trespass on the case would lie if A. did not perform the contract. One is surprised to find this adjudged to be "a like case" to trespass. The reasoning was—if A. wrongfully seized B.'s property (*malfeasance*) it was *trespass*. If A. promised to do something for B., and did it so negligently (*misfeasance*) that B. suffered loss thereby, it was *like trespass*. If A., by promising to do something for B., induced B. to do something and then A. failed to do his part (*non-feasance*), B. had sustained loss by relying on A.'s promise, and this was *also like trespass*. On such an ingenious, though scarcely convincing, piece of judicial reason rests the whole of the English law of simple contracts, by which a promise given for valuable consideration is enforceable by the Courts. For if there were no valuable consideration—that is, if B. had not put himself in a worse position, either by doing something, or paying or promising to do or pay something, he had suffered no damage, and therefore had no action. It was not long before the Action on the Case almost entirely superseded the action of debt. The reason was that in Debt the defendant could wage his law (see p. 8), and so escape paying a debt at the expense of perjury; while in an action on the case wager of law was not allowed. Coke says,[2] "Wager of law lieth not when there is a specialty or deed to charge the defendant, but when it groweth by word, so as he may pay or satisfy the party in secret, whereof the defendant having no testimony of witnesses may wage his law, and thereby the plaintiff is perpetually barred, as Littleton, sect. 514, saith; for the law presumeth that no man will forswear himself for any worldly thing; but men's consciences do grow so large (specially in this case passing with impunity)

[1] *Vide, supra*, p. 27.

[2] Co. Litt. 295 *a*.

as they choose rather to bring an action upon the case upon his promise, wherein (because it is trespass *sur le case*) he cannot wage his law, than action of debt."

The Law Merchant: Statutes Merchant.—Mercantile law of this period is very scanty, probably because commercial transactions were in the hands of a limited class, who were all members of various trades' and merchants' guilds, who had either courts of their own or preferred to pursue each other before certain local courts. The Mayor's Court, London, and the Court of Passage, Liverpool, are survivors of these ancient jurisdictions. It is obvious that, at a time when even the King's Courts had a difficulty in executing their judgments, these local tribunals had a much greater difficulty. Especially was it the case when a judgment debtor did not live in the locality. By the Statute of Merchants (1285), amending the Statute of Acton Burnel (1283), a simple way of enforcing mercantile debts was provided. The merchant could summon his debtor before the Mayor of London, York, or Bristol, to acknowledge the debt and day of payment. A recognizance was to be entered, and the mayor's clerk to make out a bill obligatory, sealed by the debtor and the king's seal. This was called a *Statute Merchant*, and is the first instance, so far as we know, of the royal authority being extended to validate mercantile contracts. If the debtor did not pay on the day named, the creditor must produce the bill to the mayor, "who shall incontinent cause removeables of the debtor to be sold to pay the debt." We find, also, in the Year Books of Edward III. cases where the assistance of the Chancellor and the Council is invoked in cases where alien traders were concerned. In one case, in 1389,[1] a merchant of Genoa who had his ship lying in the Thames petitions the Lord Chancellor for justice against three other Genoese merchants

[1] Select Cas. in Ch., p. 9 (Selden Society's Publications, vol. x.); see also, same volume, p. 3.

who owe him large sums of money, and craves a speedy remedy. The petitioner states that his ship is lying unfreighted, that certain creditors of his in London are unpaid, and that he cannot afford to wait the length of time necessary to prosecute an action at common law. The order made on the petition was to command the defendants to appear before the King in his Council in his Chancery "on Friday next."

Imprisonment for Debt.—If the debtor had no moveables within the mayor's jurisdiction, but had some within the realm, the mayor must send the recognizance to the chancellor, who shall send a writ of *fieri facias* to the sheriff in whose county the goods were. If the debtor had no goods he should be imprisoned.

Sedition.—The **criminal law** also received attention in the time of the Edwards. Edward I. enacted, "from henceforth none" should be "so hardy to tell or publish any false news or tales, whereby discord, or occasional discord or slander, may grow between the king and his people or the great ones of the realm."[1]

The law of treason had, as has been shown,[2] been extended by the subtlety of the Norman lawyers. The process was checked by the famous Statutes of Treason of Edward III. (1352). The offence was cut down to the following:—

(1) Compassing or imagining the death of the king, queen, or their eldest son.
(2) Violating the queen, the king's eldest unmarried daughter, or his eldest son's wife.
(3) Levying war against the king in his realm or adhering to his foes.
(4) Counterfeiting the king's coin or seal.
(5) Slaying the chancellor, treasurer, or judges while in the discharge of their duty.

[1] Statute of Westminster I. c. 34.

[2] *Supra*, p. 21.

Pleadings.—Written Pleadings now came into use. Instead of the verbal altercations between the parties by which they arrived at an "*issue*," the plaintiff put his case in writing, and delivered it to the defendant. To this the defendant replied, and the plaintiff then rejoined on the reply. It seems that these written altercations might go on indefinitely; beginning with the plaintiff's declaration, followed by the defendant's plea, they went on through the mazes of the reply, the rejoinder, the sur-rejoinder, the rebutter, the sur-rebutter, and so on alternately by each party.

Indictments in Writing.—As the reader has seen, the old way of putting a prisoner on his trial was for some men of the vicinage to "present" him to the sheriff or the judges in eyre, swearing that they believed him to be guilty of some crime. This was called "indicting" the prisoner. Under Edward I. the practice arose of putting all **indictments in writing,** and until 1916 there might be seen at assizes or sessions a parchment document almost exactly the same as that used in 1320, save that at first it was writ in Latin—for the better understanding of the prisoner, it is supposed—and afterwards in English:—

"Middlesex } The jurors on their oath present William
to wit. } Styles that he did on the tenth day of March in the year of our Lord one thousand nine hundred and seven one pair of boots of the value of fivepence sterling the property of Thomas Smiles feloniously steal take and carry away against the peace of our Sovereign Lord the King his Crown and dignity." There is the same simplicity of phrase, the same terseness of statement, the same allegation of a breach of the peace, and the same entire absence of punctuation as our forefathers, the grand jurors of Edward I.'s time, exhibited.

Certainty of Criminal Pleading.—Until 25 Edward III. it was not uncommon for a man to be put on his trial as

"a notorious thief" or a "general oppressor" or upon some other vague and general charge. Edward III., carrying on the policy inaugurated by Edward I., forbade[1] men to be put on trial unless the indictment stated *specifically* the acts which were going to be alleged as criminal. From that day to this, *uncertainty* in an indictment is a fatal error, and the principle has become well established that the prosecution must let the prisoner know beforehand of what he is accused in such a manner that he can properly prepare his defence.

Commissioners of Assize.—"The great judge and the little judge, The judges of assize," as Hood calls them, first appear in the reign of Edward I. **The circuit, or assize system,** no doubt took its rise from the Justices in Eyre; but the judges of assize as they exist at the present time were developed in *temp.* Edward I., and are the creation of the hereinbefore much-quoted Statute of Westminster II. By clause 30 of that Act the justices itinerant were given power to try all civil cases by means of the writ *Nisi Prius.* Before this, the justices itinerant seem to have confined themselves to pleas of the Crown and various real actions known as assizes. But from this time the justices went on circuit by virtue of a special royal commission of *Gaol Delivery, Oyer and Terminer, Assize,* and *Nisi Prius.* This gave them power to deliver all the gaols, *i.e.* by trying all those who had been imprisoned on a charge of crime; to hear and determine (*Oyer and Terminer*) all things affecting the royal peace, crown, and dignity; and all writs of assize (*Mort d'Ancestor, Novel disseisin, nuisance,* and the like); and also try such cases as should be brought before them on a writ of *Nisi Prius.* The commission could be issued not only to the king's justices, but also to anyone else. In fact, it was as commissioners they sat, even though they might also be justices.

[1] 25 Edw. III. c. 3.

The Writ of Nisi Prius.—At Common Law, when an issue was joined, the plea concluded "therefore of this the said A. B. prays may be inquired of by the country," or "and of this he puts himself upon the country." Thereupon the Court awarded a writ addressed to the sheriff of the county where the venue of the action was "that he cause to come *here*" (*i.e.* to Westminster) on such a day, twelve *libros et legales homines*—that is, a jury. This was called the writ of *Venire Facias*. The intolerable inconvenience of summoning a jury from (*say*) Westmorland or Devon to try an action at Westminster caused a practice to spring up of continuing the cause from term to term until such time as the justices in eyre were about to visit the county, and then of transferring the cause to those justices. The Statute of Westminster II., c. 30, ordered that in future there should be inserted in the *Venire Facias* the words that the sheriff should command the jurors to come to Westminster on such a day in Michaelmas or Easter terms "*nisi prius*" (unless before) that day the justices appointed to take assizes shall come into his said county. To this day the justices of assize, when they sit to try civil actions, are said to be "sitting at *Nisi Prius*." In the time of Elizabeth the writ of *Nisi Prius* was extended to actions tried at Westminster (see p. 75).

THE COURT OF CHANCERY AND THE COUNCIL.

We have seen how in the preceding period the three Courts of Common Law were established, all growing out of the justices who, presided over by the Great Justiciar, formed an essential part of the *Curia Regis*.

The formation of the separate Courts of Exchequer, Common Pleas, and King's Bench, took away most of the legal business from the Council; but some was still left. It consisted of appellate jurisdiction over the three Courts of Common Law, and original jurisdiction, not bounded by the

law, but used to "give redress to all men according to their deserts." It was, in fact, the remnant of the King's Prerogative of Justice. This jurisdiction was exercised by the King in his Council in his Parliament. The word Parliament simply means the magnates of the realm, earls, barons, judges, prelates, and such councillors as the king summoned to attend. The Council consisted of such of these as the king called specially to advise him in judicial business. It exercised the same functions as the House of Lords and the Privy Council afterwards exercised. In Richard II. the Council no longer sat in Parliament; and the jurisdiction of the Lords and the Council became distinct. In course of time the Lords only heard appeals by writ of error. The Chancellor was an influential member of the Council in Parliament, and afterwards of the Council. He was, in fact, the head of the legal department, for out of his office all writs issued. The original procedure in the Council in Parliament was by petition.

These petitions were addressed to the King, and were considered by him in Council. Some cases came within the Common Law, and these would be met by the issue of a writ; others were matters of grace and favour, sometimes contrary to the Common Law, and at others of a special kind not within the *Consuetudo Curiæ*. The last kind would be decided generally by the Council, with the chancellor as the chief legal member of it. So that the chancellor's jurisdiction was derived from the Council.

But the establishment of the Chancery as a court of judicature did not take place until many years after. Until Edward III. we find petitions made direct to the chancellor. But it is very doubtful whether there was in this period a Court of Chancery—for the trial of causes—as a separate tribunal distinct from the Council. (See Chapter VIII.) It is important to remember that the chancellor was an administrator rather than a judge. His judicial duties only arose in the course of his office as chief legal member of the

Council, to which everyone was entitled to look for redress of any and every grievance. His separate judicial position grew upon him very gradually. It was not until somewhere about the reign of Henry VI. that any distinction appears to be made between the common law and the equity jurisdiction of the chancellor; and from about Henry VII. we see the rise of the modern Court of Chancery. From this time forth there was established in England a Court of Equity concurrent with the Common Pleas, the Exchequer, and the King's Bench. This Court of Equity invented new doctrines, new processes, and new remedies. To it our legal history owes uses and trusts, the specific performance of contracts, injunctions to prevent the continuance of a wrong, new principles governing the guardianship of infants, the recognition of rights of property in married women, and many other important doctrines, remedies, and forms of procedure.

The *Writ of Subpœna* is said to have been invented by John de Waltham, Bishop of Salisbury and Keeper of the Rolls, in the reign of Richard II. As a matter of fact, De Waltham did not invent the *subpœna*, he only adapted it to the use of the Court of Chancery; and it is by no means certain whether he was the first person to adapt it. The *Writ of Subpœna* was so called because it commanded the person to whom it was addressed to appear in the Court of Chancery on a certain day, and answer the complaint of the plaintiff. It was a flexible kind of process, easily adapted to any form that might be desired; and its efficacy was that, if the defendant did not appear as he was ordered, he was liable to be committed for contempt of Court. The device was the more easily accomplished, forasmuch as all the king's writs issued out of Chancery; although until his time they were all returnable in one of the three Common Law Courts. Despite many remonstrances by the House of Commons during the Lancastrian period, the new Court throve apace, and speedily established two important doctrines.

The first was the doctrine of Uses. The second was the right to issue injunctions to restrain acts not necessarily prohibited by the common law, but contrary to good conscience. Indeed, the whole of the Chancellor's jurisdiction was based on conscience, and this was necessarily so, seeing that it took its rise from the delegation to it of the king's conscience in matters of justice.

Uses.—The **Doctrine of Uses** was based on the idea that the person really entitled, as a matter of equity and good conscience, to the enjoyment of property, was not of necessity the person who had the actual possession of it, nor even the person who had the actual legal possession of it. The Court of Common Pleas could only recognize the person who was seised, because the various Writs of Right and Assizes were only framed so as to give relief to the person entitled to the seisin. Now seisin could only be acquired in certain stated forms: by descent from the person last seised, by feoffment with livery of seisin, or by one or two other prescribed modes. But the Court of Chancery did not ask whether or no a person claiming land had procured a formal conveyance. Did the last real owner intend the claimant to have the benefit of the property? If so, whoever had that kind of possession which the common law recognized must give the use and benefit of the land to him who had the conscientious right to it. Thus came a separation between the *use* and the *seisin*, the one being the ownership, recognized in Chancery, and the other the sole estate known to the ancient Courts of Common Law. The word *user* comes not from *usus*, but from the Latin *opus*, old French *os*. Sir Frederick Pollock and Mr. Maitland point out that before the Norman Conquest we may find a man saying that he conveys land to a bishop *to the use* of a church.[1] The earliest reliable reference to the Use occurs in 50 Edward III. c. 6,

[1] Pollock and Maitland, vol. ii. p. 226.

giving creditors execution against lands and chattels in spite of *gifts to uses* made in defraud of them. 7 Richard II. c. 12 forbids aliens, and 15 Richard II. c. 5 forbids spiritual persons and corporations, to hold lands by *way of use*; and 1 Richard I. c. 1 makes all grants by, and executions against, a settlor or grantor of lands binding on his heirs and *feoffees to uses*. It will be seen that these statutes refer to uses as already in existence; and it is a traditional belief that they were invented by the clergy in order to defeat the Statutes of Mortmain.[1] However this may be, it is safe to say that uses, or equitable estates, first came into prominence in the period from Edward I. to Richard III., and were fully established before the end of that period. After the Statute of Uses (Henry VIII.) the use became a trust. Sir Robert Atkyns, in the case of *The Att.-Gen.* v. *Sands*,[2] says, "a trust is altogether the same that a use was before 27 Henry VIII. (*Statute of Uses*), and they have the same parents, Fraud and Fear, and the same nurse, a Court of Conscience." The first recorded "bill" in equity which turns upon a trust is *Dodde* v. *Browning*, reported in 1 *Calendars* xiii. in one of the first four years of Henry V.

Procedure in Chancery: Petition: Bill.—The procedure in Chancery was entirely different from that at common law. To begin with, all the proceedings were in English. No writ was required to give the chancellor jurisdiction, because he simply exercised the prerogative of the king to grant relief in matters of grace and equity.[3] The party who wanted redress for his wrong presented a *Petition* to the Court, which petition was afterwards called a *Bill*. This bill[4] commenced the proceedings. It contained a statement

[1] Gilb. *For. Rom.* 17.

[2] Hard. 491 (20 Car. II.).

[3] The word *equity* is here used in its widest sense as meaning justice or right, apart from any question of legal right.

[4] From *libellum*=a writing.

of the facts alleged by the plaintiff, and if it disclosed a case for interference the *subpœna* was issued, commanding the defendant to appear on such a day and make answer. At first, no doubt, the defendant appeared in person, but gradually a practice arose by which he was allowed to submit a *written* answer *on oath*. The power to compel a man to answer a complaint on oath was one of the secrets of the success of the new Court; for at the common law the defendant was not allowed to give evidence on his own behalf, much less could he be compelled to submit to an examination by the plaintiff.

Discovery: Interrogatories.—Hence arose the practice of filing a bill in Chancery, in the form of a long string of questions, to which the defendant had to reply in writing and on oath. When a party to a common law action wanted to get at evidence of facts known only to the other party, he would file his bill of interrogatories in Chancery and read the answers in the action at common law. The same thing happened in the case of documents. If the other party had documents in his hands, there was at common law some difficulty in compelling him to produce them at the trial. For one thing, you might not know quite what documents he had, and you could not ask him, because he could not give evidence. But in Chancery you could file a bill to compel him to discover on oath and in writing what documents he had in his possession relating to the case. This was called a Bill for Discovery of Documents.

Injunction to restrain Action at Common Law.—Before the end of the Yorkist line the Chancery had grown in power to a wonderful extent. It had invented the searching procedure by bill: it had fostered the system of uses; it had discovered the injunction; and had found out how, by that formidable weapon, to override the common law, when the latter was in conflict with the principles of good conscience.

Suppose A. had a right of action against B. by the common law and not by the rules of the Chancery, A. began his action in the King's Bench or the Common Pleas, B. promptly applied to the Lord Chancellor, by bill, stating the facts; *and the chancellor issued an injunction commanding A. not to go on with his action at common law.* If A. disobeyed the injunction he was guilty of contempt, and the Court of Chancery would send him to prison.

These instances have been given to show what, in the early days of the Court of Chancery, were the motives of its jurisdiction. (1) Where the common law had no remedy, as in the case of uses; (2) where the Common Law Courts had no procedure, as seen in discovery; (3) where the common law, relying merely on some technical formal ground, worked a manifest hardship. In these cases the chancellor would interfere.

At the time with which we are dealing the jurisdiction of equity was very vague. Its principles were still more undefined. "Equity is the length of the chancellor's foot," said a wit; and he was right.

Justices of the Peace.—Besides the Chancery Court which was concerned with civil matters, Edward III. set up in every county a tribunal far from ostentatious, but in reality of great power. This was the tribunal of the **Justice of the Peace.** Long before Edward III. there had been certain men in every county who were bound to preserve the king's peace. They consisted of the sheriffs, the king's constables and bailiffs, and a few others—all *ex officio.* They could arrest disturbers of public order, and hold them in prison or bail them; and from the nature of their duties were called "Conservators (*i.e. preservers*) of the peace."

1 Edward III. c. 16.—But Edward III. appointed in each shire "good men and lawful, that were no maintainers of evil or barrators in the county, *to keep the peace.*" This,

the first Act on the subject, merely adds to the *ex officio* conservators a number specially appointed by the crown.

4 Edward III. c. 2.—The Jurisdiction was speedily extended; for only three years after their creation, the keepers of the peace were empowered to receive accusations, and act on them by committing the accused to prison to wait the coming of the judges of assize, when such keepers were ordered to send their indictments before the said judges. In this we see the origin of the *preliminary jurisdiction* of justices in petty session, *i.e.* the jurisdiction to inquire into an allegation, and, without trying the prisoner, to see if any *primâ facie* case is made out against him. If the accusation is altogether frivolous, or the evidence very flimsy, the prisoner is allowed to go; but if not, he is committed to the assizes or sessions to be tried.

34 Edward III. c. 1.—There are other statutes of the same reign dealing with the powers of the Keepers of the Peace, and conferring a more and more extended jurisdiction, and we come at last to 1360, when a consolidating Act was passed. In every county there shall be one lord, "and with him some three or four of the most worthy in the county, with some learned in the law," to keep the peace (s. i.). They are to have power to "pursue, arrest, take, and chastize them according to their trespass or offence" (s. ii.). They may imprison or punish according to the law and custom of the realm (s. iii.), and also inform offenders and "inquire of all those that have been pillors (? pillagers) and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past" (s. iv.). They may arrest and imprison all those they may find by indictment or suspicion, and take surety or mainprize for the good behaviour of those "that be not of good fame. To the intent that the people be not by such rioters or rebels troubled nor endangered nor the peace blemished" (ss. v. and vi.). We find in this clause one of the most important functions of the new tribunal, namely,

that of preventing crime by "binding people over" to keep the peace or be of good behaviour.

Conservators, now called Justices of the Peace.—Further, the justices of the peace, as they now began to be called, might hear and determine at the king's suit all felonies and trespasses done in the county (s. vii.), but all fines imposed by them for trespass must be reasonable and just (s. x.).

Appeal from Justices of the Peace to the King's Bench.—From the very creation of the office, the Court of King's Bench assumed an appellate jurisdiction by means of the writs of certiorari and mandamus. By means of these a subject could always appeal to the King's Bench against a conviction wrong in point of law, or against an unfair trial. The first mandamus found in the books directed to justices of the peace is in Edward IV.

1 Edward IV. c. 2: Quarter Sessions.—The Statute 34 Edward III. c. 1 gave the justices of the peace the power to take indictments. An Act of the next Edward greatly enlarged this power by wholly denuding the Sheriff's Tourn of all criminal jurisdiction and giving it to the justices of the peace sitting in Quarter Sessions. The reason given in the preamble of the statute is the corruption of the sheriffs, who, it appears, allowed much licence to their menial servants to arrest people on their own responsibility. It is not impossible that Parliament was easily persuaded to abolish the ancient but tumultuous and popular Court of the Sheriff.

The King's Peace: Extension of the Theory.—The **King's Peace:** Before the end of this period the theory of the *Pax Regis* had extended to its full limits. In the time of Edward I. it was still law that there must be *some* violence to constitute a crime a breach of the peace, and so a plea of the Crown. But very soon after it became customary to allege in all indictments that the offence was committed "*contra pacem domini regis,*" an allegation which the

accused was not allowed to deny, even when there was no suggestion of violence having actually been used. Even up to 1916, if some pupil of Fagin snatched a pair of boots from a shop door and ran away with them, he was indicted that he did "feloniously steal take and carry away" the boots "against the peace of our Sovereign Lord the King his Crown and dignity." The effect of inserting the allegation *contra pacem*, &c., was to enable every prosecution to be conducted in the name of the Crown. It is owing to this, in great measure, that appeals of felony fell into disuse, and were almost, though not quite, obsolete before the reign of Henry VII. It was a displacement of private vengeance by public justice.

SUMMARY OF THE PERIOD.

Edward I.—Richard III. inclusive.

1. **Real Property:**
   (a) Freeholds are made alienable *inter vivos*; but sub-infeudation is put an end to (*Quia Emptores*, Edward I.).
   (b) Entails are established (*De Donis*, Edward I.), and continue in full force and effect until *Taltarum's Case*, when the courts emphatically decide in favour of common recoveries as a means of barring entails (Edward IV.).
   (c) Copyholds, formerly tenants in villeinage, gain security of tenure, and no longer hold at the will of the lord.
   (d) Various slight changes are effected, *e.g.* the writ of waste is given against limited owners.

2. **Law of Treason** is codified and simplified (Edward III.).

3. **The Law of Simple Contract,** *i.e.* that a party who has given valuable consideration for a promise can bring an action for damages if the promise is broken, dates from this period (precise date not known).

4. **The Courts of Justice:**
   (a) The Council, sitting as the Court of Chancery, is found established as a Court of Equity.
   (b) Justices of the peace are created with a local criminal jurisdiction. Quarter Sessions take the place of Sheriff's Tourn.
   (c) Justices of assize, *i.e.* with a commission of gaol delivery, oyer and terminer, assize, and *nisi prius* are appointed instead of justices in eyre (Edward I.).

5. **Procedure:**
   (a) Indictments begin to be in writing (Edward I.), and are ordered to be certain and definite (Edward III.).
   (b) Written pleadings take the place of verbal altercation between the parties in civil causes (about Edward I.).
   (c) Bills, petitions, and the *subpœna* are used in Chancery (Richard II.).
   (d) "Actions on the case" are introduced by virtue of the Statute "*In Consimili Casu*" (Edward I.).

CHAPTER IV.

Henry VII. to Elizabeth (1485—1603).

General.—The Tudor period, though one of the most important in the history of England, politically and economically, presents a singular lack of material for the purely legal historian. The legal changes were few. The common law by this time was fairly well ascertained, thanks to the labours of Britton, Fortescue, Hale, Littleton, the author of the Fleta, and a few other diligent text-writers. The decisions of the judges had begun to be recorded in the Year Books, to the greater certainty of the law, and for the better guidance of their successors.

During the reign of Henry VII. the attention of Parliament was fully occupied with measures for recruiting the national energies, so seriously shaken by the prolonged Wars of the Roses. Henry VIII. was busily and continuously engaged in consolidating the royal power, and in domestic and religious undertakings. Mary's time was taken up in trying to restore the religion so ruthlessly pulled down by her father and brother; and in the reign of Elizabeth men's minds were full of religion and of wealth.

Yet it must not be thought that the law stood still. Some changes there were, one of them, at least, of the first importance to lawyers. But the chiefest feature of the legal history under the Tudors was the steady consolidation of the common law, as will be seen when it is stated that the great works of Coke, embodying that consolidation, appeared immediately after the end of Elizabeth's reign.

The Statute of Uses (27 Hen. VIII. c. 10).—The **law of real property** underwent considerable changes, the moving cause being the Statute of Uses, an Act more important to the conveyancer than any other—so important, indeed, that writers on real property law always call it "*the* statute." The object of the statute can best be gathered from its preamble, which, in the manner of those times, set forth at great length the ills and grievances by which legislation had been called forth.

Summary of Statute of Uses.—*Preamble*: Whereas by the common laws of this realm lands, tenements and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record (*e.g. fines and recoveries*), writing sufficient made *bona fide*, . . . yet nevertheless divers and sundry imaginations, subtle inventions and practises have been used, whereby the hereditaments of this realm have been conveyed by fraudulent feoffments, fines . . . (&c.) craftily made to secret uses, intents, and trusts, . . . by reason whereof, and by occasion of which, fraudulent feoffments . . . (&c.) to uses, confidences, and trusts, divers and many heirs have been . . . disinherited, the lords have lost their wards, marriages, reliefs (*and other feudal incidents*), . . . the king's highness hath lost the profits of the lands of persons attainted, . . . and many other inconveniences have happened . . .; *for the extirping and extinguishment of all such subtle practised feoffments* (&c.) . . . it is enacted:

(a) That where any person *stand or be seised* of and in any . . . *hereditaments*, to the *use, confidence, or trust* of *any other person or persons*, or of any body politick . . . that in every such case that or *those persons which have or hereafter shall have any such use, confidence, or trust* in any such lands . . . or hereditaments, *shall* from henceforth be deemed to *have such estate, possession, and seisin*

of and in the lands . . . and other hereditaments as he or they had before in the use, confidence or trust of the same lands . . . or hereditaments.

The object of the statute was, it will be seen, utterly to destroy the doctrine set up by the Court of Chancery of the distinction between the seisin, or legal estate, in land, and the use, or beneficial estate. How it utterly failed to accomplish that object will be seen. Two or three points are to be noticed:

(1) Some person must be *seised* of the land. The word "*seised*" applied only to the possession of an estate of freehold;[1] therefore, if A. was possessed of a term of years, *i.e.* a leasehold, to the use of B., the statute did not apply. For the same reason it did not apply either to copyholds or to goods and chattels.

(2) He must be seised to the use of *another*; therefore, if there was a feoffment "to A. and his heirs, to the use of A. and his heirs," the statute did not apply.

(3) There is nothing in the statute to take away or diminish the jurisdiction of the Court of Chancery as a court of conscience, which would enforce an obligation conscientious though not legal.

(4) The statute *did not destroy the "use."* It only clothed the use with the seisin, taking that seisin out of the legal feoffee. *E.g.* if A. was seised in fee simple to the use of B. for life, and after his death to the use of C. for life, and after his death to the use of D. in fee simple, the effect was: To B.'s use for life is added the seisin for life (leaving the rest of the seisin in A.). When B. dies, C.'s use for life receives a seisin for life to clothe it. When B. and C. are dead, D.'s use arises, and it is clothed with a seisin of the same magnitude, *i.e.* the use being in fee simple, the seisin is of the fee simple, and as a fee simple is

[1] *Supra*, pp. 25-27.

the largest possible estate in land, the seisin given to A. is exhausted.

As has been shown, the statute did not quite destroy the equitable doctrine of the separation of legal and beneficial estate (*vide supra*). That theory still took effect with regard to copyholds and leaseholds, and goods and chattels.

Tyrell's Case: 4 & 5 Philip & Mary: Trusts.—The old doctrine was soon to be revived, under another name, it is true, but of the same nature and substance, by one of the most important cases to be found in the reports. One Jane Tyrell, in the fourth year of Edward VI., for the sum of £400, bargained and sold to her son George Tyrell all her manors, lands, tenements, &c., to hold the same to G. T. and his heirs for ever. [*The effect of the bargain and sale was to give the use to G. T., and the statute gave him the same seisin as he had use, viz. the fee simple.*] The limitations continued—to G. T. and to his heirs for ever, to the use of Jane for life, and after her death to the use of the said G. T. and the heirs of his body, *i.e.* in tail.

The bargain and sale to G. T. and his heirs gave G. T. the use in fee simple, and the statute gave him the same seisin. Then follow two other uses, one to Jane, and one to G. T. in fee tail. The question arose whether the last two uses were executed by the statute; that is to say, whether by the Statute of Uses Jane, who had a use for life, took also the seisin for life, and G. T. the same as to his estate tail. "But all the judges of the C. B., and Saunders, C.J., thought that the limitation of uses above is void, . . . because an use cannot be engendered of an use." [1]

It is difficult to support the finding of Saunders, C.J., and the other judges of the Common Bench, upon the reason which is given in the judgment. Why "an use cannot be engendered of an use" is more than a modern lawyer can

[1] *Tyrell's Case*, Dyers' Rep. 155a.

imagine. The effect of the decision, namely, that the statute only applied to the first use, is generally expressed thus: there cannot be a use upon a use. It is not impossible to find a reason for the decision in *Tyrell's Case*. The best argument seems to be that George Tyrell stood seised to the use of *himself*, while the statute only refers to a person who is seised to the use of *another*. Therefore the statute had no application.

The Court of Common Pleas, as will be seen, declared all the uses, except the first, void.

Trusts.—This was the opportunity of the Court of Chancery. As we have noted, the jurisdiction of that Court was not directly diminished by the Statute of Uses. As soon as the common law judges refused to take notice of any use except the first, the chancellor took all the others under his protecting *ægis*, and enforced the ultimate use in the same manner as before the statute. To take an example: X. enfeoffed A. to the use of B., to the use of C. The common law courts only took notice of the first use, which carried the legal estate to B. C. went to the chancellor, who compelled B. to hold merely as C.'s trustee, C. taking the benefit. From about this time the use enforced by the Court of Chancery was known as a **trust**, the word "use" being applied only to that which took effect under the statute, *i.e.* the first.

The Statute and Conveyancing.—The Statute of Uses is, perhaps, the most important to a conveyancer. By taking advantage of it, means were invented to transfer the seisin without the troublesome formality of "livery of seisin." By taking advantage of the same peculiarity, namely, the facility for transferring the seisin by merely conveying a use, many inconvenient rules of the common law were dexterously avoided, and, without going into details, which

will be found in treatises on real property, it may be stated that modern conveyancing dates from the Statute of Uses.

The Law of Wills of Land.—Whatever may have been the law before the Conquest, it is certain that after that time no will of land was permitted to be made. It is not clear why such a rule should have prevailed in the case of non-military tenures, but one readily understands why it should be enforced in the case of land held by knight-service. For to allow a will of such land would have been to deprive the lord of relief, wardship, and marriage, his most valuable feudal rights.

In the early days of uses, it became the practice for owners of land to convey their estates to a feoffee, to hold it to such uses as the feoffor should appoint by his will. For example, the owner of land desired to dispose of it by will. He enfeoffed A. in fee simple. Then, by some writing to take effect after his death, or even by word of mouth, he declared his will that A. should hold to the use of B. and his heirs. Thus, the full limitation would be to A. and his heirs, to the use of B. and his heirs. This kind of disposition of land is generally called a **will of uses.**

When the Statute of Uses was passed, it incidentally destroyed the will of uses, because when the feoffor enfeoffed A., and did not immediately declare any uses, A. held to the use of the feoffor, and the Statute of Uses clothing the use with the seisin, A. had no estate at all.

Five years after the Statute of Uses, it was found impossible to continue the absolute restriction on the devise of freeholds, and, therefore, an Act was passed allowing a certain liberty of testation. The Statute of Wills (1540) begins by reciting: "Our said sovereign lord, most virtuously considering the mortality that is to every person at God's will and pleasure most common and uncertain, of his most blessed disposition and liberality, being willing to relieve and help his said subjects in their said necessities

and debility, is contented and pleased that it be ordained and enacted by authority of this present Parliament."

Sect. 1 gives power to all owners of socage lands to dispose of *by a last will and testament in writing or otherwise by any act or acts lawfully executed during life.* Sect. 3 reserves to the king, as against the devisee, the same reliefs and other payments as were made by an heir. Sect. 4 allows a tenant by knight-service to devise two-thirds of such land by will, saving to the king or the lord his rights of wardship and primer seisin in the other third part. The statute said nothing about copyholds, and as the Statute of Uses did not affect copyholds, they were still devised by wills of uses. By a further Act two years later it was declared that married women, infants, and idiots, cannot make a will of land.

It is important to notice that the Act does not provide any particular form of will. Blackstone declares that under the statute "bare notes in the handwriting of *another person* were allowed to be good wills," because they came under the designation of "other act lawfully executed in the testator's life." A further point is, that a number of the rules which formerly applied to wills and uses, were applied also to wills under the Act, *e.g.* a will of uses only referred to such land as had been given to the feoffee to uses. Without the same reason, the new will only referred to such land as the testator had when he made it. Thus, "I devise all my land to A. B." did not give A. B. all the land the testator had when he died, but only that which he had when he made the will.[1]

Statutes of Bankruptcy, 34 & 35 Hen. VIII. c. 4, and 13 Eliz. c. 7.—The **Law of Bankruptcy** took its rise in this period. By a statute of Henry VIII. *all persons* who tried to defraud their creditors either by fleeing the realm or by "keeping house," *i.e.* stopping at home and refusing to

[1] See also p. 130.

allow admission to creditors, might be declared bankrupt. All their property was to be forfeited and sold, and the proceeds rateably divided amongst the creditors. Unlike the present law, however, the Act of Henry VIII. left *the bankrupt still liable for the balance of his debts*, and he was liable to imprisonment. A further statute of Elizabeth amended the procedure and constituted a Court of Commissioners in Bankruptcy. The statute of Elizabeth *only applied to traders*. It is only necessary to say here that under both the Acts bankrupts were treated as criminals.

Statutes to prevent Fraud.—There are two famous Acts of Elizabeth passed with the laudable view of preventing frauds. They are both of the utmost importance to the student, and are generally called 13 Eliz. c. 5, and 17 Eliz. c. 4. The first is to protect creditors against fraudulent debtors who put their property out of the reach of execution. By the statute all conveyances and dispositions of property, made with intent to defraud creditors, are utterly void and of none effect. The best opinion seems to be that this was only an emphatic declaration of the common law, and no new idea. 27 Eliz. c. 4 enacted that when a man fraudulently made a voluntary gift of land in order to defraud a subsequent purchaser, the gift should be void. This Act was probably rendered necessary by the facility with which secret gifts could be made by means of verbal uses and trusts.

Star Chamber.—The **Courts of Justice** had already been established almost exactly in the form which lasted to 1875, but there was another Court established in the reign of Henry VII. As I have shown on a previous page, the King in Council always exercised a vast authority in all legal matters. Especially they interfered to redress the grievances of the poor against the powerful. From the time of Henry VII. the judicial power of the Council was chiefly exercised by the Committee of the Council called the Star

Chamber; and this Committee vastly extended the scope of the Council's jurisdiction under the Tudors and the Stuarts. In this period, also, the Chancellor, himself, had attained jurisdiction in equity. In fact, he was the sole judge of the Court of Chancery.

3 Hen. VII. c. 1.—In the year 1488 was passed an Act whose purpose can be best gathered from an extract from its preamble: "The king, our said sovereign lord, remembereth how by unlawful maintenance, giving of liveries, signs, and retainders by indentures, promises, oaths, writings, or otherwise embraceries of his subjects, untrue demeanings of *sheriffs* in making of panels and other untrue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the not punishing of these inconveniences, and by reason of the premises, little or nothing may be found by inquiry, whereby the laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries, and unsureties of all men living, and losses of their lands and goods to the great displeasure of Almighty God."

There can be no doubt that at this time, notwithstanding the abolition of much of the sheriff's ancient power, he had still a great deal of authority, and that his authority was often exercised mischievously and corruptly. As to the corruption of jurors, and their intimidation by local magnates or factions, there is abundance of testimony. It is one of the reasons given in the preamble of 1 Edw. IV. c. 2,[1] for the disestablishment of the sheriff's tourn and the setting up of quarter sessions. It formed a parliamentary grievance throughout the Middle Ages, and was the subject of many a popular satirical ballad.

Criminal Jurisdiction.—The statute goes on to ordain that the chancellor, treasurer, and keeper of the privy seal,

[1] *Supra*, p. 59.

or two of them, with a bishop and a temporal lord of the Privy Council, and the two chief justices of the King's Bench and Common Pleas (or two other justices in their absence), should have authority to *call before them* and *examine* all those charged with "any misbehaviour before rehearsed" (*i.e.* in the preamble), and to punish them on conviction.

The Privy Council as a Court.—It is shown in Chapter VIII. how the Common Law Courts grew out of the *Curia Regis* or King's Council. But it is certain that the Council did not part with all right of jurisdiction. Sitting as an administrative body, one of the duties it took upon itself was to interfere upon occasion to prevent a manifest failure or miscarriage of justice, especially where the offender was too powerful to be dealt with by the sheriff, or where he was the sheriff, or where the offence was followed by *maintenance*, *i.e.* the perversion of justice by violence and intimidation. It required a great deal of moral and physical courage for a jury to return a verdict against a Percy or a Fenwick when the case was tried in Northumberland. There were pretty sure to be scores of armed retainers of the Percy or dozens of the Fenwick sept in the Court; desperate men, only too ready to risk life and limb on the bidding of their chief.

The Council seems to have had not only criminal but civil jurisdiction; for from 1350 to 1422 there were at least ten petitions presented by Parliament or by the Commons House against the encroachments of the jurisdiction. In 1350, the petition was that men should not be tried by the Council in question *touching their freeholds* or life or limb; another one prays that *no Common Pleas* be tried by the Council, and so on. It is obvious, therefore, that long before 3 Henry VII. there was plenty of jurisdiction in the Privy Council, and it becomes difficult to say what was the effect of 3 Henry VII. c. 1. It is suggested that the effect was to establish a *regularly constituted Court* for the trial of the offences

specified. There had undoubtedly been some jealousy between the Houses and the Council; and Henry, who wished to establish order, and saw that it could only be done by a strong central body with the power to strike hard and swiftly, took it out of the power of Parliament to complain by inducing them to pass an Act constituting the tribunal, which was, after all, only a committee of the hated Privy Council.

Civil Jurisdiction of the Star Chamber.—Besides the criminal, there was a certain amount of civil jurisdiction exercised by the Star Chamber. Certain admiralty cases, actions by or against aliens and between corporations were cognizable.

Decline and Fall.—The Court of Star Chamber was a powerful instrument in the hands of the Crown; and not long after Henry VII. it had ceased to be anything more than a mere tool by which the prerogative was maintained. The great complaint against it was its *inquisitorial procedure; i.e.* instead of the prosecution being obliged to prove guilt, the prisoner was brought up and examined by the Court with a view to extracting admissions of his guilt from his own mouth. It was abolished on account of its manifold abuses, in 1640.

Treason.—During the Wars of the Roses one of the features that least commended itself to the English mind was the series of executions and confiscations of property by which every change in the fortunes of war was followed. When the Yorkists were uppermost they tried, condemned, and executed all those who had supported or assisted the Lancastrians. When the Red Rose was in its turn triumphant, the process was reversed. It was useless for the traitor to protest that in affording aid in men, money, or counsel he had only obeyed the person who was at the time, in fact, on the throne. The answer given was that though

Edward was king *de facto*, Henry was king *de jure*; or, on the other hand, that though Henry was king *de facto*, Edward was king *de jure*. These were indeed perilous times for honest men who cared not two straws for politics, and had not the folly or the courage to brave death or exile in defence of someone else's principles.

Henry VII. assented to an Act by which treason was defined to be an offence committed only as against the king *de facto*, and not as against the king *de jure*. Henry VIII. passed an Act to enable treasons committed out of the realm to be tried within the realm.

The Court of Wards and Liveries.—The **Court of Wards** was another body established by the Tudors (32 Henry VIII. c. 46). An Act of the following year annexed to this Court another, called the *Court of Liveries*, so that the tribunal became known as the Court of Wards and Liveries. Its functions were to manage the property of wards who held *in capite* of the Crown and to act as guardian of the person of such wards. The Court controlled the marriage of those in its guardianship, levied fines for marrying without the king's licence, and, when the heir attained his majority, fixed the amount payable to the king for "suing out his livery." There was no jurisdiction except where the land was held in chivalry,—that is, not when the tenure was socage. As far as related to all matters whatsoever connected with the king's wards and their estates, the jurisdiction of the Court of Exchequer was taken away. When tenure in chivalry was abolished,[1] the Court of Wards and Liveries was discontinued.

High Commission Court.—In Elizabeth's reign two new Courts were created. The first was the **Court of High Commission**, created by virtue of 1 Eliz. c. 1, the statute consti-

[1] See p. 83, *infra*.

tuting the Queen head of the national Church. Power was given to the sovereign to appoint commissioners to exercise jurisdiction in spiritual matters, such as heresies, schisms, and all abuses and contempts of ecclesiastical authority. The uses and abuses of this Court, its rigorous action under Archbishop Laud, the hostility it excited, and its eventual abolition by the Long Parliament, form an interesting chapter in the political, religious, and constitutional history of the country, but they have little interest for the lawyer.

Exchequer Chamber.—There was another Court, however, established by Elizabeth, of great legal interest, and that was the famous **Court of Exchequer Chamber,** which was, and continued to be for nearly 200 years, the highest Court of authority in the common law. Before this time there had been a Court sitting in the Exchequer Chamber, consisting of all the judges, *i.e.* the barons of the Exchequer and the justices of either Bench, to try appeals on points of law from the Common Pleas only.

Appeals from King's Bench.—By 27 Eliz. c. 8, where any judgment should be given in the K. B. in debt, detinue, account, covenant, trespass, ejectment, or action on the case *first commenced there*, except where the Crown was a party, the party against whom judgment was given might appeal on a point of law to the Court of Exchequer Chamber. The proceeding was by writ of error, and the Court was to consist of the barons of the Exchequer, and the justices of the Common Pleas, or at least six of them.

Appeals from Exchequer.—By another Act, four years later, a similar appeal was allowed from the Court of Exchequer to a Court consisting of the justices of the other two Courts, or six of them at least. It appears to have been an ancient practice for the judges of any Court in which a case of special difficulty arose to adjourn it to a Court consisting of all the common law judges sitting in the Exchequer

Chamber. Instances are to be found in *Shelley's Case*,[1] and in the famous *Case of Shipmoney* (Charles I.).

Trials at Nisi Prius.—Another important reform was effected in the **trial of civil actions.** Up to this time all causes triable in Middlesex had been heard at bar, *i.e.* by several of the justices or barons of the respective Courts. By 18 Eliz. c. 12 trials in Middlesex were assimilated to trials at assizes. The *writ of Nisi Prius*,[2] which had hitherto only issued for actions triable by the judges of assize, was to be granted also for issues triable in Westminster Hall, and, consequently, any civil case could now be tried by two judges and a jury. The saving of time effected by this change was enormous.

The Action of Assumpsit.—In a previous page[3] will be found an account of *dicta* as early as Edward IV. in favour of an action on the case for the non-performance of a promise not under seal. These *dicta* were confirmed in the succeeding reign (Henry VII.), when we find it declared by the whole Court of King's Bench that an action would lie for *non*-feasance as well as for *mal*-feasance. This action of trespass on the case, *viz.* for breach of a contract not under seal, and *not a mere debt* or liquidated sum for work and labour, or for goods supplied,[4] was called *assumpsit.* The name "assumpsit" was given because the plaintiff sued the defendant *quare cum assumpsisset*, that is, because he had undertaken. For instance, in Henry IV. an action was brought against a carpenter *quare cum assumpsisset* to build a house within a certain time, which he had not done. At that time the action failed. But in the reign of Henry VII. jusctices on the King's Bench took a contrary view. There are two cases reported in the same Year Book in the twenty-first year of Henry VII. One of them is as follows: "If

[1] Coke's Reports, 106. [2] See page 51. [3] *Supra*, p. 45.
[4] These would be covered by the common law action of debt.

one covenants to build me a house by such a day, and does not do it, I have an action on the case for this nonfeasance as well as if he builds it imperfectly. And so it is if one makes a bargain with me that I shall have his land to me and my heirs for £20, and he refuses to perform it: I shall have an action on the case, and there is no occasion for a subpœna." The judge (Chief Justice Fineaux) of the King's Bench is, as it would seem, the real author of *assumpsit*, and it is evident that his desire to give an action on the case for the non-performance of a promise made for valuable consideration was much influenced by the fear of the growing jurisdiction of the Court of Chancery. The common law judges were very jealous of the subpœna, as they invariably style the process of the chancellor.

It was only from the end of Elizabeth's reign that the action became of general use. When it did become common it ousted the action of debt almost entirely from the Courts. That action, like all other early forms, was highly technical, formal, and cumbrous to a degree that made its use dangerous. Moreover, it proceeded with a stately dilatoriness extremely irritating to the plaintiff who wanted his money. But the action of assumpsit, being in form an action to obtain redress for a wrong done, was quicker, and not so tedious. After it came into favour we scarcely hear of the action of debt.

The Action of Ejectment.—It has been indicated elsewhere that by the common law, when a lessee was ousted from his holding, his remedy was to bring an action of trespass for damages. At some time or other, but certainly in or before Edward IV., he could not only get damages, but a writ of possession by which he was put back on his land. Thus he stood in as good a position as a freeholder, and was not put to the trouble and expense of a real action, in which he might possibly have to stake his right on the stoutness of a champion or the strength of his armour.

At some time in the Tudor period—the date is not precisely known—it occurred to an ingenious pleader to adapt the remedy of ejectment to the case of a freeholder. This is how it was done: A. claimed a freehold estate in land actually in the occupation of T., the latter being a tenant of B. A. made a lease of the disputed land to X. X. went to take possession, and was promptly turned out by T. Then X. sued T. for ejectment. Now, the respective titles of X. and T. depended upon the titles of their landlords. If A. was the real owner of the land, then X., as his lessee, had the best right to possession, and T. was a trespasser when he turned him out. On the other hand, if B. was the real owner, T. was lawfully in occupation, and was justified in ejecting X. So the real question was, which of the two, A. or B., was owner of the land. Therefore, when T. was sued by X., he wrote to B., and B. came in and defended the action. X. also wrote to A., and A. came in and prosecuted the action. So that a verdict for the plaintiff would mean that A. was the real owner of the land, and the question of title to real property was tried by a mere action of trespass.

The Action of Trover and Conversion.—Another of the actions on the case arising out of the Statute *In Consimili Casu* was that of trover and conversion. Trover comes from *trouver*=to find; and the action would lie where A. had *found* B.'s property and then converted it to his own use, *i.e.* used it for his own purposes. It was in substance like the action of *detinue*,[1] being for wrongfully withholding property from him who was the rightful owner. In such a case as the one just given, detinue would not lie in many cases; for instance, if the defendant had parted with the property before the action was brought, because if A. had sold or given the thing to C., it was C. and not A. who

[1] *Supra*, p. 28.

withheld it from B. But the facts were similar, and the damage to A. was the same, and so an "action on the case" was given.

The original action of trover, no doubt, was one in which the defendant really had found the goods; but speedily it was applied by a fiction to cases which were covered by the old writs of detinue and trespass. For instance, if A. lent a horse to B., and B. refused to return it, this was detinue, and A. could sue for the return of the horse or its value. Or, again, X. came to Y.'s house and wrongfully carried away a horse. This was trespass. But the actions of trespass and detinue were both technical, especially detinue. In the case of trespass, the plaintiff had to prove that the original taking had been wrongful, as well as that the defendant was wrongfully withholding the possession of the horse; while in the action of trover the plaintiff only had to prove that at some time or other the defendant had possession of the horse, and had exercised dominion over it.

One cannot fix the date when it took place, but it did happen that at some period between the time of the Statute *In Consimili Casu* and the middle of the reign of Elizabeth, a plaintiff whose goods were detained or had been wrongfully taken by the defendant could bring an action upon the case for trover instead of detinue or trespass. The plaintiff was allowed to allege that the defendant *found* the thing and then converted it to his own use, and this allegation of finding, which the defendant was not allowed to deny, brought the case within the reach of trover.

The first case reported, as far as can be found, was *Mulgrave* v. *Ogden*,[1] in the year 1594, the substance of which can be gathered from the report. "Action upon *trover* of twenty barrels of butter, and counts that he *tam negligenter custodiat*[2] that they became of little value, and upon this it

[1] Croke's Reports, Elizabeth, p. 219.
[2] *Trans.* = So negligently guarded them.

was demurred,[1] and held by all the justices,[2] that no action lieth in this case, for no law compelleth *him that finds a thing* to keep it safely: as if a man finds a garment, and suffers it to be moth-eaten, or if one finds a horse, and giveth it no sustenance; but if a man finds a thing and *useth it*, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, but for negligent keeping no law punisheth him."

Of course, the defendant had not really found the butter. He was probably a man who had undertaken in a friendly way to take charge of it; but it had to be stated that he found it.

There is another case reported in 1595, under the name of *Ascue* v. *Sanderson*,[3] which was an action against a sheriff for having seized three hundred sheep in execution under a writ of *fieri facias*, and having sold one hundred of them he did not return the others to the debtor. Here there is no doubt about the action, and, indeed, from the reports of these two cases, especially the absence of any question as to the form of the writ, it is safe to conclude that the action of trover had been started some little time. At all events, it was in general use under Elizabeth, as may be seen from the fact that there are at least a score of cases scattered up and down the pages of Croke's Reports.[4]

SUMMARY.

Real Property:

(a) The Statute of Uses was passed in Henry VIII. to avoid use of lands; but the main object of the Act was defeated by the decision in *Tyrell's Case*, and the trust came into force instead of the use, being the same thing under another name.

[1] Objected to on a point of law.
[2] Of the Queen's Bench.
[3] Croke Eliz. pp. 433, 434.
[4] Croke Eliz. pp. 352, 485, 495, 638, 724, &c.

(b) Modern conveyancing dates from the Statute of Uses.

(c) Wills of land permitted. Two-thirds knight-service lands, and all in socage tenure. (Statute of Wills, Henry VIII.)

The law of bankruptcy begins (Henry VIIII.) and is amended by Elizabeth. Elizabeth's Act only applies to traders. Bankrupts are treated as criminals.

The two statutes to prevent fraud on creditors (13 Eliz. c. 5) and purchasers (27 Eliz. c. 4).

The Courts of Justice:

(a) The Court of Star Chamber established (Henry VII.).

(b) The Court of Wards and Liveries (Henry VIII.).

(c) The Court of High Commission (Eliz.).

(d) The Court of Exchequer Chamber (Eliz.).

Legal Procedure:

(a) The action of *assumpsit*, *i.e.* trespass on the case for non-performance of simple contract (Henry VII.), and begins to supersede action of debt.

(b) The action of *ejectment* is extended by a circuitous procedure to freeholds, and partly ousts the real actions.

(c) Writs of *nisi prius* issued for Middlesex actions, thus enabling two judges to try cases as at assizes (Eliz.).

(d) The action of trover and conversion comes into use, and gradually supplants detinue.

CHAPTER V.

James I. to James II. (1603—1688).

General.—It is a stale saying that the Stuart period was one of good legislation and bad government. With the bad government this work has nothing to do. It is only concerned with the good legislation.

Notwithstanding the political troubles that convulsed the nation during almost the whole of the Stuarts' reigns, the development of the law proceeded steadily. Mercantile causes deserted the ancient but impotent merchant courts, and were tried by the king's judges. The law of real property received, perhaps, few additions or alterations until the time of Charles II., but, in the reign of that merry monarch's grandfather, the greatest of English lawyers, Coke, endeavoured to raise that branch of legal learning to the level of a science. Coke so laid down the law of real property, and so explained it, that except for statutory alterations his works may be looked upon as a code of the law of real property to this day. After many futile attempts, military tenures were abolished by the first Parliament of Charles II., an act which entailed many important consequences.

Parliament also regulated and settled the intestate succession to personalty, and the law relating to monopolies, thus calling into existence the patent laws.

In this period also the law relating to offences against the king and his government received much attention, and an important change was effected in favour of the liberty of

the subject by regulating the procedure of the writ of *Habeas Corpus*.

The celebrated Statute of Frauds was passed with the view of compelling people to put important transactions into written form. It precluded a plaintiff in many cases from suing until he could produce documentary evidence, and made writing necessary in the conveyance of land.

With much of the legislation of the time we do not intend to deal. The series of statutes directed against Roman Catholics and Protestant Dissenters, the great Petition of Right, and other measures which mark the time, are fully dealt with in the learned work of Mr. S. R. Gardiner.

The Law of Real Property.—Under the Tudors the burdens of tenure in chivalry had been severely felt. They were still more grievously felt under the Stuarts. One of the early acts of the Parliament of James I. was to approach the king with a proposal to abolish knight-service and its incidents, compounding with the king for his revenues arising out of it. The negotiations broke down upon a paltry question of a few thousands a year, and during the whole of the reign of the first two Stuarts, the royal landlord exacted the uttermost farthing from his tenants *in capite*. Excessive fines and reliefs were levied, and when a king's ward, having attained majority, and with difficulty raised the sum to sue out his livery, entered upon his inheritance, he found the buildings in disrepair, the timber cut, and the whole estate in ruins, because His Majesty's Court of Wards and Liveries had taken everything possible, and not spent a penny on the property. A female ward was in a worse plight; she might either be bestowed in marriage on the highest bidder, or ordered to marry a man so repulsive that she could not accept him. The disobedience resulted in a fine to the king of the value of the match.

Abolition of Knight-Service Tenure.—In the first year of Charles II., called by a polite fiction the twelfth year, tenure by knight-service was abolished, and all land so held was turned into free and common socage.[1] The Court of Wards and Liveries was abolished. Wardships, values, and forfeitures of marriage, and aids and all incidents of the feudal system were put an end to.[2]

Since this statute the greater part of the land of the kingdom has been held in socage, except grand and petty serjeanty, copyhold and gavelkind.

Wills of Land.—The Statute of Frauds,[3] in order to remedy the inconvenience occasioned by the Statute of Wills, provided that in future all wills of land should be in writing, signed by the testator or by someone in his presence at his direction, and should be witnessed and attested by three or four credible witnesses in the presence of the testator.

Charters of Conveyance.—Another section of the Statute of Frauds (sect. 1) enacts that no conveyance of freeholds made merely by livery of seisin shall be valid unless it is evidenced by a document signed by the feoffor or an agent authorized in writing.

Leases.—Pursuing the same policy, the same section declared void all leases merely by word of mouth; but the next section made an exception in favour of leases not exceeding three years.

Personal Property: The Statute of Distributions.—Statutes dealing with personal property were rare in early law, simply because personalty formed so little of the country's wealth as not to be worth legislating about. We

[1] 12 Car. II. c. 24, s. 1.
[2] *Ibid.*, ss. 1 and 2.
[3] 29 Car. II. s. 5.

have seen how liberty of testamentary disposition of personalty existed at a very early period, and was confirmed by more than one declaration of the early Norman kings. The distribution of the personalty of an intestate was in the hands of the Church, by whom the personal estate was to be distributed amongst the widow and next-of-kin of the deceased. The administration was in the hands of the ordinary of every diocese, and of the judges of the Prerogative Courts of the two archbishops. It appears that although each of these Courts professed to be governed by practically the same rules, in fact each Court had its own customary canon law and practice, so that much uncertainty prevailed in the country. The Statute of Distributions (1670) was passed to remove this uncertainty. By it were established uniform rules as to the persons entitled to a share of intestates' personalty, and as to the shares they were to take. If there were a widow and children or issue, the widow took one-third, by analogy to dower, and the children shared the remainder. If there were a widow but no issue, then the widow took one-half and the next-of-kin the other half. Children of a deceased next-of-kin were to represent their parents; but this principle was not to be extended beyond the children of brothers and sisters of the deceased—*i.e.* a man's nieces and nephews represented, or stood in the shoes of their parents; but more remote collaterals, *e.g.* cousins, did not. A child who had been advanced, or set up in life by his father, was not to claim a share of that parent's estate unless he brought into account —"hotchpot" it was called—the portion that had been advanced to him. Thus the doctrine set up by the chancellor, that the law supposes a parent to wish to provide for all his children on an equal footing, was recognized by statute. The Statute of Distributions,[1] said to have been framed by Edward Hyde, Earl of Clarendon, but not passed

[1] 22 & 23 Car. II. c. 10.

until three years after his flight into exile, has ever since been the basis of the law on the distribution of personalty *ab intestato*. In fact, it has only been altered twice, and that but slightly, once in 1685,[1] and the second time in 1890.[2]

The Law of Patents.—A patent is a monopoly granted by the Crown to a subject. Until the year 1623 it had been customary for the Crown to grant monopolies or patents either to favourites as a pure matter of grace, or to servants of the Crown by way of reward for services, or to people who, like Mompesson and Mitchell, paid handsomely for the privilege. The Duke of Buckingham had a patent of gold lace, another had a monopoly of taverns in the metropolis, and so on. In 1623 was passed the famous Statute of Monopolies,[3] which declared all existing monopolies and patents null and void, except those granted for the exclusive use within the kingdom of some new manufacture, provided it had been granted to the "true and first inventor" thereof. All such existing patents were cut down to twenty-one years from the date of the grant. As to future monopolies, they were only to be given for the "sole working or making of any manner of *new* manufactures within this realm to the first and true inventor and inventors" for the term of fourteen years or under.

The Monopolies Act is the foundation of the present patent laws of the world. Numerous other Acts have been passed from time to time, especially in the reigns of Queen Victoria and King George V.;[4] but they all deal simply with procedure—that is, the manner in which letters-patent are to be applied for, and the machinery of the Patent Office.

[1] 1 Jac. II. c. 17, s. 7.
[2] Intestates' Estates Act, 1890.
[3] 11 Jac. I. c. 3.
[4] Patents Act, 1907—a consolidating Act.

The Common Law.—There was little or no change in the common law, except in so far as the Reports and Commentaries of Coke, which pulled the common law together, so to speak, altered the law by making its principles clearer than they had been before. The actions on the case, viz.: **assumpsit** and **trover,** continued to increase in favour, to the extinguishment of **debt** and **detinue.**

The Action of Ejectment was still further improved in the time of the Commonwealth, so as to make it an easier mode of trying title to land. Hitherto the real claimant made a lease to a tenant, and that tenant suffered himself to be ejected by the tenant of the other claimant. During the Commonwealth a new fiction was introduced by Chief Justice Rolle. The defendant was not allowed to deny that a lease had been made, and that the nominal plaintiff had been ejected by someone at his (the defendant's) orders. Consequently no lease was made, and no ejectment really took place. The nominal plaintiff merely alleged these matters, and called on the real claimant to make good his title. Soon after, the nominal plaintiff became a fictitious person, by name **John Doe,** who alleged that he had been ejected by another fictitious person, yclept **Richard Roe.** So that the action of ejectment was an action brought by a fictitious person on a fictitious lease, because he had been ejected (which in fact he had not) from land demised to him by the real plaintiff. The date of the birth of John Doe is not precisely known. A case occurs in 1741, in which he is mentioned as plaintiff; but there is nothing to indicate that he appears on the scene for the first time. In fact, the report points to the conclusion that the practice is of some standing, and it may be said that during the period now under consideration, the action of ejectment began to be based on a *fiction of a demise* and a *fiction of a trespass*; and that shortly after, it was based on a *fiction of a demise to a fictitious lessee,* and a *fiction of a trespass committed by a*

fictitious casual ejector. Blackstone objects, even so late as 1742, to the lease being alleged to be made to a *fictitious* person, and says that the general practice is bad, but his opinion never seems to have been acted on.[1]

The Statute of Frauds (29 Car. 2, c. 3) was the most important of the Acts relating to the common law passed during this period. Its full title is *An Act for Prevention of Frauds and Perjuries*.

It enacted that upon certain contracts no action should be brought, unless the agreement, or some note or memorandum thereof, was in writing, signed by the defendant or his agent. Contracts for the sale of goooods of the value of £10 and upwards must either be proved by such written evidence, or by evidence that part of the goods had been accepted by the buyer or part of the price had been paid to the seller. The statute is an important one, and has given rise to much controversy.

The Law Merchant.—Up to the reign of Elizabeth there is, so far as can be ascertained, very little of mercantile law to be found in the reports. This is because the law merchant (*Lex Mercatoria*) was at that time only the customary law enforced in various local courts which had jurisdiction over local trades or local markets. The cutlers of Sheffield had a court of their own, so had the merchants of Bristol, and the merchants of London. But from the time of Coke we find the law merchant administered in the Court of Common Pleas. But it was only administered to a special class, namely, the class of traders. By *law merchant* is meant the law obtaining amongst traders and merchants relating to bills of exchange, charter-parties, marine insurance, brokerage, and the like. A private person could not be sued on a negotiable instrument, because negotiability was only im-

[1] Bl. Com. iii. p. 175.

posed by Law Merchant, and therefore was only binding on traders. How the law subsequently developed to its present form will be shown in a subsequent chapter. It is sufficient here to remark that, during the period of which we are now treating, the *Lex Mercatoria* slowly developed from a body of local customs to a system of law, part of the law recognized by the king's courts and administered by the king's judges. It became a customary fiction to allege that contracts of charter-party were made at the Royal Exchange, London, though in fact they were made abroad, on purpose to bring the cases within the jurisdiction of the Common Pleas. It is probable that the development of actions *in consimili casu* for *assumpsit* assisted in the process of bringing mercantile causes into the king's courts. Still, the process was slow, so that an author of the seventeenth century, writing of mercantile law, says: "This kind of learning is not common in our books."

Criminal Law differed little from the criminal law of the previous periods, except in the matter of offences against the sovereign and the state.

Treason.—The law of treason had been administered with great severity under the Tudors. The judges under the Stuarts administered it still more harshly. They perverted the Statute of Edward VI., which required two witnesses to prove a charge of treason into meaning that the two could each depose to an overt act of a different kind of treason. For instance, one might swear to an act of levying war against the king, and another to compassing and imagining the king's death. Still worse was the wresting and twisting of the Statute of Treason (Edw. III.). In *Peacham's Case* (James I.) a clergyman was found guilty of compassing and imagining the king's death because he had written a sermon inveighing against the bishops and the High Commission Court, together with a few remarks on the king. The com-

position was not in the best taste; but it had never been seen by a single soul, except the author, until it was found in a drawer by the officers of the Court of High Commission. Many other executions took place on grounds no better than this. Russell was convicted for agitating in favour of a new parliament (1683). The only ray of light is in *Pine's Case* (Chas. I.), where the judges declared that *the mere speaking of words*, though they might show "an evil and depraved mind," could not amount to treason. There must be some act done in furtherance of the design indicated by the words. Still, the resolution in *Pine's Case* was not invariably acted upon, and people were convicted for words written and spoken. The argument was: "A. has said that the king's government is bad. Therefore, A. must wish that government at an end. That government cannot be ended, except by the king's death. Therefore, A. is 'imagining' the king's death, which is treason."

Seditious Libel.—The law of seditious libel came into prominence in the time of James I., and continued to be debated until long after the Restoration. The offence was a vague one, and seems to have consisted of writing or publishing anything to the scandal of the government, that is, written blame, true or false, concerning the king or his family, ministers, judges, magistrates, or officers. The truth of the writing was no defence.

The most famous cases are the case of *Prynne*, who published a book called *Histriomastix*, a learned but tedious and pedantic work directed against the morality of stage plays and players. It was supposed to be levelled at the Queen; and the Star Chamber, who had special jurisdiction in cases of libel, sentenced the author to have his ears cut off (1637).

In 1680 Chief Justice Scroggs, in *Carr's Case*, held that to publish any news at all was unlawful; and in the *Seven Bishops' Case*, 1688, those prelates were indicted for

seditious libel in presenting a petition to the king complaining of the Declaration of Indulgence. They were acquitted, but the verdict in that case did not render the law of seditious libel less stringent.

Other cases were those of *Baxter*,[1] who was tried by Jeffreys and fined for certain passages about the "persecution of the saints," supposed to refer to the persecution of the Nonconformists by the bishops. The most infamous case was *R.* v. *Barnardiston*. The prisoner was tried for writing gossipy letters, containing the political rumours of the day, to a friend. Two of the statements charged as libels were "the Papists and high Tories are quite down in the mouth" and "Sir George is grown very humble." "Sir George" was Jeffreys, who tried the case, and it is almost unnecessary to state that the prisoner was found guilty. Jeffreys ruled that there was no need to find any malicious intent. He seemed to think that any comment on affairs of state was illegal.

Seditious Words.—In the early part of the period prosecutions for seditious words were frequent. The best-known case is that of Elliot, Holles, and Ballantyne, who were prosecuted for seditious speeches in parliament. The words charged against Elliot were "the king's Privy Council and his judges, and all his Council learned, have conspired together to trample under their feet the liberty of the subjects of this realm and the privileges of this House." The prisoners were found guilty and sentenced to fines and imprisonment.

Writ of Habeas Corpus and the Habeas Corpus Act, 1679.—Enough has been said on a preceding page[2] to show the nature of the writ of *habeas corpus*. During the stirring times of Charles I. and Charles II. the law relating

[1] *State Trials*, 493.

[2] *Supra*, p. 23.

to this writ received considerable attention, from the fact that it was one of the means of protecting the liberty of the subject against the executive and the Crown. The writ itself was a sufficient protection against arbitrary imprisonment, and against prolonged incarceration without trial, provided there was no hitch in the procedure. But the procedure was not strict enough, and was especially weak in five points. These were—(1) If the gaoler failed to bring up the prisoner on the first writ, a second writ, called an *alias*, had to be applied for, and if this was disregarded, a third, called a *pluries*. This caused delay. (2) A judge might fix any day he pleased for the return to the writ, and the Stuart judges, in cases where the prisoner was imprisoned for reasons of state, often fixed a far distant day. (3) There was nothing to prevent a gaoler, between the *alias* and the *pluries*, removing the prisoner to another prison, so that the process had to be begun again. (4) The writ could not be issued in vacation. (5) The Court might adjourn from time to time the application for the writ. In 1676 occurred *Jenkes' Case*, in which the prisoner was removed from gaol to gaol, was refused a writ in vacation, and was subjected to vexatious delays and difficulties. That case was the cause of the Habeas Corpus Act,[1] which was merely to amend procedure. The chancellor and the common law judges were each and all empowered to issue the writ. The gaoler must make a return within three days, unless the prisoner were confined more than twenty miles from the Court that issued the writ; then the time was extended to ten days, and to twenty if the distance was more than a hundred miles. Prisoners must not be removed from one prison to another.

The writ may be applied for in vacation. If the prisoner is committed for a misdemeanour, he must be let out on bail; and if he is committed on a legal warrant for treason

[1] 31 Car. II. c. 2.

or felony, he must be released on bail if not tried in the second term of his commitment. **These provisions for speedy trial are the essence of the Act.**

The chancellor or any judge refusing a *habeas corpus* is subject to a penalty of £500, and a gaoler who refused to make a return to a penalty of £100, for the first offence, and £200 for the second.

The Court of Chancery.—During the Tudor period, the business of the Court of Chancery had increased to an enormous extent. The Statute of Uses accounted for much of the new business, and the Statute of Wills and the improvements in conveyancing for much more; but perhaps the almost total abolition of private jurisdictions, and the vastly increasing commerce of the country accounted for most of all.

The reign of James I. marks an era in the history of the Chancery Court. Two circumstances contribute to make the period important. One was the approximation of equity or Chancery decisions to a system of law, and the other the gain for the Chancery of the preponderating judicial power in the country. Both events happened in the chancellorship of Egerton, Lord Ellesmere.

From Edward III. to Henry VIII. the holders of the office of Lord High Chancellor were politicians and ecclesiastics, sometimes knowing nothing of law except, perhaps, a little of the *Jus Civile*, and a smattering of canon law. Henry VIII. appointed for the first time a lawyer—the blameless Sir Thomas More, whose term of office formed such a contrast to those of his predecessors that people devoutly hoped for a succession of legal chancellors. After More came churchmen, politicians, and lawyers promiscuously, until Ellesmere, from whose time the chancellorship, the coveted woolsack, has been invariably the prize of a lawyer. Ellesmere, being a lawyer saturated with all the lawyer's reverence for precedent and love of fixed and

orderly procedure, tried to settle the practice of the Court; and so began in Chancery the multitude of rules of procedure which eventually made the proceedings in the Court of equity quite as technical as those in the Courts of law. Whether this was better or worse than procedure by rule of thumb, which was what the Chancery started with, need not be discussed.

The next idea stamped by Ellesmere upon the Court of Chancery had reference not to form, but to substance. Hitherto "the length of the Lord Chancellor's foot" was the only measure of the law there administered. Ellesmere inculcated a regard for precedent. He refused to decide a point one way one day and the other way the next. He did not make the mistake of the old common law judges, and refuse to entertain a case because it was without precedent, but he considered himself bound by the decisions of his predecessors and of himself. From his time precedent became as valuable in equity as in law, a matter contributing greatly to the well-being of the state as tending to the certainty of law.

The second memorable thing about Ellesmere's chancellorship was the famous quarrel with Coke, by which the Court of Chancery became the preponderating power in the justiciary, and the rules of equity were made to prevail, in case of conflict, over the rules of common law. For many years the chancellors had claimed to be able to override the common law, and had, in fact, done so. Where the rules of common law and equity conflicted, the man having the better right at common law might go to the King's Bench or Exchequer, or Common Pleas, bring his action, and even get judgment. The other man went to the chancellor, proved that he had the better right according to the rules of the Chancery Court, and obtained an injunction to restrain his opponent from proceeding further with his common law action. If the common law plaintiff persisted in going on, he committed a contempt of the Court of

Chancery by disregarding its injunction, and was committed to prison.

Not unnaturally, the justices of either bench and the barons of the Exchequer resented the extraordinary claims made by the chancellors, and many and fierce were the contests between the Courts of Law and the Courts of Equity. The matter came to a head in the year 1616. In 1614 occurred the case of *Courtney* v. *Glanvil*.[1] A. had sold to B. a jewel worth £20 on the representation that it was worth £350, and other jewels worth £100, and had taken as payment a bond for £600. On B. failing to pay, A. obtained judgment for the full amount, and the Exchequer Chamber confirmed the judgment. B. filed a bill in equity to obtain relief, and it was ordered that on B. returning the jewel and paying £100 A. should release him. A. refused, and was committed for contempt. The common law judges granted a *habeas corpus*, and let him out, Coke declaring the decree in equity and the imprisonment to be absolutely illegal. So far Coke was victorious.

But in 1616 another case arose on which the matter was settled. The *Earl of Oxford's Case* was one where the master and fellows of Magdalen College had granted a lease of Covent Garden for seventy-two years at £9 a year. Fifty years after they sold the fee (under a licence from the Crown) to the Earl of Oxford's predecessor in title, in consideration of £15 a year. For forty years the grantee continued in possession, and spent £10,000 in building on the land. Then the master of Magdalen took possession of part of it, on the ground that under the Statute of 13 Eliz. against alienations of ecclesiastical and college lands, the conveyance was void. The Earl of Oxford brought an action of ejectment by means of a colourable lease,[2] and the judges found for the college. The Earl at once filed a bill in equity for relief, and Ellesmere granted it on the

[1] Cro. Jac. 343.

[2] *Supra*, p. 86.

ground that the claim of the master of Magdalen was against all good conscience.

Coke openly murmured against what he called the subversion of the laws of the land, and in the same year made a bold endeavour to put an end to the obnoxious proceedings. A case occurred in which the plaintiff had obtained a judgment at law by the trick of enticing the defendant's witnesses into a beer-house while the action was being tried. The defendant duly filed his bill for relief in equity, and the plaintiff was ordered not to proceed with his judgment. Coke heard of it, and advised the plaintiff's attorney to prosecute the defendant and his counsel under the Statute 27 Edw. III. By that Act the king's subjects are forbidden to impeach the judgments of the King's Court in another court.

In the same year Coke persuaded a brother judge to try to persuade a grand jury to indict under this statute persons who had applied to the chancellor for relief against judgments. The grand jury refused to expose themselves to the risk of Ellesmere's indignation, but the irate chief justice persisted in forcing on the crisis. He publicly announced his intention to refuse to hear any counsel who had art or part in presenting bills in equity for relief against common law judgments. There is no doubt of the righteousness of Coke's indignation. The law—the common and statute law—was his divinity. In it he saw no flaw, no imperfection. Moreover, he magnified his office. The chief justice was a judge according to the ancient and undoubted laws and customs of the realm. The lord high chancellor was a new-fangled invention, a hybrid sort of creature, half judge, half secretary of state, whose decisions were founded on nothing more solid than his own whims and fancies.

Ellesmere took a different view. He was not disposed to surrender a jurisdiction that had been exercised for sixty years at the least. Distrustful of his own power to cope with the rugged chief justice, he appealed to the king.

James consulted Bacon, the attorney-general, and a number of other lawyers, who decided in favour of the Chancery. The reasons given by them amount in substance to two. First, as to the Statute of 27 Edw. III., it applied only to appeals to foreign courts. Second, there was a strong current of practice for sixty years in favour of the injunctions in question. It had even been known for judges to direct persons to apply for them.

The king adopted Bacon's opinion, and ratified it by a decree bearing date the 14th of July, 1616. From that day down to 1875, when the Court of Chancery ceased to have a separate existence, these injunctions continued to issue. The ground upon which they were supported by Lord Ellesmere was that they did not question the *legality* of the judgments, but only the "hard conscience" of those who obtained them.

Other names famous in the history of the Court of Chancery occur in this period. Bacon, on taking his seat, defined the function of his Court to be "to supplement, not to subvert, the law." Lord Keeper Coventry (Charles II.) pursued the policy of Ellesmere, and founded his decisions mainly on principles deduced from the decrees of his predecessors. Indeed, Lord Hardwicke ascribed to him the foundation of modern equity; and it may be taken that after his time few new principles were introduced, though the old principles have been extended and amplified and explained, more particularly by Lord Eldon.

The student who cares to make a comparison between equity as Coventry left it, and the equity of to-day, will do well to consult Bohun's *Cursus Cancellariæ*, a text-book written about 1700. The first fifteen pages contain a clear and succinct account of the Chancery jurisdiction of the time. The author divides the jurisdiction into (1) ordinary or legal, (2) extraordinary or absolute. In exercising the ordinary jurisdiction the Court was guided by the rule of law and even by legal procedure, *i.e.* as to pleadings, &c.

This came about in two ways: (a) where some statute gave the chancellor jurisdiction; and (b) where the proceedings concerned some officer of the Court or his servant. Examples of the first are to be found in the case of *habeas corpus*. The chancellor, in granting a writ of *habeas corpus*, proceeded on exactly the same lines as the Court of King's Bench. As to the second, in the days of which we are writing, every Court claimed for its officers the privilege of being sued only in their own Court. Common law actions, *e.g.* of debt, against a clerk in Chancery or one of his menial servants must be brought in a department called the Petty Bag Office. The pleadings (in Latin) were delivered exactly as in an action in the Common Pleas, and after all had been delivered and an issue arrived at, the "record" (*i.e.* the papers belonging to the case) was made up and sent to the *King's Bench* or *Common Pleas* to be tried. The Court of Law having tried the issue, returned the case to the Chancery with a report, and on this report the chancellor delivered judgment.

As to the extraordinary or equitable jurisdiction, we find that procedure was by bill, as at first; that is, a written statement by the plaintiff setting forth his grievance. Bohun gives some curious advice to counsel as to drawing bills. "No counsellor" ought to "put his hand to bill, answer, or other pleading, unless it be drawn, *or at least perused*, by himself in the paper draught"! "And counsel are to take care that the same be not stuffed with repetition of deeds, writings, or records *in hæc verba*: but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without . . . tautologies, multiplication of words, or other impertinences . . . to the end the antient brevity and succinctness in bills, and other pleadings, may be restored and observed. Much less may any counsel insert therein matter merely criminal or scandalous *under the penalty of good costs to be laid on such counsel*," to be paid to the aggrieved

party before such counsel will be heard. He instances one counsel who alleged "in that part of the bill which charges a confederacy" that the defendants were "brethren in iniquity." The offensive phrase was struck out as scandalous or impertinent, and "counsel forced to pay good costs." One wonders what would happen nowadays if a member of the Bar were ordered to pay the costs of striking out part of one of his pleadings.

By way of showing the young practitioner how to avoid prolixity and vain repetition, one author gives a precedent of a bill (in a comparatively simple case) which takes up six pages of close print. He then goes on to show how a bill should be drawn. It ought to consist of nine parts, viz.:—(1) *The direction*, containing the title of the judge, &c.; (2) *The introduction*, humbly complaining, &c., with the plaintiff's name and address; (3) *The premises*, setting out the transactions antecedent and leading up to the bill, which must begin with "Whereas"; (4) *The allegations*, *e.g.* that the plaintiff had done such and such things at the defendant's request; (5) *The complaint*, as of fraud, oppression, and confederacy. It appears to have become customary to allege that the defendant was confederating with divers persons unknown to defraud the plaintiff; (6) *The clause giving cognizance in equity*, *e.g.* that the plaintiff could get no relief at law; (7) *The interrogatory*, which repeated in the form of questions the whole of the *premises* and *allegations*; (8) *The prayer* of the bill, *e.g.* to perform a contract, injunction, &c.; (9) *The conclusion*, in which the plaintiff asked for a writ of *subpœna* to be granted.

From this book we gather that the rules as to bills, answers, and other proceedings in Chancery had now attained some degree of strictness. The plaintiff must frame his bill according to rule and precedent; the answer must be filed within a certain number of days, and in a regular form.

As to substance, we find that Chancery had embraced the

following matters:—trusts, relief against fraudulent bargains, relief against penalties and forfeiture, specific performance of contracts, declarations of right, *e.g.* as to the several customary rights of lord and tenants of a manor, alimony, injunctions to restrain nuisances, the guardianship of infants, and the management of their estates.

The following limitations had been laid down:

(1) The Court cannot override a statute.

(2) Where the plaintiff has an effective remedy at common law for the same thing, to common law he must go.

(3) The Court will not interfere in favour of volunteers, *i.e.* persons who had not given valuable consideration for what they claim.

(4) "He that hath a title only in equity shall not prevail against him that hath a title both in law and equity."

(5) The Court will not relieve a man against the *reason and policy* of the common law.

Juries.—In 1670, a decision was given which has had an important effect upon the proceedings in English Courts of Law. At the present time it is the everyday practice for counsel to tell juries that they are the sole judges of the facts. Perhaps this always was so; but it was the practice for judges of the sixteenth and seventeenth centuries to force juries into returning verdicts according to the views of the judge. A refractory jury might find themselves in the position of culprits, and be fined or imprisoned. Since about the fifteenth century, jurors had ceased to be witnesses, and had become judges whose duty was to weigh the evidence given in open Court.

In 1670, two Quakers, Penn and Mead, were indicted at the Old Bailey for unlawfully assembling, and causing others to assemble, in Gracechurch Street, contrary to the Conventicle Act. The Recorder, who presided, summed up

violently against the prisoners, and directed the jury to find them guilty; but the only verdict that the jury would return was "guilty of assembling in Gracechurch Street," which amounted to "not guilty." The Recorder promptly fined the whole twelve, who paid, all except one Bushell, the foreman; him the Recorder committed to prison, but he sued out a writ of *Habeas Corpus*. The return to the writ was that the prisoner was committed for finding a verdict "against full and manifest evidence, and against the direction of the Court." Vaughan, C.J., delivered judgment; from first to last he pooh-poohed the contention of the Recorder. He said, If you bring the same evidence before two lawyers, or even two judges, how rarely do you find them both coming to the same conclusion? How could the Recorder set up that he was certainly right and the whole twelve jurymen surely wrong? It amounted to a claim of infallibility. Moreover, some of the jury might be personally acquainted with facts of which the judge knew nothing.

The last reason given by Vaughan is of considerable historic interest as showing how, at that time, jurors were not quite divested of the character of witnesses; but the whole effect of the decision was to establish the right of jurors to give any verdict they thought proper, with absolute immunity except in cases of corruption.

The Jurisdiction of the House of Lords.—The limits of the judicial function of the House of Lords were settled in the reign of Charles II. In 1667 they claimed to try, as a court of original jurisdiction, an action brought by one *Skinner* against *The East India Company*. There was an immediate outcry from the Commons, and the Lords have never since claimed to exercise original jurisdiction, except in peerage cases, the trial of peers for treason and felony, and impeachments by the House of Commons. Eight years after, a second outcry arose from the Commons because the Lords heard an appeal in Equity, in the case of *Shirley* v.

Fagg. Here, however, the Upper House gained its point, and continued to hear appeals. The appeal in common law cases was as old as the *Curia Regis* and the *Magnum Concilium*, the appellate jurisdiction of the Great Council becoming vested in the House of Lords when that body came into existence.

SUMMARY.

Real Property:

(a) Tenure by knight-service, with all its incidents of wardship, marriage, aids, reliefs, fines, &c., abolished, and the land turned into free and common socage.
(b) Conveyances of freeholds to be evidenced by writing.
(c) Leases for over three years to be in writing.
(d) Wills of land to be in writing, signed by the testator and attested by credible witnesses.

Personal Property.—The Statute of Distributions settled the succession to personalty *ab intestato*.

Patents for Inventions.—The Statute of Monopolies created the modern law of patents.

The Common Law remained practically *in statu quo ante*, but was illustrated by the works of Coke.

Ejectment was simplified as a means of trying title to freeholds.

Evidence.—Written evidence made compulsory in certain cases by the Statute of Frauds.

Mercantile Law.—Mercantile cases begin to come into the King's Courts, but are for the most part confined to the class of traders.

Criminal Law:

(a) *Treason* receives great attention, and the law is strained by the judges.

(b) *Seditious libel and seditious words.*—The law is much debated and strained as against the prisoner.

The Court of Chancery:

(a) Quarrels arise between the Courts of Law and Equity, and the latter prevail.

(b) Ellesmere, Bacon, and Coventry systematise the law and procedure of the Court.

Trial by Jury.—Juries are declared to be the sole judges of the facts and unimpeachable for verdicts given—other than corrupt verdicts.

Procedure.—The procedure on the writ of *Habeas Corpus in criminal cases* is regulated.

CHAPTER VI.

William and Mary to the End of Lord Eldon's Chancellorship (1688—1827).

General.—The Revolution of 1688 made little or no difference to the laws of the country, except in a political sense. It is, however, convenient to make it a point of departure in considering the legal history of England.

From William and Mary to the end of Eldon's chancellorship there was no such fundamental change in any branch of the law as had marked the previous periods—nothing, for instance, like the Statute of Uses, or Charles II.'s Act for the abolition of knight-service. The law developed slowly, chiefly by the decisions of a number of able men who presided over the Courts both of Common Law and Equity, and if we want to trace the history of the law of England during this period we must pay more attention to the Reports than to the Statute Book. Holt and Mansfield on one side of Westminster Hall, and Hardwicke, Thurlow, and Eldon on the other, practically left the law as we find it to-day. Since their time, many alterations in procedure and conveyancing have been made, and many amendments of the law of crimes and their punishments; but it is safe to affirm that the judges of the King's Bench Division to this day abide by the principles of Mansfield and Holt, and the judges of the Chancery Division look very largely for their law to Eldon and to Hardwicke.

Real Property.—There was a tendency during this period to amend the law of real property by improving the law of conveyancing. In 1703 and 1706 Acts were passed for the registration of deeds and wills in the West Riding of Yorkshire, and in 1707 a similar statute passed in relation to the East Riding. The object was to render titles to land more secure, and the policy thus inaugurated of causing instruments of title to land to be registered has since been extended to the important county of Middlesex. Then there are the Act of 1721, by which, for the first time, the lands of insane persons were enabled to be conveyed by persons appointed to act for them; an Act to amend the law as to the foreclosure and redemption of mortgages; and many others of slight interest.

Besides these, there were the two important Acts 9 Geo. II. c. 36 (1736) and 11 Geo. II. c. 19 (1738), the first making sweeping alterations in the **law of mortmain,** and the second a leading statute on the **law of landlord and tenant.** The **Mortmain Act** changed the old law in this respect: formerly no conveyance of land could be made to a corporation, or to the use of a corporation, without the licence of the Crown or other immediate lord of the fee.[1] By the Act of 1736, no land could be given to a charity by will, but gifts *inter vivos* could be made if they were either (a) for full and valuable consideration, or (b) made at least twelve months before the donor died—the idea being to check death-bed donations. *The Statute* 11 *Geo. II.* gave a landlord power to sell goods which he had distrained for rent. Formerly he could only impound them.[2] Again by the old law, a tenant might easily avoid distress by removing the goods from the premises, because only things on the land could be distrained. By the new Act the landlord could follow the goods if they were removed with a fraudulent intention of defeating the landlord's right.

[1] *Ante*, p. 40. [2] *Ante*, p. 13.

Wills of Copyholds.—55 Geo. III. c. 892 is a good specimen of the kind of legislation on legal questions that obtained in the time of Lord Eldon and Lord Thurlow. These celebrated chancellors were intensely conservative. The alteration of one of the technical rules of real property was to them little less than sacrilege. "Abolish contingent remainders!" said Lord Eldon, when a Bill with that object was laid before Parliament, "you might as well try to abolish the law of gravitation!" And so influential were these two chancellors that for years they prevented any legal reforms by Act of Parliament.

Before 1815, a will of copyholds was made in the same way as a will of freeholds had been made before the Statute of Uses—that is, by the owner surrendering his copyhold to the lord to the use of a friend, who was admitted by the lord.[1] The copyholder then made a will by which he devised the use of the land to a devisee, and the friend held as trustee for that devisee. The device was cumbrous in the extreme, and its inconvenience must have been felt frequently. The easiest way to deal with the matter would have been to say at once that it should be lawful for copyholders to devise their copyholds, but this was too sweeping a change for my Lord Eldon. So a statute was passed enacting that a will of uses of copyholds should be valid although no previous surrender had been made—as pretty a specimen of tinkering as is to be found in the Statute Book.

The Law of Copyright dates from this period, the first Copyright Act being passed in 1709 (8 Anne, c. 19). The law on the subject has recently (Copyright Act, 1911) been consolidated and amended.

The Law Merchant.—"Before Lord Mansfield's time, we find that in the courts of law all the evidence in mercantile

[1] See p. 67.

cases was thrown together; they were generally left to a jury, and they produced no established principle."[1] More than anyone else, Lord Mansfield helped to bring about in this a change.

When we consider what change this was, we shall see how important was Lord Mansfield's tenure of office. He was appointed Chief Justice in 1756. A great predecessor, Lord Holt, had considerably improved the Mercantile Law. It is not too much to say that he accomplished more for Mercantile Law in England than the whole body of his predecessors collectively. He is said to have had a special *corps* of jurors, city men, who were always empanelled to try commercial causes. With their help Holt settled two, at least, of the most important branches of the Law Merchant—namely, the law relating to bills of lading and the law of bailments. The latter he transplanted almost entire from the Roman law; and settled principles relating to all kinds of bailees in the celebrated case of *Coggs* v. *Bernard*.[2] This decision is still authoritative on the law of factors, pawnees, carriers, innkeepers, and all kinds of depositees.

One decision of Lord Holt was somewhat extraordinary. It is the well-known *Clerke* v. *Martin*,[3] in which the Chief Justice refused to allow as Law Merchant a custom which had arisen amongst traders to count promissory notes as negotiable instruments, on the same footing as bills of exchange. Lord Holt seems to have been under the impression that the Law Merchant, being part of the common law, must have been in existence from time immemorial, and as the usage of treating promissory notes as negotiable had sprung up within the memory of man, that they could not be under the Law Merchant. The result was an Act of Parliament,[4] which placed these instruments on the footing of negotiability. As to the question of principle, however,

[1] *Lickbarrow* v. *Mason*, 2 T. R. 63, *per* Buller, J.
[2] 2 Lord Raymond, 909.
[3] 2 Lord Raymond, 757.
[4] 3 & 4 Anne, c. 9.

it was long doubtful whether new Law Merchant could be made, and the point has only been decided within the last few years against the view which Holt took.[1]

But the work of Mansfield consisted in incorporating into the law of England the Law Merchant. Before his day the *Lex Mercatoria* consisted of customs prevailing in trade, which customs had to be proved by evidence as *facts*. Mansfield laid it down that the Law Merchant was *law*, and was, therefore, a question for the judge and not for the jury. The jury might be asked to find as a fact whether a custom did in fact obtain, but the legal effect of that custom was for the judge to determine. It followed from the position that the Law Merchant was part of the law of the land that whenever any custom or usage had been found to be part of the Law Merchant, it required no further proof in any case which might afterwards arise. The full effect of the new departure can hardly be over-rated. Take, for instance, the case of the liability of the drawer of a bill of exchange, who alleged that he had received no consideration for it. The holder proved that he had received it from some one for valuable consideration. Before Lord Mansfield's time he would also have to bring evidence to prove that by the usage of merchants the mere fact that the defendant had not received consideration did not absolve him from liability. The jury then decided the whole question of Liable or Not Liable. Now observe the line taken by Mansfield. He said the question of liability is one of law, that is, of the Law Merchant, which is part of the common law. It is only for the jury to find two facts, namely, (1) that the defendant signed the bill, and (2) that the plaintiff is a holder for valuable consideration. If they find both facts in the affirmative, it is for the judge, as a matter of law, to decide whether by the Law Merchant the defendant is liable or not.

[1] *Goodwin* v. *Robarts*, 1 Ap. Ca. 476.

A glance through the reports of the eighteenth century shows how Lord Mansfield built up the law of marine insurance, as, for instance, in the case of *Woolridge* v. *Boydell* (Dougl. 16 A.), where the question of implied warranties arose, and the Chief Justice laid down the rule that "contracts for insurance must be founded in truth." In *Lewis* v. *Rucker* (1761), he laid the foundation of that important branch of maritime law called "particular average." In *Tyrie* v. *Fletcher* (1777), he set forth the rules as to when the premium paid on a policy of marine insurance must be returned, and laid it down that the risk of such a policy is entire—a novel doctrine; and he also declared, what has been taken for law ever since, that a contract for marine assurance is one of indemnity, and not like life assurance, which is a wager. In *Worsely* v. *De Mattos* (1758) he decided that all Acts concerning bankrupts are to be construed favourably for creditors and to suppress fraud.

The work of Mansfield was ably carried on by his successors, notably Lord Chief Justice Ellenborough; and it may safely be asserted that before the year 1827 the Law Merchant, as we know it to-day, was, in principle, settled.

International Law.—The greater part of our law on the subject of rights of belligerents and neutrals, prize of war, and those other matters which form the English contribution to the law of nations, was the work of Sir William Scott, afterwards Lord Stowell, brother of the more famous, but not more learned, John Scott, Lord Eldon. During the Napoleonic wars, it was Lord Stowell who had to adjudicate upon almost all the cases of prize, with the result that he enriched the pages of the law reports with a series of great judgments, leaving the law in such a state as to be the foundation of all the modern decisions. Such cases as *The Twee Gebroeders*,[1] *The Maria*,[2] *The Hoop*,[3]

[1] 3 C. Rob. 336. [2] 1 C. Rob. 340. [3] *Ibid.* 196.

The Immanuel,[1] *The Gonge Margaretha*,[2] remain the leading cases on the protection of neutral territory, the right of visitation and search, trading with the enemy, the right of neutrals to trade with the enemy's colonies, contraband of war, blockade, and kindred subjects.

The Law of Gaming and Wagering.—Amongst the Acts affecting the civil side of the common law were 7 Geo. II. c. 8, and 10 Geo. II. c. 8, by which the "infamous practice of stock-jobbing" was prohibited. The first of the Acts (1727) recites at great length how "great inconveniences have arisen and do daily arise by the infamous practice of stock-jobbing, whereby many of His Majesty's good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations," and then goes on to forbid under a penalty of £500 any "putts or wagers, or contracts in the nature of putts or wagers," on public stocks or funds. Any money paid on account of such contracts was to be recoverable, with double costs.

In the same spirit of legislating against gambling, the Statute of 9 Anne, c. 14, had declared all securities given by way of payment for gaming or wagering debts on the same footing as securities for illegal consideration. And from the time of Anne to the reign of George III. statutes were frequently passed to suppress lotteries. Still, wagering contracts were, in themselves, as legal as any other contracts, and at that time the Courts were not unfrequently made to decide wagers.

The Law of Bankruptcy.—A distinct change was made here (1711). Previous to this date, when a tradesman became bankrupt, his creditors took all his property, and the debtor was still indebted for the balance, for which balance he could be arrested. By 10 Anne, c. 20, the

[1] 2 C. Rob. 186. [2] 1 C. Rob. 189.

creditors were made to accept the most the debtor could give, and were then obliged to restore the bankrupt to liberty. There were nearly a score of other Acts passed relating to bankrupts and bankruptcy, but they referred only to details.

Common Law Procedure.—Some attempts were made after the Revolution to deal with the procedure in the Common Law Courts, especially with a view of minimising technicality and providing more expeditious means of trial. Two or three matters were reformed. One was the removal of an anomaly that had disgraced the Courts since the establishment of the *Curia Regis* by William I. Until 4 Geo. II. c. 26 (1731), all pleadings in common law actions had been in a curious language called, by courtesy, French. Since that Act they have been in English. A second reform was to provide (1705) that judges might give judgment on demurrers (points of law) without regarding any defect in the writ.[1] To understand the full effect of, and full need for, the statute, let the student turn to Croke (Elizabeth), where he will find an objection taken to a writ because a word was wrongly spelt: — "elemosynary" instead of "eleemosynary." The objection failed, not because it was frivolous, but because the wrong spelling was customary, and therefore right. The next reform (12 Geo. I. c. 31) was rendered necessary by the increasing volume of the business of the Courts. Instead of the two justices or barons required by 18 Eliz. c. 12, for trials at *nisi prius*, it was enacted that a single judge should be competent to try such causes, thus allowing twice as many cases to be tried in the same time.

Equity: Development.—The chief doctrines of equity may be said to be the doctrines of trusts, the doctrines con-

[1] Another Act to the like effect, 5 Geo. I. c. 13.

nected with the administration of assets, married women's separate property, mortgages, guardianship of infants, specific performance, fraud as distinct from common law deceit, relief against penalties and forfeitures, and injunctions. There are other matters which are merely connected with the peculiar procedure of equity, as, for instance, discovery of documents and interrogatories, and the taking of various accounts, *e.g.* between partners.

We have seen that uses began as early as Edward III., but we have it on the authority of Lord Mansfield that it was not until the chancellorship of Lord Nottingham (Car. II.) that trusts became what they are in modern times. Lord Nottingham established as a principle that admitted of very few exceptions that the limitations of a trust estate were to be regarded as analogous to the limitations of a legal estate. With regard to trusts of lands, the Statute of Frauds assisted in the development of Lord Nottingham's theory by enacting that all such trusts should be evidenced by writing, and that lands held upon such trusts should be liable to execution for debts of the *cestui que trust* in the same way as if he were seised at law; not by the same process, that is, the writ of elegit addressed to the sheriff, but by the process of equitable execution, that is, the appointment of a person by the Court to receive the profits of the land in order to satisfy the judgment debt. The doctrine of resulting trusts where the purchase was made in the name of another [1] was as old as uses themselves, but Lord Nottingham decided, in *Cook* v. *Fountain*, 1676, that where the purchase was made in the name of a child there should be a presumption of advancement, which would rebut the presumption of a resulting trust.

But it is too much to say that Lord Nottingham settled the law of trusts. For instance, he held in two reported cases that a trustee was compelled to accept a trust, a

[1] "Snell's Equity," 11th ed., p. 117.

doctrine which would not be accepted for a moment in these days. In fact, it may be taken that, with one exception, all the great equitable doctrines and the practice of the Court of Chancery were settled *finally* by Hardwicke, Thurlow, and Eldon. The service rendered by Ellesmere, Nottingham, Bacon, and the chancellors of that time was practically this:—They laid it down as a maxim that Equity ought to act according to rule. Before them, every Equity judge decided each particular case according to what he thought were the merits of that case. But Lord Nottingham finally settled that chancellors were almost as much bound by precedent as were chief justices.

The Stuart chancellors laid the foundation; but, as I have stated, the real builders of the system of modern Equity are the great triad, Hardwicke, Thurlow, and Eldon. Look at the reports, and you will almost certainly find the leading case on any particular equitable doctrine in a judgment of one of these three, most probably Eldon. Since 1827, when, after a reign of twenty-six years, the greatest master of equity quitted the woolsack, no new doctrines have been invented, no new principles applied by judges in Chancery. Eldon, in fact, left Equity a system of justice as much fixed, settled, and by rule limited, as the Common Law was. The last new right created by the chancellors was the one known as "restraint on anticipation." Lord Thurlow is said to have been trustee of a marriage settlement, and by his advice a clause was inserted giving the wife an income *without power of anticipation*, *i.e.* without power to alienate it or charge it. The clause was copied by other conveyancers, and soon came into common use. Lord Thurlow also asserted emphatically the right of the Court to interfere between parent and child for the latter's benefit, remarking on one occasion, when his power was questioned, that he had no doubt but the Court of Chancery had arms long enough to enforce its decrees.

To conclude the subject, at the establishment of the

Court of Chancery under Edward III., and down to the chancellorship of Ellesmere, Equity was "the length of the chancellor's foot." As soon as the woolsack began to be filled regularly, and, as of course, by successful lawyers, the procedure of the Court was regulated, and *some* regard was paid to precedent, but the chancellors did not consider themselves absolutely bound by the decisions of their predecessors. But Lord Nottingham and after him Coventry, Hardwicke, Thurlow, and Eldon, altogether abolished the "chancellor's foot," and based the jurisdiction entirely on settled rules and principles, guided by precedents.

Criminal Law.—A noticeable feature of the criminal jurisprudence of this period was the enormous number of crimes punishable capitally. Prior to this time, in theory of law, there were a great many capital crimes, but, in practice, executions were rare, except for treason or homicide, or other grave offences. The reason was, that in very many cases the offender had "benefit of clergy," *i.e.* if he could read, or write his own name, he escaped death—a survival of the days when the ability to read and write was strong *primâ facie* proof of the clerical character. In 1691, by 3 William and Mary, c. 9, benefit of clergy was taken away in cases of theft from dwelling-houses (including burglary), and other statutes followed, so that Blackstone (1743) laments that no fewer than 160 crimes are subject to the penalty of death.

Before the end of the period, however, one of the worst features of the criminal law had been to a great extent removed. Until the year 1813, a person convicted of felony, without benefit of clergy, was liable to capital punishment, to **forfeiture** and to **attainder.** The consequence of the last part of the punishment was, that the felon's wife and family took none of his property, nor could any one inherit an estate from or through him, because his blood was attainted. Blackstone defends the law as it

existed in his day by arguing that a man is far more likely to be restrained from crime if he knows that detection means beggary for his family as well as ruin for himself; but early in the nineteenth century different views began to be put about, and, in consequence, by 54 Geo. III. c. 145, and by 9 Geo. IV. c. 31, the law of forfeiture for felony was greatly modified. Prisoners convicted of treason or murder, or of aiding and abetting, or being accessory to either of those crimes, were left in the same state as before. In all other cases, however, forfeiture should extend only to the life interest of the criminal. There should be no attaint of blood, except in the cases aforementioned, but the heir should succeed to the property of the felon as though the latter had died a natural death.

Habeas Corpus: Further Legislation.—The Act of Charles II. had improved the procedure in Habeas Corpus, but there were three points it left untouched, viz.: (1) it only referred to cases where the prisoner was in custody on a charge of crime; (2) it did not fix the amount of bail that might be demanded; (3) and most important of all, it did not provide any guarantee against falsity in the return to the writ. It might and did happen that a gaoler would falsely return that the prisoner had been committed legally, as for felony on a magistrate's warrant, and the judges who granted the writ had no means of going behind that return. With the view of remedying these imperfections, a statute was passed in 1816 (56 Geo. III. c. 100), extending the statutable remedy to cases of imprisonment, other than imprisonment on a charge of crime; for instance, detention under the pretext of lunacy. The Act also provides that judges might examine into the truth of the returns made to the writ. The other defect, viz. that relating to bail, had been tried to be met by the Bill of Rights (1689), which enacted that "excessive bail should not be required." It was impossible to fix an amount, and

so at the present time bail is at the discretion of the magistrate or judge, subject to review by the High Court in cases of excess.

Treason: Procedure.—The unfair means adopted by the officers of the Crown in prosecuting persons accused of high treason has been stamped upon the public mind by the trials of Russell and Sidney (James II.), and the "campaign" of the infamous Jeffreys in the West after Monmouth's Rebellion. The prisoner did not know until he stepped into the dock to take his trial what he was to be charged with; the jury was often packed by the sheriff; the accused could not compel the attendance of witnesses to testify for him; and if any witnesses came forward on his behalf they were not allowed to be sworn, so that their testimony was nearly valueless.

The Bill of Rights (1689) enacted that all jurors in cases of treason should be freeholders; and some years after, by 7 Will. III. c. 3, and 7 Anne c. 21, more extensive reforms were introduced:—

(1) No indictment for treason, except an attempt to assassinate the king, was to be found more than three years after the date of the alleged offence.

(2) The prisoner should have a copy of the indictment ten days before the trial.

(3) He should also have a list of the Crown witnesses and a list of the jurors empanelled (*i.e.* out of whom the jury to try him was to be chosen) ten days before trial, and in the presence of two witnesses.

(4) He should have the same means of compelling the attendance of witnesses for him as the Crown had to procure the attendance of witnesses against him.

(5) His witnesses were to be sworn.

(6) Two witnesses must prove acts relating to the same treason, *e.g.* one cannot prove an act of "com-

passing the king's death," and another an act of "levying war against the King in his dominions." [1]

Another concession to the public demands for the fair trial of prisoners accused of high treason was made by 20 Geo. II. c. 30 (1747), by which such prisoners were allowed the assistance of counsel. The greatness of the concession will be appreciated when one remembers that it was not until 1836 that other prisoners were allowed the like privilege.

Treason.—But although the procedure in cases of treason was reformed after the Great Revolution, the law itself left a great deal to be desired. In William III. one Harding levied men in England, and sent them over to France to join the French forces in an attempt to restore the Stuarts. The judges declared this to be a "compassing and imagining the death" of William. The theory generally held was that any act which might have a tendency to dethrone the king by force is "imagining" his death. But the strangest case of all is that of *Damaree and Purchase* (1710), who, with a riotous mob, paraded the streets, shouting "Down with the Presbyterians," and proceeded to pull down a number of dissenting meeting-houses. They were found guilty of levying war against the queen in her realm. The argument upon which they were condemned is to be found in Hale's *Pleas of the Crown*. It is:—There are two kinds of "levying war," viz.:—(1) Levying a war against the king and his army with intent to do his majesty some grievous bodily harm, to depose him, or compel him to change the course of his government, or the like; and (2) levying war for a *public object*. Thus, to join a mob for the purposes of pulling down *all* dissenting chapels was treason; but it would not have been "levying war" to join a mob with intent to pull down *one or two particular* meeting-houses.

[1] *Vide supra*, p. 88.

Hale's view was indorsed by Lord Mansfield in the *Lord George Gordon Case*, which arose out of the No Popery riots. "If," he says, "the multitude assembled with intent, by acts of force and violence, to compel the legislature to repeal a law, it is high treason"—*i.e* by levying war.

The trials of Horne Tooke and Hardy, in 1794, gave rise to decisions on the words "imagining the king's death." The defendants were members of two political societies, having for their objects the carrying on of an agitation for universal suffrage and annual parliaments. No acts of violence had been committed; but the case for the Crown was that the ulterior object of the societies was to depose the king and set up a republic. The Attorney-General (John Scott) contended that if he proved an intention to depose the king that was enough. In law it amounted to "imagining his death." Erskine, for the defence, contended that this kind of treason consisted in an actual intention to kill the king. He admitted, however, that evidence of intention to depose was evidence of imagining death; *but the inference was one of fact, not of law*, and therefore it was for the jury.

Such cases as that of *Damaree and Purchase* have not arisen since the Riot Act[1] (1714), which was passed partly in consequence of it; but in other treasons the law remains the same as it was laid down by Mansfield, Hale, and the other old authorities. Only the *punishment* has been altered.[2]

Riots: The Riot Act[3] (1714) was passed partly in consequence of *Damaree's Case*,[4] and partly in consequence of the frequent riots and tumults which arose between the Hanoverians and the Jacobites. Twelve persons assembling together riotously in a public place constitute an unlawful

[1] 1 Geo. I. st. 2, c. 5.
[2] *Infra*, p. 140.
[3] 1 Geo. I. st. 2, c. 5.
[4] *Supra*, p. 116.

assembly; and if they refuse to disperse within one hour after a proclamation has been read to them, they are guilty of riot, and can be dispersed by force. They are guilty of felony without benefit of clergy (*i.e.* of a capital offence), and if, in dispersing the mob, any of them are killed, the slayer is exonerated from guilt. Since the passing of the Act, it has been usual, before ordering the police or the military to use deadly weapons, for some magistrate to read the statutory proclamation, a ceremony commonly called "reading the Riot Act." It may be pointed out, however, that at common law any subject may, and every subject ought to, assist the magistracy in suppressing riots; so it may happen that a soldier who kills a rioter to prevent an imminent breach of the peace, or a felony, is protected, although no proclamation has been read. The soldier is not protected because he is a soldier, or because he acted by command of his superior officer, but because he is doing his duty as a citizen.[1] The effect of the Riot Act was much discussed in the case of the Bristol Riots (1831), when it was declared to be common law that magistrates ought to use every means in their power to suppress public disorder.

Development of the Law of Libel: *Seditious Libel.*—We have referred to the law of seditious libel as it stood before 1688. After that date, prosecutions under this head were frequent, especially towards the end of the 18th century, when, after a long contest between Erskine on the one hand, and the law officers of the Crown and the judges on the other, the legislature interfered, and revolutionized the law. The point of contest may be shortly stated thus:—*Was the guilt of the libel—that is, its criminal character, a question for the judge, or was it for the jury?* By a long series of decisions from William III. to Lord Mansfield, it had been laid down in terms positive that the judge, and the judge

[1] Case of Arms, Pop. 121.

alone, could decide the question of the nature of the libel. The only question for the jury was the fact that the words complained of had been composed or published by the defendant. The judge asked the questions—"Do you find the prisoner published the libel in London? and do you find that the words refer to the people they are said to refer to?" and to these the jury had to say "Guilty" or "Not Guilty." The form of questions should be noted, because it became important in the time of Erskine.

To come to the authorities, in the case of *R.* v. *Fuller*, Lord Holt, C.J., asked the prisoner whether he could prove the truth of his words, and on receiving an answer in the negative, directed the jury to convict. In *R.* v. *Tutchin* (1704), the same judge told the jury—"If you are satisfied that he is *guilty of composing and publishing these papers in London*, you are to find him guilty." [1] Clearly, Holt did not leave the question of the criminality of the words to the jury. After this comes the case of *R.* v. *Francklin* (1731) for publishing the Hague letter, supposed to have been written by Bolingbroke. Lord Raymond, C.J., presided, and he plainly told the jury:—"Gentlemen, if you are sensible and convinced that the defendant published that *Craftsman* of the 2nd January last, and that the defamatory expressions in the letter refer to the ministers of Great Britain, you ought to find the defendant guilty." "Whether these defamatory expressions amount to a libel or not, . . . this does not belong to the office of the jury, but to the office of the Court." But in the time of Lord Mansfield the matter came to a head. One Woodfall was indicted for publishing Junius's letter to the king, and the jury returned a verdict of "guilty of publishing only." This celebrated verdict was afterwards returned by other juries in cases of libel. Its effect was to acquit the prisoner, because they did not find that the libel meant what it was said to mean,

[1] 14 State Trials, 1905.

nor that it referred to the person to whom it was said to refer. This was in 1770. The chief of the opposition lawyers, headed by Lord Camden, no mean jurist, fiercely attacked the chief justice in Parliament. Mansfield declined to argue the matter. In 1777 Horne Tooke was tried for having written that the king's troops engaged in the American War had been guilty of murder. Here, again, Mansfield only left to the jury the publication and the innuendoes, reserving the question of the criminality for the Court.

The last great case is *R.* v. *Shipley*,[1] commonly called the *Dean of St. Asaph's Case*. A pamphlet called *A Dialogue between a Gentleman and a Farmer*, containing some remarks on the then existing system of parliamentary representation, had been written by Sir William Jones, and published by the Dean of St. Asaph, his brother-in-law. The trial came on at Exeter Assizes in 1783, and Erskine defended with his usual wonderful eloquence and fire, with the result that the jury found the verdict "guilty of publishing only." It appears from Erskine's own account that he had it in his mind to bring forcibly home to the public the dangerous, and, as Erskine considered, wrong view of the law taken by Mansfield. The presiding judge at Exeter was Mr. Justice Buller, in whose Chambers Erskine had been. The great advocate, during the whole of the trial, took up the position that the pamphlet was innocent, and that it was entirely a question for the jury whether it was innocent or not;—that is, the jury must determine the criminality of the libel, or, to put it another way, they must decide whether the pamphlet was a libel or not. The judge took the contrary view, and told the jury it was for them only to find the publication and the innuendoes. When the jury had brought in their verdict, Mr. Justice Buller told them that by adding the word "*only*" they would be

[1] 21 State Trials, 847.

negativing or, at all events, not finding the truth of the innuendoes. Erskine, very properly, asked that the verdict be entered as given, but the judge, also very properly, insisted on making clear to the jury the incompleteness of their finding. They then found the innuendoes, and, as this had the effect of a verdict of guilty, Erskine applied to the King's Bench for a new trial, on the ground of misdirection by the judge. Whoso wishes to gain an idea of the force of Erskine's eloquence can do so by reading the report of his argument in support of the motion.[1] We cannot say more than that he insisted that, by the common law, the jury had a right to bring in a general verdict, *i.e.* of guilty or not guilty on the whole question. He insisted that the criminal intent makes the crime, and that criminal intent is a matter of fact, and therefore for the jury. Lord Mansfield delivered judgment, most uncompromisingly against Erskine. Justice Buller's direction was, he said, abundantly supported; in fact, the rule had been uniform since the Revolution.

There seems very little doubt that the chief justice was absolutely right in law. A course of practice dating back for a hundred years, and supported by such authorities as Chief Justices Holt, Raymond, and Lee, not to mention Mansfield himself, was quite enough. Moreover, it is a general rule of law that the construction of a document, *i.e.* its legal effect, is matter of law, and therefore for the judge.

The immediate result of *The Dean of St. Asaph's Case* was to declare the law with great distinctness, but indirectly it was the cause of an entire alteration in the law. In 1792, *Fox's Libel Act* "enacted and declared" that in a trial for criminal libel "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue; . . . and shall not be required or directed by the court or judge before whom such indictment or information shall be tried to find the defendant or defen-

[1] 2 State Trials, 961.

dants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." This statute directly overruled the law as laid down in the King's Bench for a hundred years, and established the principle that Erskine had contended for.

I have treated of the point settled by Fox's Act at some length, because although that Act, in point of form only, settled a subsidiary question, and not the main point, viz. of the nature of a seditious libel, in fact it did very much more. I have shown on a previous page [1] the kind of words that were held seditious by Jeffreys, Scroggs, and others before the Revolution. After the Revolution the law was in nowise altered.

For instance, in the case of Francklin, the libel consisted of a mere political article, censuring the foreign policy of the government. The libel for which Tutchin was convicted was an article charging the ministry with corruption and bad management.

The law is best summed up by Lord Holt:—"Nothing can be worse to any government than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime, and no government could be safe without it is punished."

After the Libel Act, when the question of criminality was left to the jury, it is strange to observe that convictions for seditious libel were for a time more numerous, juries being, if anything, stricter than the judges had been before. But the fact is accounted for when we consider that the nation was in a state of wild excitement owing to the excesses of the French Revolution. On December 17th, 1792, an extraordinary verdict was given. Two prisoners in the King's Bench prison had put up a placard, "This house to let. Peaceable possession will be given by the present

[1] *Supra*, p. 90

tenants on or before the 1st day of January, 1793, being the commencement of the first year of liberty in Great Britain." They were charged with seditiously devising, contriving, and intending to excite and stir up divers prisoners to escape, by publishing an infamous, wicked, and seditious libel, and were found guilty. But the nation soon recovered from its panic, and since 1815 prosecutions have been rare, and convictions rarer, because the prosecution has had to prove, to the satisfaction of twelve shop-keepers, that the accused had the intention of stirring up the people to overturn the government by force.

Every day we see in the newspapers articles which Mansfield and Holt would have held to be grossly seditious libels, but which the twelve shop-keepers consider reasonable comment on public affairs.

Justices of the Peace and Quarter Sessions.—In 1694 an Act was passed greatly strengthening the position of the Court of Quarter Sessions. It had grown a common practice for persons indicted at these courts to apply before trial to the King's Bench to have the cases removed from the local court on a writ of *certiorari*. As the statute [1] puts it—"Divers turbulent, contentious, lewd, and evil-disposed persons, fearing to be deservedly punished where they and their offences are well known," put the prosecution to a lot of trouble and expense, and endeavoured to have the indictment tried at Westminster or London. It was provided, therefore, that no *certiorari* should issue unless the applicant entered into recognizances to appear at the next assizes. Moreover, if the applicant is eventually convicted, the King's Bench should order him to pay to the prosecutor all the costs of and incident to the *certiorari*.

[1] 5 Will. & Mary, c. 11.

SUMMARY.

Real Property:

(a) The first Yorkshire Registry Acts were passed.

(b) The Mortmain Act allowed conveyances in mortmain, *inter vivos*, under certain restrictions.

(c) The law of distress was altered by giving the landlord the right to sell the goods distrained on, and to follow goods improperly removed.

(d) An alteration was made with regard to wills of copyholds.

Personal Property: The only change was the invention of a new kind of property by the Copyright Act.

The Law Merchant was improved and settled by Chief Justices Holt and Mansfield.

International Law: A series of important decisions was given by Sir William Scott (Lord Stowell).

Procedure at Common Law:

(a) One judge enabled to try causes at *nisi prius*.

(b) Judges to decide demurrers without regard to any defect in the writ.

Chancery: Law and Procedure: The chief doctrines of modern equity, and the practice of the Court *finally* settled. Since the chancellorship of Eldon, equity has been a certain system of law.

Criminal Law:

(a) Capital punishment became more common.

(b) Forfeiture and attainder for treason and felony partly abolished.

(c) The law of treason remained the same, but the procedure was modified in favour of the accused, and counsel allowed to defend.

(d) The Riot Act created the law as to unlawful assemblies, and directed a certain method of procedure for dispersing them.

(e) The law of seditious libel, and the question of general verdicts, gave rise to a long controversy between Erskine and Lord Mansfield. Finally, *Fox's Libel Act* enabled juries to give a general verdict of guilty or not guilty.

(f) Frivolous applications for writs of *certiorari* to remove causes from Quarter Sessions checked by compelling the applicant to give security for costs.

CHAPTER VII.

George IV. to Present Day (1827—1921).

General.—It is from the year 1827 that we must date modern legal history. It was in that year that Parliament entered on the work of Law Reform. Until then, legislation upon legal subjects had, with very few exceptions, been of the most piecemeal character. There had been from the earliest times an unwillingness on the part of Parliament to interfere with law as distinguished from politics. The consequences were—(1) That the greater part of English Law was contained in the decisions to be found in the Books; (2) That many laws had survived when the reasons for them had vanished; (3) That laws, highly inconvenient, not having been repealed, of necessity had to be evaded by devices more or less cumbrous and expensive.

Bentham had, before this, commented severely on two things. The first was the want of system and of certainty in the law, caused by the fact that it had been made by the judges upon the spur of particular occasions, and by the difficulty of extracting with sureness the *ratio decidendi*. The second was the extraordinarily harsh penal laws. Death was the punishment alike for killing a man and for stealing a sheep; for high treason and for petty larceny.

Henry Brougham, afterwards Lord Chancellor, was a devout Benthamite; and in 1827 he delivered in the House of Commons a long and brilliant speech on the Laws of England. He dwelt particularly on the necessity for codification, especially of the criminal law; on the absurdity of fines and recoveries; on the complexity of the methods of

conveying land; on the cumbersome process of the Common Law Courts; on the extraordinary technicality of writs and pleadings; on the fictions which had to be resorted to; and on the harshness of the penal laws. The result of this remarkable speech was the appointment of two commissions —one to consider the criminal law, and the other the methods of the Courts at Westminster and the Common Law. The intention of Brougham was to codify the whole of English Law; but the actual result of the commissions consisted of the presentation of certain valuable reports, which afterwards led to the appointment of further commissions, upon whose labours were based the Real Property Act of 1845, the Common Law Procedure Acts of 1852, 1854, and 1860; and the Criminal Law Consolidation Acts of 1861. More immediate results were the abolition of fines and recoveries; the complete revolutionizing of the law of dower, and the confining of capital punishment to murder and high treason.

It may be said, in fact, that almost every legal change since 1827 has been upon the lines indicated by Brougham, and by him borrowed from Bentham. These changes have been for the most part merely in matters of procedure, conveyancing and codification. There has been singularly little alteration in the substantive law.

The dismissal of Eldon from the chancellorship rendered the occasion appropriate for introducing measures of legal change. He had held his high office for twenty-six years, and though he had done no slight service by consolidating the principles and practice of the Court of Chancery, he had persistently opposed all sweeping or radical changes in the law. It is as much to Eldon's retirement as to Brougham's agitation that we owe the series of measures at this time enacted.

Real Property.—In no department of the law have more changes been made than in the Law of Real Property. Yet

the alterations have not been so much in the law relating to realty as in the law relating to the disposition of realty, that is, the Law of Conveyancing. It is not within the scope of this work to enter upon a discussion of the details of modern Real Property Law. Only the main features will be considered. The Fines and Recoveries Act, 1833, abolished the cumbrous business known as **fines and recoveries.**[1] For these fictional actions disentailing deeds were substituted in cases where the entail was to be barred; and in the cases where a married woman wished to convey an interest in land, she was to execute a deed jointly with her husband; and to prevent undue marital influence, she was to acknowledge, before a commissioner or a judge at Westminster, that the deed was her own voluntary act. By the Dower Act, 1833, the **law of dower** was greatly modified. Instead of a wife being entitled to dower only in lands of which the husband was *seised*, she took dower out of his equitable estates also. But, on the other hand, the husband was enabled to alienate his land *inter vivos* or by will, free from dower, which he was only able to do formerly by a series of intricate conveyancing manœuvres too long to explain here.

The law of prescription, *i.e.* the acquisition of a right in another's property (*e.g.* rights of way and the like), was much simplified by the **Prescription Act,** 1832, which provided that a presumption of right should arise by twenty years' user, and become irrebuttable at the end of forty years.[2] The **Rules of Descent** were also altered about the same time. By the Common Law, no ancestor could inherit from a descendant; no relation of the half-blood could be heir; and the course of inheritance might still in some cases be arrested by attaint of blood. The Inheritance Act, 1833, reversed all three of these rules; and it also enacted that

[1] See pp. 38, *et seq.*

[2] The periods for *profits à prendre* are thirty and sixty years respectively; and for right of light twenty years' irrebuttable.

for the future descent should not be traced from the person last seised, but from him who last acquired by purchase.[1] The **Real Property Limitation Act** also, in 1833, barred all claims to realty, or money charged on land, or to legacies, unless they were made within twenty years of the time when they vested. The period was cut down to twelve years by the Real Property Limitation Act of 1874. Other important statutes in this connection are, the **Conveyancing Acts,** 1881, 1882, and 1890; and the **Settled Land Acts** of 1877, 1881 to 1893, of which accounts are to be found in the text-books of Williams and Goodeve. The object of the former was to simplify deeds of conveyance; and the latter were intended to give to tenants for life of settled estates greater facilities for dealing with those estates. The measure is most important, for half the land of the country is under settlement. **Copyholds** are optionally enfranchisable by the Copyhold Act, 1894.

Feoffment with Livery was practically superseded by the Real Property Act, 1845. Up to that date it was nominally still the way of conveying freehold hereditaments; but in fact it had long been obsolete. For two centuries lawyers had been using conveyances by deed in order to avoid the necessity at livery of seisin. These deeds, being merely conveyancers' devices, were necessarily somewhat technical, and the law of conveyancing was much simplified by the provision that freeholds in possession might be conveyed by a simple deed of grant. In 1875 and 1897 were passed the **Land Registry Acts,** which were intended to make land transferable by registration at a Land Registry. These Acts are, as yet, only in operation in the County of London.

Wills.—Until 1837 testaments of personalty could be by word of mouth, though, since the Statute of Frauds, wills of

[1] *I.e.* not by inheritance, escheat, or partition.

land must be in writing. The Wills Act, 1837, codified the law relating to wills and testaments, and introduced a good deal of new law. First and foremost comes the proviso that *all* wills and testaments [1] must be in writing. Then, that *all* property can be directly devised or bequeathed by will, including copyholds.[2] Next, that all wills speak as from the testator's death, so that all property of which he dies possessed may be included in it. Various other sections modified, explained, or annulled decisions which had been given on the Statute of Wills and the Statute of Frauds.

Married Women's Separate Property was invented by the Court of Chancery; but it only applied to cases where the property had been *expressly* given to the married woman's separate use. The Married Women's Property Act, 1882, made all the property "separate property" where the parties married after 1882, or where the property was acquired after that year. There had been other Acts in 1870 and 1874 giving some lesser rights of the same kind to married women; but the Act of 1882 swallowed up its predecessors.

Equity.—Since the chancellorship of Lord Eldon, most of the alterations made in Equity, or Chancery Law, have been by statute. There have been a few—a very few—new extensions of old doctrines, and there has been one case in which, by judicial decision, a doctrine formerly set up by judicial decision has been overturned—namely, the doctrine of precatory trusts. It had frequently been held that where a testator gave property to A., with a "hope" or "trust" or "confidence" that A. would provide for B., A. was held a trustee for B. By the authority of the late Sir George Jessel that series of decisions has been of late years overturned; and it is now established that a trust *must* be

[1] Except those of soldiers and sailors *in expeditione*.
[2] See p. 105.

declared in imperative language.[1] So far as I know, that is the only important new doctrine of Equity since Eldon. There has also been a certain amount of reluctance to follow other old doctrines established by the early chancellors, especially in one direction, viz. the old judges in Equity were very ready to make the trustee's position extremely onerous. The trend of modern decisions and practice is to make his duties and liabilities as light as may be, provided that he acts honestly and to the best of his judgment.

There have also been numerous statutes on the subject of trusts and trustees, with the object of clearing up doubtful points, and of relieving trustees from undue burdens. These are the **Trustee Acts** of 1850, 1852, 1857, 1859, 1888, and 1893, the last of which codifies the provisions of the former Acts and greatly improves the position of the trustee who is honest but unfortunate or mistaken. Another object of the statutes is the saving of expense to the trust estate. Thus, new trustees can be appointed without the expense of an application to the Court; and a trustee is not responsible for the dishonesty or incompetence of an agent or co-trustee whom he thought honest and competent. A further piece of legislation is by the Rules of the Supreme Court, issued in 1883. Under the old system of Equity, a trustee acted very much at his peril. If the trust instrument did not state his powers fully and accurately, and he was in doubt, he had to make up his mind and act to the best of his judgment. Should he turn out to be wrong, he would probably render himself liable to an expensive lawsuit and heavy loss. By the new rules, he can go to a judge of the Chancery Division and obtain a solution of the difficulty, and the directions given by such judge completely exonerate the trustee from all liability. By the Trustee Relief Act, 1857 (now re-enacted as part of the Trustee Act, 1893), a trustee who

[1] But see *Comiskey* v. *Bowring-Hanbury*, [1905] A. C. p. 84, where, however, there was a gift over which helped to show that the testator did not intend an absolute gift.

is in difficulty may pay the whole of the trust fund into Court and get rid of all future responsibility.

International Law.—During the Great War (1914—1918) the Prize Courts, under the presidency of Sir Samuel Evans, Lord Sterndale, and Sir Henry Duke successively, and the Committee of the Privy Council on appeal, gave many decisions of importance. No new principle was established, unless it can be said that one was established in *The Kim*,[1] when it was held that the doctrine of continuous voyage, applied by American Prize Courts during the American Civil War,[2] extended to cases where contraband goods were to be sent to the hostile country not necessarily by transhipment. In other words, the doctrine is now that of continuous transportation, and not continuous voyage. *The Zamora*[3] disapproved the dictum of Lord Stowell in *The Fox*[4] to the effect that the Crown can, by order, prescribe or alter the law which Prize Courts have to administer; and emphatically laid it down that Prize Court law is not municipal law, but the law of nations.

Joint Stock Companies and Limited Liability.—By the common law every association formed for the sake of sharing profits, is either a corporation or a partnership; and a company which is neither one nor the other is a thing unknown to the common law. A corporation was formed either by Royal Charter or Act of Parliament. When unincorporated companies with a joint stock divided into transferable shares began to assume importance, the reception they met with from the Courts and the legislature was not encouraging. They could not sue their debtors, and each member was answerable for the whole of the company's debts. The Bubble Act, 6 Geo. I. c. 18, attempted to put

[1] [1915] P. 215.
[2] *The Bermuda*, 3 Wall. 514.
[3] [1916] 2 A. C. 77.
[4] Edw. 312.

them down altogether; but the futility of this course was soon perceived, and in 1825 the Act was repealed.

The same statute which repealed the Bubble Act [1] empowered the Crown to grant charters of incorporation to joint stock companies, and at the same time declare the persons incorporated personally liable for the corporation's debts. This was followed in 1834 by a statute empowering the Crown to grant privileges to companies by letters patent, especially that of suing and being sued in the name of a public officer. In 1844 it was enacted that all companies might obtain a certificate of incorporation without applying to Parliament for a charter; but the only limit to the liability of individual members was that creditors had to show that they could not obtain payment from the company before they sued the individuals composing it.

But the extensive character of modern commercial undertakings demanded greater protection for joint stock enterprise. Accordingly, in 1855, an Act was placed upon the statute-book enabling companies registered under the Act of 1844 to obtain from the registrar of joint stock companies a certificate of incorporation with **limited liability.** By limited liability is meant, that the liability of each member is limited to the amount of capital which he undertakes to subscribe. Extensive alterations were made by Acts of the two succeeding years; and by the Companies Act of 1862, the law on the subject was consolidated and extensively amended. Incorporation is now no longer a privilege; and any seven persons may form themselves into a company for any lawful object, and with limited liability. The various statutes passed on this subject since 1862 have been chiefly with the objects of preventing the machinery of the Companies Acts being used to defraud shareholders and the public, and to provide means for putting an end to joint stock concerns when they are insolvent or fraudulent, or for

[1] 6 Geo. IV. c. 91.

any reasons unable to successfully carry out the object for which they were formed, notably the Companies Act, 1900. These Acts are now consolidated into one statute, the Companies (Consolidation) Act, 1908.

The Law Merchant.—No branch of law received less attention from the legislature until the nineteenth century; and in the last three reigns none has received more. A number of Acts, in the nature of codifying statutes, have been placed on the statute-book. Thus, in 1882, the Bills of Exchange Act codified the law relating to bills, cheques, and promissory notes. In 1890, the Partnership Act did the same for the law of partnership. This was followed in 1893 by the Sale of Goods Act, which codified the existing common and statute law affecting the most widely used contract of all. The Act of 1893, it is believed, only made one alteration in the law of sale. There has been other legislation affecting the law merchant which Holt and Mansfield made, notably, the Mercantile Law Amendment Act, 1856, by which a few amendments were made and doubts cleared up; but the striking feature of the history of the law merchant in this period has been the three statutes briefly referred to above. A Commercial Court has also been established as part of the machinery of the King's Bench Division for the more expeditious trial of commercial causes.

Bankruptcy.—The law of bankruptcy has undergone considerable changes in the last seventy years. Until 1895, a debtor was not allowed to declare himself a bankrupt; but by the Bankruptcy Act of that year a debtor might declare himself insolvent to one of his creditors, and the creditor might then ask for a commission in bankruptcy to issue. The Bankruptcy Acts of 1849 and 1861 allowed the debtor himself to petition to be made a bankrupt; but the Act of 1869 allowed him only to call a meeting of his creditors and explain his position to them. The creditors could then

appoint a trustee to take the debtor's estate and realize it for their benefit. This was *liquidation*, not bankruptcy properly so called. In 1883 the new Bankruptcy Act allowed the debtor to present a petition to the Court to make himself a bankrupt. The great feature of the Act of 1880 is the provision for constituting the Board of Trade a supervising authority in bankruptcy cases. The functions of the *official receivers* appointed by the Board are, in general terms, to act as official trustees or caretakers of the bankrupt's estate, and to endeavour to find out whether the bankruptcy is due to the recklessness or fraud of the bankrupt, and if so, to report the facts to the Court in order that the culprit may be duly punished. Since 1869, any person except a married woman, whether a trader or not, can be a bankrupt. The Bankruptcy Act, 1914, continues, in the main, the policy of the Act of 1883, with a few alterations, principally as to practice. By section 125, sub-section 1, every married woman who carries on a business, whether separately from her husband or not, is made subject to the bankruptcy laws; and by sub-section 2 a married woman carrying on a trade or business is liable to bankruptcy proceedings on a judgment against her, whether the judgment is or is not expressed to be payable out of her separate estate. This is new; and was rendered necessary by the vastly increased number of women traders. The subject of the Bankruptcy Courts will be found treated of on p. 155.

Criminal Law.—From 1827 to 1832 a series of Acts consolidating various parts of the criminal law was passed. 7 & 8 Geo. IV. c. 28 made certain reforms in criminal pleading, abolished benefit of clergy, and enacted that no felon should suffer death except for a felony which was excluded from the benefit of clergy before the Act. In the same year the law relating to larceny and the law of malicious injury to property were consolidated; and in the

following year the law relating to offences against the person. In 1830 a similar Act was passed on the law relating to forgery; and in 1832 as to coinage offences. These Acts made a few alterations and additions; but they left untouched the definitions and principles of common law. In 1837 the punishment of death was abolished except in very few cases. Two important statutes were passed, in 1851 and 1853 respectively, to amend procedure in criminal cases, especially to enable judges at the trial to amend indictments slightly wrong in form only, and to simplify indictments; *e.g.* in an indictment for stealing bank-notes or coin, it is sufficient to state that the prisoner stole so much money. The Act of Edward III., as to certainty in criminal pleadings, had been construed to mean that the particular kinds of coin and numbers of each kind must be specified in the indictment.

But the nearest approach to a criminal code is to be found in the Criminal Law Consolidation Acts, 1861. They are, the Larceny Act, the Malicious Damage Act, the Forgery Act, the Coinage Offences Act, and the Offences against the Person Act. These Acts, again, do not define most of the offences they deal with, but leave the common law definitions untouched. For instance, the statute last mentioned, though it deals with the sentences for murder and manslaughter, does not say what those offences are. The statute of 1861 in course of time required amendment, and a series of enactments, drawn on somewhat bolder lines, aimed at simplifying and amending, as well as consolidating, certain parts of the criminal law. The draughtsmen no longer shirked the difficulty of definition. The Forgery Act, 1913, embodies within its twenty-two sections parts of more than sixty statutes, and repeals the greater part of the Forgery Act, 1861. Forgery is compendiously defined as "the making of a false document in order that it may be used as genuine"; and the Act deals also with offences kindred to forgery—*e.g.* "uttering," forgery of dies and

seals, possession of material for the purpose of forgery. The Perjury Act, 1911, defines perjury and deals with various aspects of it which were formerly the subject of numerous statutes, as well as of the Common Law. The Larceny Act, 1916, is a well-drafted Act dealing in a similar manner with the crime of theft. The Incest Act, 1908, makes incest a crime; and is remarkable for a unique proviso that all charges under the statute shall be heard *in camera*. Such a proviso runs contrary to the general theory and practice of English law. The subject of the right of a judge to order a trial *in camera* was dealt with in *Scott* v. *Scott* ([1913] A. C. 417), where the House of Lords decided that there is no power to order a case to be tried *in camera*, however disgusting or painful the details may be, unless justice cannot be done otherwise. Before this decision it was common practice to order nullity suits to be tried *in camera*. *Scott* v. *Scott* decided that the practice was unlawful. There have been many other alterations, especially measures for the prevention of crime (particularly 8 Edw. VII. c. 50), and for the punishment of offences against children and young persons.

One of the blackest blots on the pre-Benthamite penal system was the unfair way in which prisoners were treated. We are accustomed to speak and think of "old English fair play," and to contrast it proudly with continental modes of trial. As a matter of fact, the fair treatment of prisoners on trial is of modern growth. Before the Revolution of 1688 the matter stood thus: a man accused of treason or felony could not be defended by counsel, except that a member of the Bar was allowed to argue a point of law for the prisoner. It was only in cases of misdemeanour, where conviction would not entail loss of life and property, that counsel was allowed to defend. Besides, the behaviour of judges and prosecuting counsel, especially in cases of treason, sedition, and other State offences, was frequently most brutal. The Attorney-General, Coke, who prosecuted Raleigh for

treason, referred to that eminent explorer, warrior, and statesman as a "scurvy knave."

After 1688 the behaviour of counsel and judges was less flagrantly indecent, and in some cases was as fair as could be wished; but still prisoners felt the necessity of opposing trained advocacy by trained advocacy. In 1747 a "full defence by counsel" was allowed to those accused of treason; but it was not until nearly a century later (1836) that the same privilege was extended to persons accused of felony. In the same year was passed an Act to prevent a previous conviction being given in evidence to the jury in the case before them, except where the prisoner brings evidence of his good character.

The right of appeal in Criminal cases was granted in 1907 (see p. 182).

Indictments and Criminal Trials. — The Indictments Act, 1915, brought about a revolutionary change in criminal procedure. Under the law as it stood prior to this Act, indictments were obliged to be written on parchment; and, by long custom, must contain certain ancient formulæ. Thus, an indictment for burglary must state that the prisoner "burglariously," "broke and entered." In felonies the word "feloniously" must be used. In treason it was customary to state that the prisoner was "seduced by the Devil," and "not having the fear of God in his heart," committed the crime charged. Further, if a prisoner was once put in charge of the jury, and the indictment turned out to be defective, there was no power of amendment. An old rule did not allow of felony and misdemeanour to be included in the same indictment. The statute of 1915, with the rules made thereunder, is an attempt to apply, as nearly as may be, the modern practice relating to pleadings and the procedure thereon which have, since the Judicature Act, 1873, prevailed in civil cases. The indictment need no longer be written on parchment.

It must commence with the name of the Court of trial, and must contain a plain, brief statement of the offence charged, with particulars thereof. The judge has power to amend at any stage of the trial if it can be done without injustice. Any number of felonies or misdemeanours can be included in one indictment; and—a very great innovation—felonies and misdemeanours may be included in the same indictment. If a felony and a misdemeanour are charged in the same indictment, the prisoner has the same right of challenging jurors as if all the offences charged were felonies. To prevent injustice to prisoners, if the Court should be of opinion that a person accused may be embarrassed or prejudiced in his defence by the joinder of counts or offences, or if for any other reason it is desirable to do so, the Court may order a separate trial of any count or counts of an indictment. The contrast between the indictment at Common Law and the indictment under the Indictments Act, 1915, may be seen from the following examples of indictments for murder:—

1. *At Common Law.*

Middlesex to wit. { The jurors for our lord the King upon their oath present that John Styles on the first day of June in the year of our Lord one thousand nine hundred and fifteen feloniously wilfully and of his malice aforethought did kill and murder one James Noakes against the peace of our sovereign lord the King his crown and dignity.

2. *Under the Indictments Act,* 1915.

Statement of Offence.

Murder.

Particulars of Offence.

John Styles on the first day of June 1921 in the county of Middlesex murdered James Noakes.

Treason.—In the early part of Queen Victoria's reign certain persons who thirsted for notoriety made some stir in the world by pretending to attempt the Queen's life. In consequence of these acts of folly, the Treason Act, 1842, provided that, when an attempt was made to injure in any manner the person of the Queen, the offender should be tried as if for murder, but punished as if for treason. Discharging or aiming firearms, or throwing, or using, or attempting to use, any weapon, with intent to alarm or injure her Majesty, was made a high misdemeanour, punishable by imprisonment and whipping.

By the **Treason Felony Act,** 1848 (s. 3), conspiracies to depose the Queen, to levy war against her, or to induce any foreigner or stranger to invade her dominions, were made felony punishable by transportation for life, or imprisonment for two years. They had been held to be overt acts of compassing the Queen's death under the statute of Edw. III., and had been made substantive treasons by 36 Geo. III. c. 7, made perpetual by 57 Geo. III. c. 6, when the intention was expressed, uttered, or declared by publishing any printing or writing, or by any overt act or deed. The Treason Felony Act repealed the 36 and 57 Geo. III., except so far as related to offences against the person of the sovereign, but did not affect the old Act of Edw. III., or the construction put upon it.

It was held in *R.* v. *Casement* ([1917] 1 K. B. 98) by the King's Bench Division and the Court of Criminal Appeal that an indictment charging high treason by adhering to the King's enemies elsewhere than in the King's realm was a good indictment. [See also *R.* v. *Lynch* ([1903] 1 K. B. 444)]. The point was by no means free from doubt, although Hawkins (*Pleas of the Crown*, bk. 2, ch. 25, s. 48, Curwood's edition) supported the view, which must now be taken to be the law.

Libel.—The law relating to criminal *defamatory* libels

was considerably modified by the Libel Act, 1843, commonly called "Lord Campbell's Act." Formerly it was good law to say, "The greater the truth the greater the libel," a statement at first blush somewhat difficult to appreciate, but nevertheless, resting on a perfectly reasonable basis,[1] and still correct in cases of seditious libel. By Lord Campbell's Act it was apparently partially, and really wholly, repealed in cases of defamatory libel. Any person maliciously publishing a defamatory libel, knowing the same to be false, is liable to two years' imprisonment and a fine. But if he did not know it to be false, he can only be imprisoned for one year. Then comes the important part:— If the defendant can prove the libel to be true and published for the public benefit, he is entitled to an acquittal, and to his costs of defence. A departure, however, is made from the usual criminal procedure. To entitle the defendant to give evidence of justification, he must plead the truth of the libel specially, and also the facts and reasons why the publication was for the public benefit. To this plea the prosecutor shall be at liberty to reply by a general denial. Thus, private prosecutions for libel were put much upon the same footing in point of form as civil actions for defamation. One curious point may be noticed. The plea of justification is to be "in the manner *now* required in pleading justification to an action for defamation." The "now" refers to 1843, so that counsel drawing a plea of justification to an indictment for defamatory libel must still use the archaic forms which obtained before the Common Law Procedure Act, 1852.

More sweeping alterations have been made by the Newspaper Libel Act, 1881, and the Law of Libel Amendment Act, 1888. By the former, a Court of Summary Jurisdiction may inquire into the truth of a *newspaper* libel, and may, if it deems the offence a trivial one, inflict a fine not

[1] This dark saying is interpreted *infra*, p. 199.

exceeding £50. The Act of 1888 makes privileged fair and accurate reports of proceedings in Courts, and at public meetings, meetings of such bodies as town councils, and certain other lawful gatherings. Again—and this is an extraordinary privilege granted to the newspaper press—no one can prosecute a person responsible for a newspaper libel except by an order of a judge of the High Court. The 9th section allows, but does not compel, the defendant in a prosecution for criminal libel to give evidence "at any and every stage of such charge."

Evidence.—Bentham, in his strictures on the laws of England, attacked some of the rules of evidence then prevailing. He urged that the discovery of truth was the end of the rules of evidence; and, therefore, the incompetency of witnesses ought, as far as possible, to be removed. At that time, the Common Law Courts would not allow evidence to be given by either party to the suit, nor by his or her wife or husband, nor yet by their privies in blood, estate, or interest, *i.e.* by those persons who might, directly or indirectly, be affected by the judgment. The consequence was the exclusion from the witness-box of the people who were most likely to know anything about the matters in question. A further rule was that no person was competent to give evidence in an action if the judgment therein might subsequently be evidence for or against himself. The person accused of a crime was not allowed to give evidence at the trial; neither was his or her wife or husband. The reasons adduced in support of the old rules were that the evidence ought to be that of impartial persons. Our ancestors seem to have been haunted by a bogey of perjury; for they believed that a witness with an interest in the suit would not hesitate to perjure himself in order to further his own ends.

In 1833, Bentham's views so far prevailed that by 3 & 4 Will. IV. c. 42, it was enacted that no person should

be incompetent to testify in any civil proceeding because the judgment therein might be given subsequently as evidence for or against himself. But the old notion was not dead; because the Act went on to provide that in no case should a judgment be admitted as evidence for or against any man who had given his testimony in the action. The bill, as it was introduced by Brougham, L.C., was much more sweeping; but, as yet, parliamentary opinion was not ripe.

In 1843, by Lord Denman's Act, the Benthamite theory was carried out still further. No witness was to be excluded from giving evidence by reason of incapacity, from crime or interest, except the parties or their husbands or wives.

By a further Evidence Act, introduced by Lord Brougham in 1851, one of the exceptions in Lord Denman's Act was taken away, and parties to civil suits were allowable and compellable witnesses. Two years later, Lord Brougham carried another Act, removing the disability of husbands and wives of parties. This statute left the law practically as it stood until the year 1898, that is, only making incompetent persons accused of crime and their husbands or wives. A great number of the statutes passed in the last forty years have *allowed* the defendants in criminal proceedings, or their husbands or wives, to give evidence; but in no case have they rendered those persons compulsory witnesses. The Licensing Act, 1872, was the first of these enabling statutes, which now number about twenty, including the Criminal Law Amendment Act, 1885, the Corrupt Practices at Elections Act, 1883, the Libel Act, 1888, and the Prevention of Cruelty to Children Act, 1894. And, finally, by the Criminal Evidence Act, 1898, a husband or wife can give evidence for the other if the latter is charged with a criminal offence; but cannot be called for the prosecution except in a very few cases. And, most revolutionary change of all, a prisoner is entitled, but not compellable, to give evidence on his own behalf. There are certain limitations

as to the cross-examination of prisoners and their husbands or wives who give evidence. (C. E. Act, 1898, s. 1).

Such witnesses cannot be asked questions about the prisoner's credit and character, unless the prisoner has, in his defence, attacked the character of the prosecutor or tried to show that some one else is guilty of the crime, or has given evidence of good character. Except where the wife (or husband) is willing, the other spouse cannot be called, *i.e.* is neither a competent nor compellable witness.[1] This does not apply where the offence was committed against the wife.

The proof of documents was, before Lord Brougham's Act of 1845, extremely difficult. It was necessary, in all cases where the contents of a written instrument had to be adduced in evidence, to produce the original document. By that Act, official documents were to be received in evidence without proof of the seal or signature of the person sealing or signing the same; and by the second Brougham's Act (1851) it was permitted to prove the contents of official books, registers, etc., by means of a copy officially certified to be correct, thus avoiding the trouble and expense of bringing the originals into Court.

The Bankers' Books Evidence Act, 1879, was the beginning of a change, the principle of which has been somewhat, and probably will be still more, extended. The old judicial notion was, that litigants were made for the law, and not law for the litigants. The modern idea is to make the practice of the Courts conform, as far as may be, to the convenience of the business world. Before the Act of 1879, not only the parties to the suit, but also third persons, might be compelled to come into Court as witnesses and bring their books of account. To bankers, such a practice was ruinously inconvenient; and in 1878, Mr. Ravenscroft of the Birkbeck Bank refused to take to Court one of his ledgers. The

[1] *R.* v. *Leach* (1912), App. Cas. 305.

refusal might have been serious for the witness; but, as it turned out, there was no need for his books to be produced. The case aroused much attention; and in the following year the Act alluded to was placed on the statute-book to enable bankers to furnish, for the information of the Court, sworn copies of their books, instead of the books themselves. Now, by a rule of the Supreme Court, made in 1893, a judge, sitting in Chambers, can always order that instead of a party being compelled to bring his business books into Court, a copy shall be made by some one whom the judge appoints.

Procedure in the Common Law Courts.—One of the most frequent subjects of the denunciations of law reformers has ever been the methods and procedure of the tribunals. At the beginning of Queen Victoria's reign this standing grievance had only too much cause. Process well enough adapted to the days of the feudal barons, when nobody was in a great hurry, and when the great *desideratum* was eventual justice, was unsuited to an age of commerce, when the demands of every trade and calling were daily becoming more severe, and when speedy decision was almost as valuable as exact justice. In preceding pages the rigour of the Common Law has been spoken of. It would be better, perhaps, to call it the rigidity of the Common Law judges, who refused to administer anything except the letter of the law, and that most literally. For instance, it having been laid down as a principle that all pleadings should be accurate, objection was occasionally taken on account of mistakes in spelling. Again, it is a very sound principle that no one should be sued on a contract except the persons liable under it. This again had been interpreted to mean that if A. sued B. and C. on a contract, and B. turned out not to be liable, C. went scot free, because A. had sued the wrong persons. Again, in order to bring certain wrongs within the purview of the Courts, various fictions had been

allowed, and indeed were strictly enjoined. Thus, in the action of conversion,[1] the plaintiff originally could only have a remedy if he alleged that the defendant *found* the goods and converted them to his own use. If the allegation of finding was omitted from the declaration, the plaintiff failed in his action. And in case of any slip of this kind, the party in fault was not allowed to amend his error and continue his action. It was quite impossible for the judge to allow him to make any amendment of his writ or pleadings. The unlucky plaintiff who made a stumble could only give up that action and bring another. The defendant who erred must see judgment given against him.

These defects had been commented on by Brougham in 1827, when he moved for the appointment of the two commissions before referred to. No immediate result followed the labours of those commissions; but in 1850 another small commission was appointed to inquire into the process and practice of the Superior Courts of Law at Westminster, *i.e.* the King's Bench, Common Pleas, and Exchequer. In 1852 this commission presented their report, suggesting various amendments, together with a draft bill. This bill passed into law the same year, and was the first of the three statutes known as the **Common Law Procedure Acts** (1852, 1854, and 1860). Their effect was enormous. They swept away from the procedure of the Courts of Law much of the prolixity, the expense, the tediousness, and the air of unreality that had previously characterized them. To sum up the chief provisions—

(a) *The Writ.*—By 2 Will. IV. c. 39, a writ of summons had been substituted for the old original writ addressed to the sheriff, except in the three remaining real actions.[2] The Common Law Procedure Acts went on to say that the writ should not set out in detail the cause of action.

[1] *Supra*, p. 77.

[2] *Supra*, p. 24.

(b) *All real actions* were abolished.

(c) *Judgment in default* could be given if the defendant did not appear to the writ. Formerly, the plaintiff had to proceed by way of outlawry; but now outlawry on mesne process is abolished.

(d) *Amendment.*—At any stage in the trial, the judge could allow a party to amend his pleadings.

(e) *Non-joinder and misjoinder of parties.*—As has been said before, the presence of a wrong plaintiff was fatal to the case, and the presence of a wrong defendant might be. The absence of a rightful plaintiff or defendant might also be fatal to the action, however just the claim might be. One of the most beneficial clauses of the Act of 1852 was that whereby a plaintiff or defendant might, by leave of a judge, be put in or struck out at any stage of the proceedings; and whereby in no case has any non-joinder or mis-joinder of parties to be fatal to the claim.

(f) *Reference.*—Where a claim or a defence was a matter of account or detail, the judge was empowered to order the accounts or technical details to be tried by a referee who could go into the matter more informally, and perhaps with more technical knowledge.

(g) *Pleadings.*—Great reforms were made here. No pleading must be embarrassing—if it was, it might be struck out. No fictitious allegations need be made; *e.g.* in an action for conversion, it was not necessary to allege that defendant *found* the property; in action for trespass, it was not necessary to allege that it was done *vi et armis et contra pacem.*[1] Again, *special demurrers* were taken away. A special demurrer was a technical objection to

[1] *Vide supra*, p. 24.

pleading, not generally on a point of law, but on a technical rule of pleading. Such a special demurrer was brought before the trial of the action; and the first thing counsel used to do when the other side delivered a pleading was to scan it carefully to try to find ground for a special demurrer. The most frivolous points were raised, often with success; and always with the result of delaying the trial of the action.

(h) *Action of Ejectment.*—The Act of 1852 abolished John Doe and Richard Roe. In other words, the action of ejectment was now to be brought by an ordinary writ, addressed to the person actually in possession of the disputed tenement, who, if he held of a superior landlord, must give notice to that landlord, who could apply for leave to be made a defendant.

(i) *Equitable defences* for the first time were allowed to be heard in Courts of Law. As we have seen, a man who had no defence at Common Law might have a very good one in Equity; and his only course before the Common Law Procedure Acts was to file a bill in Chancery for an injunction to stop the Common Law action. Under the new procedure, he could plead his equitable right in the original action. The result of the measure was greatly to diminish the number of "common injunctions" to restrain Common Law actions, and to cause Law and Equity to be concurrently administered to some extent. But the remedy in this instance was not wide enough. If a plaintiff had two *claims,* one legal and one equitable, arising out of the very same set of circumstances, he still had to bring two actions.

(k) *Discovery.*—The bill for discovery has already been described. This, again, was a case of bringing a second action in Equity because of the unbending

conservatism of the Common Law procedure. The Act of 1854 enabled a party to a Common Law action to apply to a judge by summons in that action for an order for discovery.

(l) *Injunctions* might also, for the first time, be granted by the Courts of Law. Hitherto, they had been issued only out of Chancery. But here again the powers given were extremely limited. A Court of Law could only grant an injunction where the plaintiff had a cause of action for damages; that is, the continuance of an existing tort, but not the doing of a threatened wrong, could be restrained.

(m) *Trial by Judge alone.*—Down to 1854, all trials at *nisi prius* were before a judge and jury. A judge alone could not try an action; but by the Act of 1854 the parties were allowed to dispense with a jury.

(n) *Adjournment.*—It seems too absurd to be true, nevertheless it is a fact, that it had been held before the Common Law Procedure Acts that a trial at *nisi prius* could not be adjourned. The origin of the rule lay in the fact that the writ of *nisi prius* was originally used for trials on circuit, where the judges sat *de die in diem* until all the causes were finished. But since 1852, the presiding judge has had power to adjourn such a case for any period in his discretion.

Procedure since the Judicature Act, 1873.—The Judicature Acts, especially that passed in 1873, made important changes in the procedure of the Courts. In the first place, as every division of the High Court can now give relief in all cases, and can grant every remedy, and take cognizance of every defence in every action, multiplicity of suits has been, to a great extent, abolished. A plaintiff can, in the same action, claim both legal and equitable remedies; and can ask, by the same writ, for redress of all his grievances against the defendant. For instance, he can, at the same

time, sue for damages for breach of contract and for libel, but subject to the rule that the Court may order issues to be tried separately, if it thinks that confusion would ensue from their being tried together. Then the defendant may counter-claim in the same suit if he has any substantive cause of action against the plaintiff; so that, as far as possible, all differences between the parties may be settled at once. It follows that no injunction can be issued from one division to restrain proceedings in an action in another division, so that "common injunctions" have fallen into desuetude. Again, the judges have been authorized to make rules for the regulation of procedure, with the intent that the practice of the Courts may keep pace with the needs of the times.

Forms of action are abolished, and the plaintiff need not now state whether he sues in trespass or on the case, in detinue or in trover. All that is required is for the plaintiff to state in his pleadings the material facts on which he relies, and the relief he claims, *e.g.* damages or injunction, &c. Not only have most of the technicalities of pleadings been abolished, but their length and number have been curtailed. An entirely new procedure has been applied to commercial causes, pleadings being altogether dispensed with in most of such cases. Chancery proceedings also have been shortened and rendered less expensive by the practice of beginning certain actions by originating summonses. When an action is so commenced, frequently it does not go into Court at all, but is decided by the master or the judge in chambers in a summary way.

Trial by Jury in Civil Causes.—During the Great War, by the Juries Act, 1918, an alteration was made in the mode of the trial of cases at Common Law which may be termed revolutionary. As a temporary measure, the Act provided that the normal method of trial should be by judge alone. Any litigant in a cause where a charge of fraud was made,

or in an action for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage had the right to demand a jury; but in any other case the Court was to order trial by jury only when convinced that the cause would be tried better with a jury than by a judge alone. By the Administration of Justice Act, 1920, these provisions were made permanent, save that a party can always ask for a jury, and must be granted one unless the Court is of opinion that the action cannot as conveniently be tried with a jury as without a jury. The absolute right to a jury in the cases mentioned above is preserved.[1] Similar provisions are applied to County Courts.

Women in the Courts.—By the Sex Disqualification (Removal) Act, 1919, women were made eligible to exercise all public functions and hold all civil and judicial offices and posts, and to be admitted to all civil professions and vocations. The result was to admit women to the Bar, to the solicitor's profession, and to be magistrates and jurors. By section 1, sub-section (*b*), provision is made for the empanelling of a jury of men only or women only, in the discretion of the judge, recorder or chairman of the court, on the application of a party, or of the prosecution or the accused. A woman may, at her own request, be exempted from service in respect of any case, where the reason for the application is the nature of the evidence to be given or the issues to be tried. There is no reason, in law, why women should not now occupy the highest judicial offices.

Fusion of Law and Equity.—This is a somewhat misleading, though generally used term. The Judicature Act

[1] The Juries Act, 1918, was to remain in force "during the continuance of the present war and for six months thereafter." The Act of 1920 is to come into force on the expiry of the said period, unless by an Order in Council an earlier date is fixed. Up to the publication of this edition the Act of 1918 is still in operation (October, 1921).

enacted [1] that "in every civil cause or matter commenced in the High Court of Justice, Law and Equity shall be administered by the High Court of Justice and the Court of Appeal respectively." And it is further enacted [2] that where the rules of Law and Equity conflict, the rules of Equity shall prevail. This does not mean, nor must it be taken to mean, that equitable principles are to be applied to matters formerly exclusively dealt with at Common Law. It simply means that in every action the judge can take cognizance of all the rights of the parties, whether at Common Law or in Equity. For instance, actions for personal injuries were always tried by the Common Law Courts, and never went into the Courts of Chancery. Consequently there are no rules in Equity here, nor can the plaintiff or defendant be allowed to set up any argument deduced from equitable rules. A case in point is *Britain* v. *Rossiter*, where the plaintiff claimed damages for wrongful dismissal on a verbal contract which was "not to be performed within a year from the making thereof." On such a contract the Statute of Frauds requires evidence in writing, but there was a rule in Equity that if the contract so required to be in writing by the statute had been part performed, it would be enforced notwithstanding the want of written evidence. But the only contracts which had ever come within the purview of the Courts of Chancery were contracts for sale of land and in consideration of marriage. Therefore, the equitable doctrine of part performance was restricted to those particular contracts. The rule is now understood, but at first it gave rise to a great deal of misconception.

County Courts.—In 1846 an Act was passed creating a new civil tribunal which has absorbed a great amount of business. The statute took away the jurisdiction of Courts of Requests, which were then the places for recovery of

[1] Section 24. [2] Section 25, sub-sect. 11.

small debts, and also the jurisdiction of various local Courts, and established a new kind of County Court for the prosecution of claims of small amount. The whole country was divided into districts, over each of which a judge was appointed to decide all cases where the claim was for not more than £20, *except* actions of ejectment, or in which the title to real property, or any toll, fair, market, or franchise should be in question, or where any provision of a will or settlement might be disputed, or for any malicious prosecution, libel or slander, seduction or breach of promise of marriage. All actions were to be tried by the judge, unless one of the parties demanded a jury; and if a jury were demanded, it should consist of five men instead of the Common Law twelve.[1]

By various amending Acts, the jurisdiction of the new County Courts has been enlarged. In 1847 the jurisdiction in bankruptcy was transferred to them from the Court of Bankruptcy and the district Courts of Bankruptcy. In 1850 the limit of claims upon which actions could be brought in the County Court was raised from £20 to £50; and if a plaintiff brought in a Superior Court any action which he might have brought in the County Court, and recovered not more than £20 in an action based on contract, or £5 in an action based on tort, he should not be entitled to costs of his action in the Superior Court. And by the County Courts (Jurisdiction Extension) Act, 1903, these Courts are given jurisdiction to try causes up to £100; but only about fifty of the Courts are nominated where actions involving more than £50 can be tried. Another statute, passed in 1865, gave a limited equity jurisdiction to the County Courts; and by the County Courts Act, 1867, actions of ejectment or actions to try title to land might be commenced there in all cases where the value or rent of the property was not more than £20 a year. The County Courts Acts, 1888, raised the

[1] The five were increased to eight by the C. C. Act, 1903.

limit of annual rent or value to £50. A further increase in the business of the County Courts was made by forbidding actions to be brought in the Hundred-Courts which might be commenced in County Courts (1867); and also by provisions depriving of his costs a plaintiff who brings an action in the High Court of Justice and recovers not more than £50 in an action of contract, or £20 in an action of tort, provided that he could have sued in the County Court (1887). Moreover, the judges of the High Court have power to remit to any County Court for trial an action begun in the High Court by an impecunious plaintiff, who, if he loses, will not be able to pay the defendant's costs.

The Court of Probate.—Until 1857, the jurisdiction over granting or revoking probate of wills and letters of administration of the personal property of deceased persons had been vested in various Ecclesiastical Courts, in which such jurisdiction had resided since the Conquest.[1] By the Court of Probate Act (20 & 21 Vict. c. 77), all causes and matters relating to this kind of business were taken away from those courts and established in a newly constituted tribunal called the Court of Probate, presided over by a judge qualified in the same way as the judges of the Superior Courts at Westminster.

The Divorce Court.—It has been shown [2] how jurisdiction in matrimonial causes was assumed by the Ecclesiastical Courts. Those Courts, acting on the rules of canon law, would only grant judicial separations and not divorces *à vinculis matrimonii*. For such a total dissolution of the marriage bond the parties had to resort to Parliament for a private bill, the evidence being heard in the House of Lords. The Matrimonial Causes Act, 1857, constituted a new Court for Divorce and Matrimonial Causes, to be pre-

[1] See pp. 19 *et seq.* [2] Page 18.

sided over by the judge of the newly constituted Probate Court and with power to give relief on all claims for divorce, judicial separation, and nullity of marriage. Owing to the enormous increase in matrimonial causes, due in part to the unsettlement caused by the Great War, in part to the very general change in the standard of morality, and in further part to the facilities granted to poor persons to have their cases brought to trial without costs of solicitor or counsel, the Probate, Divorce, and Admiralty Division, as constituted of two judges, proved unable to keep pace with its work. The Administration of Justice Act, 1920, gave power to the Lord Chancellor, with the concurrence of the President of the Division and the Lord Chief Justice to frame rules to provide for the trial of matrimonial causes of any prescribed class by commissioners of assize (section 1).[1]

The Courts of Bankruptcy.—By 1 & 2 Will. IV. c. 56, a Court of Bankruptcy was established consisting of four judges and six commissioners. The latter were practically judges of first instance, with an appeal to a Court of Review consisting of three of the four judges, and further appeals, first to the Lord Chancellor and then to the House of Lords. In 1869 this Court was abolished, and for it was substituted the London Court of Bankruptcy, consisting of a chief judge and a number of registrars. This Court only acted for the metropolitan area, the jurisdiction in county cases being given to the County Courts. But in every case an appeal lay to the Chief Judge. In 1883 the separate jurisdiction of the Bankruptcy Court was taken away, and the Court amalgamated with the High Court of Justice. A judge of the King's Bench Division now takes the place of the Chief Judge.

The Fusion of the Courts.—In 1873 the Judicature Act became law, and on the 1st November, 1875, it came into

[1] No such rules had been made up to the publication of this edition.

operation. By it the Courts of Exchequer, Common Pleas, Queen's Bench, Chancery, Probate, Divorce, and Admiralty were fused together as the High Court of Justice. The High Court was divided into five divisions, namely, the Exchequer Division, the Common Pleas Division, the Queen's Bench Division, the Chancery Division, and the Probate, Divorce, and Admiralty Division. By the Act of 1881, the Exchequer and Common Pleas Division were fused and amalgamated into the Queen's Bench Division, so that the High Court now consists of three sides, the King's Bench, Probate, Divorce, and Admiralty, and Chancery. All causes of nullity of marriage, divorce, and judicial separation, admiralty cases, as well as probate of wills and intestacies, were assigned to the Probate, Divorce, and Admiralty Division. To the Chancery Division were assigned all matters which had been under the exclusive jurisdiction of the old Court of Chancery by any Act of Parliament, and all causes of the administration of the estates of deceased persons; the dissolution of partnerships; the taking of accounts; the redemption or foreclosure of mortgages; the raising of portions or other charges on land; the sale and distribution of the proceeds of property subject to any lien or charge; the execution of trusts; the rectification, or setting aside, of deeds and instruments; the specific performance of contracts for the sale or letting of real estate; the partition or sale of real estates; the wardship of infants and the care of infants' estates. To the Queen's Bench Division were assigned all matters within the exclusive jurisdiction of the old Courts of Queen's Bench, Common Pleas and Exchequer.

These assignments are subject to the general rule that all causes and matters are cognizable by any Division of the Court. The rules as to assignment are only for the more convenient dispatch of business, and in the case of *In re Besant*,[1] Sir George Jessel tried an action in which the claim

[1] 11 Ch. D. 508.

was for an injunction to restrain a lady from breaking a covenant in a deed of separation between herself and her husband, and the lady counterclaimed for a judicial separation. Before the Judicature Act this could not have been done. There must have been two actions, one in the Court of Chancery for the injunction, and the other in the Divorce Court for judicial separation. In practice the matter rests with the judge before whom the matter is brought. If he thinks that it would be better tried by a judge of another Division, he forces the parties to assign it to that Division.

The Court of Appeal.—By the Judicature Act, 1873, there was constituted a new Court of Appeal, with jurisdiction to hear appeals from all three divisions of the High Court of Justice. The new Court was to consist of five *ex officio* judges, viz. the Lord Chancellor, the Lord Chief Justice of England (*i.e.* of the King's Bench Division), the Chief Justice of the Common Pleas Division, the Chief Baron of the Exchequer Division, and the Master of the Rolls, together with a number of ordinary judges of the Court, called Lords Justices of Appeal, not exceeding nine in number. In fact, only three Lords Justices were appointed. Of this Court the Lord Chancellor was to be president. The original idea was to appoint Scotch and Irish and Colonial lawyers to the Bench of the Appeal Court; and provision was made by the Act for carrying out that object.[1] But by the Judicature Act of 1875 the number of ordinary judges was reduced to three, and the idea of vesting in the Court an appellate jurisdiction from Courts other than those of England was abandoned.[2] In 1876, a further change was made, three more ordinary Lords Justices being appointed by virtue of the Appellate Jurisdiction Act of that year; and in 1881 the Master of the Rolls ceased to be a judge of the Chancery Division, and became an ordinary member of

[1] Judicature Act, 1873, s. 6. [2] *Ibid.*, 1875, s. 4.

the Court of Appeal.[1] Since that date, the Court has consisted of the Lord Chancellor and the Chief Justice of England (the Chief Justiceship of the Common Pleas and the Chief Barony of the Exchequer having ceased to exist) as *ex officio*, and the Master of the Rolls and five Lords Justices of Appeal, as ordinary members. A further slight alteration was made in 1891. Three members of the Court form a *quorum*, and it was sometimes found impossible, in the temporary absence of one of the ordinary members, to form two Courts. It was therefore enacted by the Judicature Act, 1891, that any ex-Lord Chancellor may, if he is willing, sit as a member of the Court of Appeal.

The House of Lords.—A considerable change has been made in the constitution of the House of Lords as an appellate tribunal by the Appellate Jurisdiction Act, 1876. By that Act were appointed two life peers, called Lords of Appeal in Ordinary, with a salary of £6,000 a year, who are to all intents and purposes merely judges. Under the Act they were only to be members of the House of Lords during tenure of office; but by an Act passed in 1877, commonly called the Blackburn Relief Act, the seat in the House, with power to vote like any other peer of Parliament, is made to last for life. The qualification for a Lordship of Appeal is two years' tenure of a high judicial office in England, Scotland, or Ireland, or fifteen years' practice at the Bar of any of those countries. No appeal is to be heard by the House of Lords unless there are present at least three of the following persons:—The Lord Chancellor, ex-Lord Chancellors, Lords of Appeal, or Peers of Parliament who hold or have held high judicial office. "High judicial office" includes the Lord Chancellorship of England and Ireland, or a judgeship of any of the superior English, Irish, or Scottish Courts.

[1] *Ibid.*, 1881.

A useful power was given to the House to sit as a Court of Appeal when Parliament is prorogued or even dissolved. By section 14 of the Act, the Queen in Council is empowered to appoint other two Lords of Appeal in Ordinary on vacation of office by one or both of the then paid judges of the Privy Council. The new Lords of Appeal are Privy Councillors; and it is their duty to sit as members of the judicial committee of that body when required to do so, and not engaged on judicial business in the Lords.

The Privy Council.—When Brougham, in 1828, made the celebrated speech to which reference has been made, no Court came in for more stringent criticism than that of the Privy Council. At that time its jurisdiction was entirely appellate, for it had never exercised original jurisdiction since the abolition of the Star Chamber. It assumed control over all the Courts in the British dominions, except those of England, Scotland, and Ireland; and as the British *Raj* extended, so the complexity of the Council's functions increased. Mahommedan, Hindu, French, Roman-Dutch law came before it for review; and the tribunal consisted not of trained lawyers and judges, but of the ordinary Privy Councillors, who were, for the most part, mere politicians.

Besides hearing appeals from the Colonies and India, the Council had an appellate jurisdiction in admiralty, ecclesiastical, and prize cases.

One of Lord Brougham's first acts as Lord Chancellor was to take away jurisdiction from the Privy Council as a whole, and constitute a body called "The Judicial Committee of the Privy Council," consisting of the Lord Chief Justices of either Bench, the Chancellor, the Lord Chief Baron, and other high judicial officers. Two other persons being Privy Councillors might be appointed members of the committee, and also two retired Indian or Colonial judges.[1]

[1] 3 & 4 Will. IV. c. 41.

At the time of Brougham's speech, the Council only sat to hear appeals for nine days in the year, and even these were not fixed. But after 3 & 4 Will. IV. c. 41, the Judicial Committee sat regularly and on stated days.

An amending Act was passed in 1871, by which her Majesty was empowered to appoint four salaried judges as members of the Judicial Committee. These paid members are bound to attend on the hearing of appeals in the same manner that judges of the ordinary courts of law are bound to attend their respective Courts.

Since the Judicature Act, 1873, the Judicial Committee has only exercised appellate jurisdiction over Indian and Colonial cases, Prize Court cases, and certain appeals on matters of Church discipline from the Courts of the bishops and archbishops. In determining the causes last named, the Committee has the assistance of certain archbishops and bishops as assessors.[1]

The Appellate Jurisdiction Act of 1876 practically makes the same persons who are Lords of Appeal in Ordinary the paid members of the Judicial Committee; so that the highest Court of Appeal for the United Kingdom and that for the rest of the Empire consists of the same persons, except that, by a recent statute, the Judicial Committee Amendment Act, 1895, the Queen may appoint as members of the Judicial Committee not more than five judges of the higher Courts of India and the Colonies, provided that such appointees are Privy Councillors.

SUMMARY (1827—1921).

Real Property.—The law of conveyancing simplified:

(a) Fines and recoveries abolished.

(b) The law of dower amended by giving the wife dower out of equitable as well as legal estates; but only in lands which the husband is entitled to at death, and of which he dies intestate.

[1] Appellate Jurisdiction Act, 1876, s. 14.

(c) The law of prescription simplified.
(d) The rules of descent altered; descent being traced from the purchaser, and ascendants being allowed to inherit.
(e) Feoffment practically abolished, and deed of grant substituted.
(f) Law of wills codified and amended.
(g) Married Women's Property Act, 1882, made all property separate estate after December 31st, 1883.
(h) Conveyancing and Settled Land Acts.
(i) Land Registry Acts, 1875 and 1900.

Equity.—The doctrines of Equity as settled by Eldon remain intact, except for statutory modifications; which are chiefly in the direction of protecting trustees.

International Law.—Some decisions of international importance.

Joint Stock Companies.—Allowed to be formed without Act of Parliament or Royal Charter. The practice of limited liability introduced.

Bankruptcy ceases to be a criminal offence; and the law is extended to non-traders, and to married women.

Criminal Law and Procedure.—Parts of the Criminal Law are codified, and the procedure made more favourable to prisoners. Treason is cut down to offences against the person of the sovereign. Defendants in prosecution for defamatory libel may prove truth and may give evidence.

Evidence.—The law as to competency of witnesses is radically changed. Almost all disabilities are removed; even prisoners being allowed to testify in some cases.

Procedure.—Common law procedure is greatly changed by the Common Law Procedure Acts, 1852—1860; and

the procedure in all cases, whether at common law or in equity, is revolutionized by the Judicature Acts and Rules. Forms of action are abolished; pleadings shortened and simplified, and delay lessened. A new style of practice is invented for commercial causes. The right of *trial by jury* in civil cases curtailed by Administration of Justice Act, 1920.

Fusion of Common Law and Equity.—The principles are not fused, but the remedies are administered concurrently in all Courts since 1873.

The Courts of Justice:

(a) *County Courts* are established, in 1846, for the trial of small cases; and their jurisdiction has been largely extended since then.

(b) *The Courts of Probate and Divorce* take the place of the Ecclesiastical Courts for matrimonial and probate cases. Merged into the High Court of Justice by the Judicature Act, 1873.

(c) *The Court of Bankruptcy* is established in 1837; and superseded by the London Court of Bankruptcy in 1869, this, in turn, being merged into the High Court of Justice in 1883.

(d) *The High Court of Justice* is formed in 1873, absorbing all the jurisdiction of the superior Common Law and Equity Courts, as well as Probate, Divorce, and Admiralty jurisdiction.

(e) *The Court of Appeal*, formed in 1873, takes over all appeals from the High Court of Justice.

(f) *The House of Lords* as an Appellate Court is reconstructed by the Appellate Jurisdiction Act, 1876.

(g) *The Privy Council* as a whole ceases to have any jurisdiction, and its judicial functions are vested in a judicial committee of that body.

(h) A *Court of Criminal Appeal* is founded.

CHAPTER VIII.

Courts of Justice.

In the **Anglo-Saxon period** courts of justice were for the most part local. The great Court was that of the shire-reeve (afterwards called sheriff), which will be treated of in a subsequent page. There was a sort of appeal to the witan and the king; but it is not until after the **Norman Conquest** that we see the administration of justice centralised in the hands of the king.

William I. established the *Curia Regis* or *Aula Regis*, which consisted of the great officers of state, such as the treasurer, chancellor, chamberlain, marshal, and a certain number of barons selected by the king as his counsellors, presided over by the justiciar. To these were added a certain number of *justitiarii* (justices or judges), whose business it was to be present when legal matters were discussed, or causes tried. The non-legal members of the *Curia Regis* seldom attended the trial of a case, as was only to be expected; and the old writs generally directed the litigant to appear before the king's justices (*justitiarii mei*).

These justices decided not only purely legal cases, but also matters connected with the exchequer or financial department of the *Curia Regis;* such as the proper mode of assessing the feudal reliefs, fines, and forfeitures. They had also civil and criminal jurisdiction in all cases, both original and appellate, and to this is traced the appellate jurisdiction both of the King's Bench and the Privy Council.

As business increased, a division of labour became a necessary convenience, and so we find the *Curia Regis*

considered as a Court of Justice, separated from the *Curia Regis* considered as the king's advisers. The councillors of the Crown took the name of *concilium ordinarium*, and the term *curia regis* was applied only to the judicial body. This separation took place in or about the year 1178 (Henry II.). A further sub-division soon became necessary, and it was accomplished by forming a separate Court to deal with financial business, and with all disputes arising, directly or indirectly, out of the assessment and collection of the royal revenues.

THE COURT OF EXCHEQUER.

The judges of this Court were called Barons of the Exchequer, with the Chief Baron as president. Its functions were to collect and account for the revenues of the Crown; and as, until 12 Car. II., much of these revenues was derived from the feudal dues payable by tenants *in capite*, and as their amount and incidence involved questions of law, it was necessary to appoint lawyers to assess them. All cases in which the revenues of the Crown were concerned came before the Barons of the Exchequer,—*e.g. Bate's Case* in James I., and *Hampden's Case* (Case of Shipmoney) in Charles I. All sheriff's and king's bailiffs or stewards had to account to the Exchequer, and all moneys due from towns holding[1] in the king's demesne had to be paid there. After the dissolution of the monasteries, Henry VIII. set up a Court of Augmentation to attend to the collection of the firstfruits and tenths formerly belonging to religious houses, but now belonging to the Crown. By 1 Ph. & M. c. 10, this Court was fused into the Court of Exchequer. Besides revenue cases, the Exchequer soon assumed jurisdiction over causes both at Common Law and in Equity.[2] The equity side had especial cognizance of

[1] See Jud. Act, 1873.

[2] *Infra*, p. 168.

actions brought by clergymen for the recovery of tithes, and the common law side of actions for debt. On the equitable side, there was an appeal direct to the House of Lords, and on the common law side, after 31 Edw. III. c. 12, to the Exchequer Chamber by writ of error. In 1841, the equitable jurisdiction of the Court was taken away. In 1875,[1] the Court itself became a division of the High Court of Justice, and in 1880 the name of the Exchequer Division was taken away and its judges became justices of the Queen's Bench Division.

The next split from the main body of the *Curia* was by the formation of a Court called

THE COURT OF COMMON PLEAS (HEN. III.).

or, as it is frequently called, the Common Bench.

Its jurisdiction extended to all civil cases between subject and subject, which were called, in the older legal phraseology, *Common* Pleas, to distinguish them from Pleas of the Crown. It had exclusive jurisdiction in all "real" actions.[2] By Magna Charta, article 17, it is provided that "common Pleas shall not follow the King's Court, but shall be held in some certain place," and the place fixed upon was Westminster Hall. Still we find the Common Pleas sitting at York in the reign of Edward III. The judges of the Common Pleas were called justices, with the Lord Chief Justice as president. After the establishment of this Court there remained in the *Curia Regis* all criminal jurisdiction and appellate jurisdiction from the inferior Courts, and all civil business which had not been transferred to the Exchequer and Common Pleas. So that there were now three Common Law Courts, viz. the Exchequer, the Common Pleas, and the *Curia Regis*, or, as it came to be called, "*Bancum Regis*," the latter name finally supplanting the former, and being Englished as

[1] See Jud. Act, 1873. [2] Pages 24 *et seq.*

"THE COURT OF KING'S BENCH"

which begins to be a separate Court (Hen. III.), absorbing all the judicial business of the *Curia Regis*, except, perhaps, the ultimate appeal. In fact, from about 1300, the *Bancum Regis* (King's Bench) and *Curia Regis* became interchangeable terms. The Court of King's Bench was the most powerful in the country. It had two sides—the CROWN SIDE and the PLEA SIDE. The Crown side was concerned with criminal matters, appeals from inferior Courts, the liberty of the subject, and the control of corporations. It issued the writs of *Mandamus*, *Habeas Corpus*, and *Quo Warranto*. On the Plea side, it had the cognizance of all actions of trespass, or any tort alleged in the old pleadings to be committed *vi et armis*, actions for forgery of deeds, maintenance, deceit, and all torts savouring of fraud; but it had no right to entertain actions for mere debt, or actions for breach of covenant, or the like; these belonged to the Common Pleas. It seems that the real original jurisdiction of the Court was in matters criminal or semi-criminal.

The King's Bench was always deemed to be the highest in the land. And, indeed, the Common Pleas and Exchequer were merely branches of it. The sovereign himself was supposed to sit there, and its writs were returnable *coram ipso rege*; though, in fact, the king did not sit there personally, as far as is known, during legal memory, with the exception of James I., who, however, was prevented by Coke, C.J., from interfering in the actual decisions. (Case of Prohibition, 1607).

In consequence of the supposed presence of the king, the Court of King's Bench had a right to review the judgments of the Common Pleas by means of writs of error. Sir J. Gilbert, in his book on the origin and practice of the King's Bench, says that it is the "sovereign eyre" (that is, court itinerary); and because the justices in Eyre always made all civil causes to cease in the counties into which they came,

therefore the King's Bench, when sitting in Middlesex, had power to order a cause to be removed from the Common Pleas (which always sat in Middlesex) to be examined for error. This may have been the reason; but it is quite as reasonable to suppose that the Common Pleas, being merely an off-shoot of the King's Bench, the latter assumed the right of appellate jurisdiction as a matter of course, in the same way that the Lord Chancellor heard appeals from the Master of the Rolls.

There was no Writ of Error at Common Law to call in question the decisions of the King's Bench; and this for the reason that the King's Bench was the highest Court in the land. But there was an appeal to the *Magnum Concilium*, and afterwards to the House of Lords. It is curious to notice how the King's Bench maintained its dignity. On a Writ of Error addressed to the Common Pleas, the Chief Justice of the inferior Court sent up the Record in the case to the King's Bench; but on an appeal from the latter Court to the House of Lords the Chief Justice of the *Bancum Regis* did not part with the Record; he merely sent up a copy to the Lords. Gilbert mentions this as a proof of the superior dignity of King's Bench.[1] But by the statute of Elizabeth already referred to,[2] a writ of error could be issued to the King's Bench triable in the Exchequer Chamber, but only for actions "originally begun" there. A case removed into that Court by writ of error proceeded to the House of Lords as the next and final appeal, and was not subject to review by the Exchequer Chamber. And, moreover, actions begun by original writ in the King's Bench did not come within the Act of Elizabeth, because original writs were issued by the clerks of the Court of Chancery,[3] and, therefore, the actions begun in this way were held to have begun in Chancery. The only cases

[1] Gilb. Hist. & Orig. of K. B. 319.
[2] *Supra*, p. 74.
[3] *Supra*, p. 29.

"originally begun" in the King's Bench were those begun there by privilege and on the Bill of Middlesex and *Latitat*.

FICTIONS BY WHICH THE COMMON LAW COURTS EXTENDED THEIR JURISDICTION.

After the sketch given in the preceding pages of the jurisdiction of the three Courts of Common Law, it may surprise the student to hear that the Court of Exchequer, until its merger in the High Court of Justice in 1875, tried common pleas; for instance, actions of debt between subject and subject; and the Court of King's Bench tried every kind of actions except the old real actions. Even jurisdiction over realty was usurped by the fictional action of ejectment (see pp. 76 *et seq.*), a proceeding personal in form, but actually a means of trying title to real estate.

The reason for the fictions about to be described was the anxiety of the judges to extend the business of their own Courts, a desire that will seem not unnatural when we learn that the judges and officers of these Courts were paid not a fixed salary, but the fees of the suitors. In these days, when a plaintiff, for instance, pays a fee of ten shillings for issuing a writ, the money goes into the Treasury. In early times it would have gone to the judges or to some other official of the Court.

The Court of Exchequer extended its jurisdiction by the WRIT OF QUO MINUS. As we have seen, its proper jurisdiction was over the king's debtors, but a plaintiff was permitted to come to the Court and aver that he, Thomas Smiles, was the king's debtor, and that he was unable to pay the king because the defendant, William Styles, wrongfully withheld a sum of money from him (the plaintiff). The Court then issued a writ against William Styles ordering him to answer the claim of Thomas Smiles. The form of the writ was as follows:—

Writ of Quo Minus in the Exchequer.

George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth : to the Sheriff of Berkshire, greeting.

We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take William Styles, late of Burford, in the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the barons of our Exchequer at Westminster, on the morrow of the Holy Trinity, to answer Thomas Smiles, our debtor, of a plea that he render to him two hundred pounds which he owes him and unjustly detains, *whereby he is the less able to satisfy us the debts which he owes us* at our said Exchequer, as he saith he can reasonably show that the same he ought to render; and have you there this writ. Witness, Sir Thomas Parker, knight, at Westminster, the sixth day of May, in the twenty-eight year of our reign.

The writ was called *Quo Minus* (*quo minus*=whereby the less) because of these words in the original Latin form of the document. The English translation of them is printed in italics in the form given above.

The Court of King's Bench extended its jurisdiction by the BILL OF MIDDLESEX and the WRIT OF LATITAT. The Court had properly the right to try cases of trespass (see page 166, *supra*); and it also claimed and exercised the right, when any defendant was in the hands of the marshal of the Court, to hear and determine any complaint against such defendant for any cause whatever. Thus, if William Styles had committed a trespass against Thomas Smiles, the latter's remedy would be by action of trespass in the King's Bench. But once Styles was in the custody of the marshal of the King's Bench, Smiles could bring suit against him for any other cause; for instance, debt. The process evolved by some ingenious officer of the Court was, when Thomas Smiles wanted to sue William Styles for debt in the King's Bench, he sued out a bill for trespass; and, when the defendant was in the hands of the marshal, an action was brought for the debt, and the trespass was entirely dropped. It was necessary to allege that the trespass had occurred in Middlesex; and the bill was issued to the sheriff of

Middlesex commanding him to bring up the defendant. But if the defendant did not live in Middlesex the sheriff had no power, so he returned for answer a "*Non est inventus*," that is, "the within-named William Styles is not found within my bailiwick." A writ was then issued to the sheriff of the county where Styles lived, commanding him to bring up the defendant. The writ proceeded on the supposition that Styles was a fugitive, and had run away from Middlesex to escape the hand of justice. Subjoined are forms of the proceeding:—

Bill of Middlesex, and Latitat thereupon in the Court of King's Bench.

Middlesex to wit. The Sheriff is commanded that he take William Styles, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the lord the king at Westminster, on Wednesday next after fifteen day of Easter, to answer Thomas Smiles, gentleman, of a plea of trespass; [*And also* to a bill of the said Thomas against the aforesaid William, for two hundred pounds of debt, according to the custom of the court of the said lord the king, before the king himself to be exhibited;] and that he have there then this precept.

Sheriff's Return.

The within-named William Styles is not found in my bailiwick.

Latitat.

George the second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth: to the sheriff of Berkshire, greeting. **Whereas** we lately commanded our sheriff of Middlesex that he should take William Styles, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto Thomas Smiles, gentleman, of a plea of trespass; [*And also* to a bill of the said Thomas, against the aforesaid William, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited;] and our said sheriff of Middlesex at that day returned to us that the aforesaid William was not found in his bailiwick; whereupon on the behalf of the aforesaid Thomas in our court before us it is sufficiently attested, that the aforesaid William *lurks and runs about in your county:* **Therefore** we command you, that you take him, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster on Tuesday next, after five weeks of Easter, to answer to the aforesaid Thomas of the plea (and bill) aforesaid: and have you there then this writ. **Witness,** Sir Dudley Ryder, knight, at Westminster, the eighteenth day of April, in the twenty-eight year of our reign.

By virtue of this writ to me directed, I have taken the body of the within-named William Styles, which I have ready at the day and place within contained, according as by this writ it is commanded me.

The writ is called "*Latitat*" because of the words "lurks and runs about."

THE COURT OF EXCHEQUER CHAMBER.

Besides the three Common Law Courts having original jurisdiction, there was, until 1875, an Appellate Court for common law cases from those three Courts. By 31 Edw. III. c. 12, the Court of Exchequer Chamber was instituted as a Court of Appeal from the Common Law side of the Exchequer. The Exchequer Chamber consisted of the Lord High Chancellor and the Lord Treasurer, together with the two chief justices and all the other judges of the King's Bench and Common Pleas; but the Chancellor and the Treasurer rarely sat there.

By an Act already referred to,[1] passed in 1585, the judges of the Common Pleas and the barons of the Exchequer were empowered to sit in the Exchequer Chamber to try appeals by writ of error from the King's Bench in certain actions.

A further regulation was imposed by 11 Geo. IV. & 1 Will. IV. c. 70, s. 1 (1830), by which, on a writ of error from one of the three Courts, the Court of Exchequer Chamber was to be composed only of the judges of the other two. Thus, on an appeal from the Common Pleas, the Appellate Court would consist of justices of the King's Bench and barons of the Exchequer; and on writ of error from the Exchequer, the chief justices and justices of either Bench would alone be entitled to sit.

The writ of error would lie where there was some manifest error on the record, or on the pleadings, or in the judgment on a point of law only.

[1] *Supra*, p. 74.

THE COURT OF CHANCERY.

The "Court of Chancery" and "the Chancery" are spoken of in very early times. But it is very doubtful whether the Chancellor, alone, had the right to hear and determine the matter of the petition. Indeed, such evidence as exists is all the other way; for the judgments (or, rather, minutes of judgments) endorsed on the early records show that in almost every case the Chancellor sat with the Council. The expression "the Chancery" may, in early documents, mean the Council sitting in the Chancery—*i.e.* the Council in one of its aspects. The earliest recorded judgment of the Chancellor alone, where no mention is made of the Council, is in 1377 where the Chancellor dismissed a petition. But here the plaintiff did not appear at the hearing, and judgment for the defendant was given in default. In (about) 1407, there is another case where plaintiff complains that defendant detains certain chattels and muniments confided to one deceased whose executrix defendant is. Defendant appears in the Chancery and says that she has already handed over all she had to the Lord Mayor. The Chancellor (apparently sitting alone) dismisses the case, but orders defendant, if she finds any further muniments, to give them up to the plaintiff. On the other hand, in cases not distinguishable, on principle, from the above, and of the same date, we find judgments given by the chancellor "with the advice of the justices of both Benches, and of the King's Sergeants, and other learned men of the Council there present"; others by the Chancellor "and the Court of Chancery"; and yet others by the Chancellor "by the authority of the Court of Chancery."

There is, however, some evidence that the Chancellor had, in this early period (at least as early as 18 Ric. II.), a jurisdiction apart from the Council. In that year (1389) there is a petition by the House of Commons "that none of the lieges may be compelled by the writ *Quibusdam certis de*

causis (the predecessor of the writ *Sub Pœna*) or any other like writ before the Chancellor *or* the Council to answer except by the Common Law." In 1394 there is a complaint that "divers lieges had been sent for to appear before the Council *or* in the Chancery under a certain penalty" (*i.e.* by the writ *sub pœna*). Again, in 1421, there is a like complaint; and again the words used are "*Sub pœna* depending before the Council *or* the Chancellor."

The evidence afforded by these petitions is strengthened by the evidence of a petition by the Commons House in 2 Henry IV. The complaint is that the Common Law judges were perpetually being sent for by the Chancellor to the neglect of their proper business. From this it would seem that the Justices of both Benches only attended in the Chancery when summoned, and that they were bound to attend when requested to do so, as the practice is to this day in the House of Lords. A fact like this considerably discounts the evidence of the judgments recorded to have been made "with the advice of the Justices of both Benches, etc." (*supra*).

It must be remembered that all writs issued out of the Chancery, whether returnable there or not. The writs "*Quibusdam certis de causis*," "*Sub pœna*," and "*Scire facias*," were certainly used to bring a defendant before the Council; and, according to the petitions of the House of Commons above referred to, "before the Chancellor," and "in the Chancery" also. The true conclusion may be that the jurisdiction of the Chancellor and the Council overlapped: that petitions were heard sometimes by the one and sometimes by the other; that in cases of great difficulty in point of law the Chancellor, who was almost always a layman, would prefer to be guided by the judges and serjeants: and that in cases where the defendant was a person of great power, or the matter was of far-reaching consequence, the Chancellor would cause the matter to be heard by the full

Council; while in cases of no great difficulty or importance, he would deal with the cause himself.

There is, however, distinct evidence in favour of another theory—viz. that "the Chancery," considered as a judicial body, was only another name for the Council. A petition of (about) 1396 is addressed to the Chancellor "and other very wise lords of the Council or our redoubted Lord the King."

Another petition of (about) 1397, prays the Chancellor "of your special grace grant a writ directed to the said Sir Hugh commanding him to be *before the Council* of our Lord the King," etc. It appears from the indorsement on the petition that a writ was issued accordingly; and that "on the day named the within-written Hugh appeared *in the Chancery*." Apparently, if this instance is worth much, "before the Council" and "in the Chancery" were the same thing. Possibly the Council, when it dealt with matters judicial, sat "in the Chancery"—a theory borne out by the prayer of another petition of about the same date (1397)—"May it please your lordship (the Chancellor) to send for the said (defendant) to be before you and the Council of our said Lord the King in the Chancery." In a third case, in 1398, an important State case of mercantile reprisals, the petition is addressed to the Chancellor, and the prayer is, "May it please your most gracious Lordship to . . . send for the said (*defendants*) to be *before you* on a certain day to answer," etc. The petition is thus indorsed, and the indorsement seems to shed much light on the question of the constitution of the Court of Chancery: "It is agreed *by the Council* that writs be sent under the great seal," etc. And it is further noted that there were present my lords the Chancellor, the Treasurer, the Keeper of the Privy Seal, the Clerk of the Rolls, Messieurs John Bussey, Henry Grene, John Russell, and Robert Faryngton, Clerk. In 1399, in a case of maintenance, where a parson complained that he dared not go to his parsonage, not even

in Lent to hear the confession of his parishioners, the defendants were ordered by writ "to be before the King and his Council in his Chancery." Nor are the available instances confined to the maintenance cases. For example, in Henry IV. there is a petition of the ordinary "conscience" or equity kind (a case of fraud) praying the Chancellor "to grant a writ directed to the said (*defendant*) commanding him under a certain pain to come *before the Council* of our Lord the King," etc.

There are here, it would seem, enough instances to show that the Court of Chancery was really the Council sitting in a place called "the Chancery"—in other words, that when the King in his Council sat to hear cases of conscience (equity) and cases of oppression by powerful persons or families whom the ordinary law could not reach, the sitting took place in the Chancery—that is, in the department of State whence all writs issued. There is no evidence to show that the Chancellor had any jurisdiction apart from the Council. There is very little evidence to show that there was really a separate Court of Chancery. The evidence rather is that the Chancellor, as president of the Council, had petitions addressed to him: that writs were issued by him, with or without the concurrence of the Council: that the causes were heard by the Council, who constituted a Court, not *of* Chancery, so much as *in* the Chancery.

It can at any rate be said with safety that the Chancellor derived his jurisdiction from the King in his Council. The solitary case in 1377, where it appears that the Chancellor, sitting alone, dismissed a petition, may be explained by the facts: (1) that the defendant appeared and made certain admissions which made a hearing unnecessary; (2) that although no one else is mentioned as having been present, there is no explicit statement that the Chancellor sat alone; (3) it would be unsafe to generalize upon a particular instance. The petitions of the Commons may be explained thus: The Council sat for many purposes. Acting judicially

it sat in Chancery. At other times it did not. Hence the expression "the Council or the Chancery"; because a person would be summoned to attend in the one case "before the Council," and in the other case "in the Chancery." The Council might meet anywhere wherever the king was. The Council in the Chancery or Court of the Chancery sat at the fixed abode of the Chancery department.

To put it shortly, the conclusion one is almost irresistibly forced to, is that the subsequent jurisdiction of the Chancellor alone, as it continued down to the nineteenth century, was usurped from the Council—unless (which is highly unlikely) there was some royal ordinance of which all traces have been lost.

The early petitions to the Chancellor may be divided, roughly, into two classes, viz. (1) Cases where the Common Law could not be resorted to because of some defect in the law itself, or because of some technical difficulty; and (2) Cases where the Common Law provided a remedy, but the petitioner despaired of justice because of the power or local influence of the party who had done the wrong—thus this class of cases was of a criminal or quasi-criminal crime.

The phrases "court of conscience," "law of conscience," and the like, were already in use. Thus, in a case in 1456, a petitioner complains of Undue Influence and Breach of Trust, and avers that in the course "of the Common Law," he has no remedy. The defendant, or respondent, by his answer, says that the bill contains nothing to charge him with. The petitioner replies "that the seide matier ys sufficient to putte hym to answer *after the lawe of conscience*, whiche ys lawe executory in this courte for defaulte of remedy by cours of the common lawe." (In this case the court consisted of the Chancellor, the justices of both Benches, and others of the King's Council).

In Mr. L. O. Pike's introduction to the Year Book (12 & 13 Edw. III. p. cix.) is to be found a bill exhibited to the Chancellor *temp.* Henry V. by certain petitioners who

complain that they have been tortiously disseised of a manor since the king passed into Normandy, and that they have no remedy because by proclamation the king has suspended the Assize of Novel Disseisin until his return. This appears also to be a case within the first class. It is worthy of note that the Court, in this case, ordered an issue to be tried by a jury of the County of Essex, and the verdict to be returned into the Chancery. Verdict being for the plaintiffs, it was decreed that possession of the manor be given to them.[1]

As early as 1456 we find a case of the Chancellor interfering for the relief of a mortgagee. In this case, the petitioner had borrowed £80 and, as security, had enfeoffed the lender in his manor of Shifton Berenger. The charter of enfeoffment contained a defeasance clause, *i.e.* that if the borrower should repay £100 at the feast of St. John the Baptist, he should be re-enfeoffed. The borrower also gave a Statute Merchant for £300. The lender had sued on the statute and put the borrower in prison. He had also endeavoured to collect the rents and profits of the manor. And the borrower complained that the lender intended to extort £450 for the loan of £80 "*against right and conscience*"; and he prayed a *sub pœna* and that "justice be done as good faith and conscience requireth." In the end, after deliberation with the Justices of both Benches, the Chancellor decreed that as the £80 had been repaid (during the course of the proceedings) defendant should liberate plaintiff from custody and re-enfeoff him in his manor and deliver up all muniments of title.

In 1432 (or 1433) there is a petition by one of two brothers praying partition of lands left by a will of uses (see p. 67) to the use of the brothers as joint tenants in fee tail. The petition states, "for which particion to be made there is now accyon atte common lawe."

[1] A similar bill, based on the same grounds, is to be found in *Select Cases in Chancery* (Selden Soc. Pub. vol. 10), p. 10.

In 1420 a petition is presented by a man who, before setting out on a pilgrimage to Jerusalem, left a coffer containing muniments, etc., with his mother. The mother died, and her second husband took possession of and refused to deliver up the coffer. The reason for petitioning the Chancellor seems to have been that Detinue would not lie; and Trover was of no use because plaintiff wanted the coffer, and not damages. He therefore prayed a mandatory injunction.

In (about) 1416 two soldiers presented a curious petition, which shows that the Court of Chancery, however constituted, had jurisdiction to decree the taking of an account, as well as to grant injunctions. The petitioners alleged that they had captured certain prisoners at Agincourt; that an Esquire named Buckton had ransomed the prisoners without the petitioners' consent; and that part of the ransom was in the hands of Maude Salvayne, wife of the Governor of Calais. An injunction was asked to restrain Maude from parting with the fund; and a *sub pœna* against Buckton that he should come up and give an account as to the prisoners he had released.

Of cases of the second class there are large numbers. In fact, the greater part of the earlier cases are cases where petitioners complain of tortious acts done by persons whom they are not able to reach in the ordinary way of law. To take a few at random:—

In 1388, one John Biere, of Bodmin, complained that Roger Mule and five others broke and entered the petitioner's house at Bodmin, beat and ill-treated his servants and "la dite maison chercheront pur le dit Johan Biere avoir malmenée s'ils l'eussent trovee." Not finding the said John, the evil-doers lay in wait for him day and night, insomuch that John had been obliged to leave the district and dared not go back. Moreover, the said Roger and his friends had detained all John's merchandise, so that John could not make a living; and "the said evil-doers have of their Covin gathered to themselves many other maintainers and

disturbers of the king's peace insomuch that they will not be justified of the Sheriff of the County against their will. . . ." Here the powerlessness of the Sheriff against a turbulent and numerous faction is made the ground of resort to the Chancery. There is a like complaint by a Cornish parson (1396) (*Select Cases in Chancery*, p. 23). In 1386 Thomas Catour of Beverley and Emma his wife petition for a remedy against Sir William Monketon, Sir John de Midleton and others, officers and servants of the Archbishop of York, who have chased Thomas and Emma from possession of seven shops and seven houses within the franchise of Beverley. A writ from the Chancery is asked for because that "Thomas and Emma can have no remedy at common law because the tenements are within the franchise of Beverley of which the Archbishop is lord."

In 1396 there is a petition which appears to allege no special ground for interference save that the offence is one which involves breach of a royal proclamation (*Sel. Cas. in Ch.*, p. 17). Another, in 1397, says, "the said William is so rich and so strong in friends in the country where he lives that the said David will never recover from him at common law."

There are other cases where the petitioners ask for a writ from the Chancery because the evil-doer is Sheriff, or a kinsman of the Sheriff, of the county. The obvious reason in these cases for invoking the aid of the Chancery is that as all juries were summoned by the Sheriff, a fair tribunal was impossible to be obtained where the Sheriff himself was a litigant (see *Sel. Cas. in Ch.*, pp. 21, 31, 33).

Later—in Henry VII. certainly—the Chancellor sat as a judge alone. Probably the Chancellor's jurisdiction, as we know it existed then, dated from the establishment of the Star Chamber (Hy. VII.), which branch of the Council took exclusive cognizance of the tortious acts committed by persons who were able to defy the law; but left untouched the administration of the Equity that had been established

relating to trusts, mortgages, fraud, specific performance, injunctions, accounts and the like. For the interlocutory work of the Courts the Chancellor had the assistance of a body of clerks. The chief of these was the Master of the Rolls, or *Custos Rotulorum*, whose primary duty was to take care of the documents of the Court and record its judgments. The office of Master of the Rolls was one of great dignity, and in the statute of 1388 (Ric. II.) he is placed before all the judges and next to the Lord Chamberlain. He was not, at the first, a lawyer, but generally a high dignitary of the Church. For instance, it was De Waltham, Bishop of Salisbury, who was Master of the Rolls in Richard II. In the early days of the Court the Chancellor sometimes delegated the hearing of a cause to the Master of the Rolls; but the latter could only sit in the *absence* of his superior and could only hear causes. Although the business of the Chancery increased a hundredfold, the theory that the Master of the Rolls was only a deputy was still kept up, and when, for the time of Lord Nottingham (Charles II.), the Chancellor sat all day and every day, the Master of the Rolls only sat from six to ten in the evening. This state of things continued until 1833, when a statute empowered the Master of the Rolls to sit all day, with the same jurisdiction as the Chancellor, other than the hearing of appeals; that is, he could not only hear causes, but motions and all other Court work.

Masters in Chancery.—The clerks above referred to were from the earliest times an important part of the machinery of the Court. It was one of the advantages of Chancery procedure that questions of detail could be referred to them for their report. In the time of Edward III. they were called Masters, and by that name they were known until the Judicature Act. In the time of Henry V. they had the power to hear applications relating to procedure, as, for instance, the sufficiency of the answer to a bill, objections

to pleadings, and such-like matters. Lord Bacon (James I.) appears to have begun the practice, when the action depended on accounts, of referring the accounts to a master to be taken in his office in order "to make the cause more ready for hearing." Cardinal Wolsey (Henry VIII.) and his successors used to refer demurrers, *i.e.* objections on points of law, to the masters, but Bacon stopped the practice. There were very few causes in Chancery decided without inquiries before a master. In administration actions, inquiries for creditors and next-of-kin, the ascertaining of classes of legatees, and the taking of accounts; in partnership actions, the taking of accounts, the sale of trust estates and partnership assets, and generally all accounts and preliminary inquiries, took place in a master's chambers.

The Central Criminal Court.

Before 1834, London and Middlesex cases were tried at the Sessions House, Old Bailey. The London cases were tried there by virtue of the commission of oyer and terminer for London, and of gaol delivery for the prison of Newgate, which commissions were directed to the Lord Mayor, Aldermen, Recorder, Common Sergeant, the King's Justices at Westminster, the Chancellor, and others.

The charter of Henry I. granted the citizens of London the right to choose their own judge for pleas of the Crown, and a charter of Edward III. gave a special privilege to the Lord Mayor of being named in every commission of gaol delivery for Newgate.

The fact that Newgate was the common gaol for Middlesex accounts for those cases being tried at the Old Bailey. But there was a difference in the modes of trial. The indictments of London prisoners were found by a London grand jury at the Old Bailey. Middlesex indictments were found by a Middlesex grand jury at Clerkenwell, and then transferred to the Old Bailey for trial. The judges were two

or three of the King's Justices, the Recorder, and Common Sergeant. The Lord Mayor and some or all of the aldermen could be present, and when present were entitled to a voice in the sentence.[1]

By the Central Criminal Court Act, 1834, the name Central Criminal Court was given to a Court sitting at the Old Bailey, to consist of the Lord Mayor, the Lord Chancellor, the King's Judges, Aldermen, Recorder, Common Sergeant, and a few others to be nominated by the Crown. This Court has jurisdiction to try all treasons, felonies, &c., committed in London and Middlesex, and in certain parishes of Essex, Kent, and Surrey. Bills of indictment were not in future to be found at Clerkenwell. It appears that the aldermen have still power to vote on the question of sentence; but the real judicial business is done by the professional judge who presides. There are now four Courts at the Old Bailey, presided over by a High Court Judge, the Recorder, Common Sergeant, and the Judge of the City of London Court respectively; but the Act of 1834 specially reserves the rights and privileges of the Lord Mayor and Aldermen. The Central Criminal Court is a Superior Court, on the same footing as a Court of Assize; and no mandamus will lie from the Queen's Bench Division.

A **Court of Criminal Appeal** was established by the Criminal Appeal Acts, 1907 and 1908. Prior to this time there was no appeal from a conviction on indictment except by way of writ of error. Before the time of Queen Anne, such a writ was held to be merely *ex gratia*, but in the 3rd of Queen Anne it was resolved by ten judges that in every case under treason and felony the writ was *ex debito justitiæ*. Thus by a gradual course of practice the writ became, instead of a method of exercising the clemency of the Crown, a method of appeal. The writ was only granted by

[1] St. Tr. N. S. 1137.

the Court (of King's Bench) on the ground of error manifest on the record. For example, a writ was granted (3 Burr. 1903) where the indictment charged the offence as being committed in the reign of a former king, but concluded "against the peace of our Sovereign lord the King, &c.," which meant the now king. To supplement the deficiency in the law, the judges used to hold informal meetings at Serjeants' Inn to discuss difficult points in criminal law. By 11 & 12 Vict. c. 78, these proceedings were regularized.

The *Court for Crown Cases Reserved* was established, with power to determine points of law which might arise at Sessions or Assizes. There was no appeal in the proper sense of the term. The prisoner could apply at the trial for the Court to reserve a point of law; and if this were done (which was quite discretionary) that point was argued before and decided by the C.C.C.R., consisting of the Common Law judges.

The *Court of Criminal Appeal* is really an appellate court. It consists of the Lord Chief Justice and all the judges of the King's Bench Division, not less than three of whom form a quorum. It is summoned by the L.C.J. with the consent of the Lord Chancellor; and may sit in two or more divisions, or out of London when the L.C.J. gives special directions to that effect. The number sitting must always be uneven; and the opinion of the majority must prevail. Only one judgment is to be delivered, except the Court directs to the contrary. The decision is final, save that where the prosecutor, director of public prosecutions, or defendant obtains a certificate of the Attorney-General that the decision involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal to the House of Lords.

Only a person convicted can appeal; and his absolute right to do so is limited to questions of law alone. On questions of fact, or mixed law and fact, he must obtain the

leave of the Court or of the judge who tried him. On questions of sentence, only the Court of C.A. can give leave to appeal. The powers of the Court in allowing or dismissing appeals are wide; but there is no power to order a new trial. The tendency has been to construe rather narrowly the power to allow the appeal if the Court thinks that "the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence." The Court is entitled to dismiss an appeal on the ground that no substantial miscarriage of justice has actually occurred. (Act 1907, s. 4, sub-s. 1.)

Writ of error in Criminal proceedings is abolished. (Act 1907, s. 20.)

INFERIOR COURTS.

The Court of Piepoudre was at once the lowest and the most expeditious of these. It was a court of record incident to every fair and market, and the presiding judge was the steward of him who had the toll of the market or fair. Its jurisdiction extended to all commercial cases arising out of the transactions of the particular fair or market, and not of any preceding one, so that the cause of action arose, the complaint was made, and the cause tried on the same day, unless the market lasted longer. From the Court of Pièpoudre an appeal by writ of error would lie to the Superior Courts at Westminster. The etymology of the name is a moot point. One opinion derives it from *curia pedis pulverizati* the Court of the dusty foot—either because of the dusty feet of the suitors, or because, as Coke puts it, justice was done as quickly as dust can fall from the foot. Another author[1] derives it from *pied puldreaux* (old French = pedlar), and says the name was given because the Court was the resort of the pedlars who traded at the fair or market.

[1] Barrington, Observations, etc., p. 337.

The Court Baron was a manorial court incident to every manor in the kingdom. It was composed of the *freeholders* of the manor, with the steward as a kind of clerk. It had jurisdiction to try by writ of right all claims to land within the manor, and all personal actions where the amount claimed was not more than forty shillings. The proceedings on a writ of right might be removed into the County Court by a precept from the sheriff called a *tolt*,[1] and the proceedings in personal actions might be removed into the King's Courts by writ of *pone*. Besides these proceedings to remove actions from the Court Baron before judgment, there was an appeal after judgment to the Superior Courts at Westminster.

Such appeal was not by writ of error, because the Court Baron, not being a court of record, had no record in which an error could be found. But a writ of *false judgment* was issued, and the Court at Westminster reheard the case.

There was also another side of the Court Baron exclusively for copyholders of the manor. Its only business was to witness surrenders of, and admittance to, copyholds. The steward presided as judge, and in this form Court Baron still exists. But the civil jurisdiction of the Court was taken away in 1846.

The Hundred Court was of Saxon origin, and had the same jurisdiction in the hundred as the Court Baron had in the manor. The free suitors were the judges, with the steward of the hundred as clerk. The Court was not of record; and causes were liable to removal from it, and its judgments were subject to review precisely in the same way as in the case of the Court Baron. The jurisdiction of this Court was abolished in 1867, though the Salford Hundred Court, being in the County Palatine of Lancaster, has continued to exist, with a jurisdiction similar to that of the modern County Court.

[1] "*Quia tollit ac eximit causam e curia baronum.*"

The County Court was the great tribunal of Saxon England. Its jurisdiction in civil cases was, at first, unlimited, but in Edward I.'s reign, suitors had shown such a tendency to resort to the King's Courts, that by the Statute of Gloucester it was enacted that no one should be entitled to a writ in the superior Courts unless the debt or damages claimed amounted to forty shillings, and the jurisdiction of the County Court was reduced to claims under that sum. The sheriff presided, but the freeholders of the county were the judges. By 2 Edw. VI. c. 25, it was forbidden to adjourn the Court for more than twenty-eight days—a return to Saxon usage.

The County Court was not a court of record, and causes were removable into the King's Courts by writ of *pone*, and a writ of false judgment could also be had. Practically the civil jurisdiction of the County Court ceased when the justice of assize were granted commissions of *nisi prius*, and by the County Courts Act of 1846 the ancient County Court was completely abolished.[1]

ECCLESIASTICAL COURTS.

Before the Conquest there was no separate ecclesiastical jurisdiction. All causes whatsoever were tried in the County Court, where the bishop sat along with the earl and the shire-reeve. But William I. allowed the clergy a separate jurisdiction,[2] and the bishop ceased to sit in the Court of the shire. No fewer than seven kinds of Ecclesiastical Courts arose, and each obtained some civil jurisdiction.

The Archdeacon's Court was the lowest of these. In this Court might be "presented" persons charged with any offence against the canons of the Church, to wit, impiety, heresy, adultery, schism, and immorality, and also such

[1] *Supra*, p. 152.

[2] *Supra*, p. 18.

wrongs as refusing to pay tithes, neglect to repair churches, and the like. In early times the archdeacon himself presided, but he had power to delegate his judicial authority, and in later times generally appointed a person called the "official." There was always an appeal to **The Consistory Court,** or Court of the bishop of the Diocese, which had a jurisdiction similar to that of the archdeacon, but extending over the whole diocese. In some cases the two Courts had concurrent jurisdiction. In others, the bishop was entitled to remove cases from the Archdeacon's Court to his own. The bishop's chancellor was the judge, and from him there lay an appeal to the archbishop of the province.

The most important function of the Consistory Court was in testamentary and matrimonial causes. But no will could be proved or letters of administration granted in a Bishop's Court when the deceased had left moveables in more than one diocese.

The Prerogative Courts of Canterbury and York granted probate in the last-mentioned cases, with the right of appeal to the Court of Delegates.

The Court of Arches was the appellate Court of the Archbishop of Canterbury; and the judge was called the Dean of the Arches. The name was derived from the name of the church where the Dean originally sat—St. Mary-le-bow (*S. Maria de arcubus*). The Court was originally a separate Court from that of the province of Canterbury, being only for thirteen London parishes in the peculiar jurisdiction of the Archbishop. There was a similar Court in the province of York. An appeal would lie from the Court of Arches to the Court of Delegates.

The Court of Peculiars was of original jurisdiction (like the Consistory Courts) over those parishes scattered through-

out the province of Canterbury, and in the jurisdiction of the Archbishop only, and not of the bishop of the diocese. Hence, also, was an appeal to the Court of Delegates.

The Court of Delegates was instituted by Henry VIII., and consisted of certain persons appointed by royal commission to hear appeals from the Ecclesiastical Courts of the Archbishops. In 1842, this Court was abolished and its powers transferred to the Judicial Committee of the Privy Council.[1]

The Crown also had power (until 1845) to appoint a **Commission of Review** to revise any particular decision of the Court of Delegates. There was also the High Commission Court from 1 Elizabeth to 16 Charles I.[2]

At the present time the Ecclesiastical Courts are of comparatively little importance. Some of them still exist; but their chief jurisdiction, viz. in matrimonial and testamentary causes, was taken away in 1857.[3]

ADMIRALTY COURTS.

Until 1875, the chief Maritime Court was that of the Lord High Admiral of England, who delegated his power to the judge of the Court of Admiralty. This tribunal dates from Edward III.; and an appeal lay to a Court of Delegates appointed by the Crown. There was also a Court of Prize, appointed in time of war, to decide questions relating to captured vessels. The Admiralty Court had cognizance of all contracts made at sea; and questions of seamen's wages earned at sea; also flotsam and jetsam, and salvage; but not of charter-parties made on land; nor of wreckage, "because wreckage must be cast up on land." It had, also, the right to try criminals. Soon after its foundation this Court attempted to assume jurisdiction over matters *con-*

[1] *Supra*, p. 159. [2] *Supra*, pp. 73 *et seq.*
[3] *Supra*, pp. 154 *et seq.*

nected with the sea, *e.g.* charter-parties made on land, wreckage, &c. But by 13 Ric. II. c. 5 (1390) such claims were declared to be unfounded. In 1536, the power to try pirates was taken away; and in 1844 all criminal jurisdiction was removed from it. By the Judicature Act, 1873,[1] the Court was merged in the Probate, Divorce, and Admiralty Division of the High Court of Justice, thus placing all the cases where the Civil Law is used in the same Division.

[1] *Supra*, p. 155.

CHAPTER IX.

The History of Land Tenure in England.

Before the Conquest tenure of land, strictly so called, was unknown. The system was allodial; that is, land was as much the subject of ownership as were moveables. There were two kinds of land, namely, *bocland*, *i.e.* land given by the king to his thanes by a book or writing; and *folkland*, *i.e.* such land as was not specially granted by the king, but was owned by those who squatted there as the island was conquered, and who had a kind of possessory title.

All *bocland* was subject to the *trinoda necessitas*, or threefold obligation of service in war, the construction and maintenance of bridges, and the construction and maintenance of castles for the defence of the country.

The great thanes who owned the *bocland* let out their lands to their dependants, who were of two grades, first, the ceorls, who were freemen paying a fixed rent in money or kind; and, second, the *villeins*, who were serfs bound to obey their master's will, and receiving from him land to cultivate for their sustenance. The first kind of tenants are the *socmanni* spoken of in Domesday Book. The word *soc* means free; and it is this tenure which has become almost universal in England since the abolition of knight-service by the first Parliament of Charles II.[1]

Coke gives it as his opinion that *bocland* was held by feudal tenure; but with all deference to so great an

[1] *Supra*, p. 83.

authority, this is a mistake. The feudal tenure of land is where the tenant has no ownership, but holds the land of a superior in return for services rendered. The superior is thus the landlord; and if that superior be king, his feudal capacity of landlord is distinct from his political capacity as head of the State. It is important to notice the difference between the *trinoda necessitas* of the Saxon thane and the feudal aids, reliefs, and other services of the Norman baron. The former was a duty cast upon all owners of land as a duty to the State; the latter consisted of *quasi-contractual* liabilities to the king personally.

After the Conquest a change took place. The feudal system was introduced from the Continent, though the system as it obtained in England was never quite the Continental feudal system. The great barons of France and Germany held their land from the Sovereign, and owed to him homage and allegiance. The vassals of the great barons, in their turn, owed allegiance to their lord; but they owed no duty whatever to the king. Sir Walter Scott, in *Quentin Durward*, puts into the mouth of one of his characters a sentence which sums up the whole situation. When King Louis XI. is in the power of one of his great feudatories, the Duke of Burgundy, he asks one of the latter's vassals, Count des Comines, if he (the king) can rely upon the Count's assistance. To this Des Comines replies, "Your Majesty may command my service, saving my allegiance to my rightful lord the Duke of Burgundy."

William I. was far too great a statesman to establish a system like this in England. Instead, he granted out fiefs to his chief vassals in return for homage, allegiance, and the usual services. But when the barons subinfeudated, their tenants owed allegiance to the king first, and to the immediate lord afterwards.

After the Conquest, then, land was all held of the king. The kinds of tenures have been dealt with in a previous

chapter,[1] and we will now consider the nature of the relations between lord and vassal.

Knight-service was the most usual military tenure. Coke described it as tenure by homage, fealty, and escuage. This requires some explanation. The tenant was obliged to declare himself the lord's man (*Fr.* homme) when admitted to the fief. He was also bound to swear fealty to him. But escuage, or scutage, was a comparatively modern innovation. The original duty of the knight was to serve his lord in war for forty days in the year when called upon, but the tenant was only obliged to serve personally when the lord took the field in person. When the lord put a deputy in command, the vassal could send a deputy to represent him, and when he could not find a suitable deputy, he would send a sum of money with which a mercenary could be hired to fill his place. Henry II. permitted his vassals to pay instead of serving, whether the king took the field in person or not. In fact Henry rather discouraged personal service by his great vassals, preferring to hire mercenaries from the continent. The sum paid by a tenant as a composition in lieu of service was known as escuage or scutage, meaning "shield-money," and in course of time personal service died out, and escuage became the rule. The knight-service thus described is ordinary knight-service, but there were two other kinds, viz. Castleward and Cornage.

Castleward, in the words of Coke, is "to ward a tower of the castle of their lord, or a door of the castle, upon reasonable warning, when their lords hear that the enemies will come over in England." This service was instead of the forty days in the field, and to it were added homage and fealty.

[1] *Supra*, pp. 11 *et seq.*

Cornage[1] was a very curious tenure. The duty of the tenant was "to wind a horn to give men of the country warning" when they hear of enemies coming to the country. When a tenant by cornage held from a subject, it was considered a kind of knight-service, but when he held direct from the Crown, it was **grand serjeanty,**[2] and was a very common tenure on the borders or marches of Scotland. Grand serjeanty also took other forms—the service being always free, but uncertain—*e.g.* to carry the king's banner when he went to war. There was also a tenure in chivalry called **petit serjeanty,** where the tenant's duty was somewhat servile—*e.g.* to present to the lord twelve arrows whenever he (the lord) should hunt in such a forest.

The services of tenants in chivalry were not onerous, as will have been perceived, but the really burdensome part of the tenure was its "incidents." These incidents were of four principal kinds, Wardship, Marriage, Aids, and Reliefs.

Wardship was the right of the lord to have the custody of the land held of him on the death of any holder when the heir was not of full age. This age was fixed at twenty-one for males, and sixteen for females, the latter being altered from fourteen by the Statute Westminster I. c. 22. The lord had also the right to the custody of the heir's person unless his father were alive, and the son was the heir-apparent of his father. The guardian in chivalry was obliged to maintain the ward in a manner suited to his rank, but he was not a trustee. That is, the wardship was not for the benefit of the ward, but of the guardian, who took all the rents and profits of the land during the wardship. When the ward came of age, he sued out his livery—*i.e.* he had to pay a still further sum in order to have the land given up to him. The guardian could sell or otherwise alien his wardship, and the transferee was called guardian *en fait.*

[1] *Cornu* (Lat.), a horn.

[2] *Serjeanty*=service.

Marriage was the right of a guardian in chivalry to choose a husband or wife for his ward. He could practically sell the ward's hand; but the ward must not be "disparaged" by the match, *i.e.* there must be congruity of rank and fortune. If the lord disparaged the ward by marriage he might be deprived of the guardianship; and the ward might lawfully refuse to entertain such a match. But if the ward refused a lawful tender, he forfeited to the guardian the value of the match—that is, the amount of profit the lord would have made; and if the ward married without the guardian's leave, he forfeited double the value of any match that had been tendered by the guardian.

Aids were payments which a vassal must make to his lord, or on his lord's behalf, on three occasions. First, to ransom the lord if the latter was captured in war; second, to make his eldest son a knight (*pur faire Fitz chevalier*); third, to provide a dowry for his eldest daughter (*pur fille marrier*). These were the three customary aids spoken of in the various documents in the Middle Ages. They were not fixed in amount, but by the feudal principles they had to be reasonable and not excessive. The enactment of Magna Charta directing that aids should be reasonable shows how, at times, kings and mesne lords exacted large sums.

Reliefs were lump sums payable by the heir of full age who succeeded to the inheritance of a deceased tenant. These ought also to be reasonable, and in no case to exceed one year's full value of the land; but in consequence of the excessive demands made by John, Magna Charta fixed the amount at 100*s.* for a whole knight's fee; and so in proportion.

On a previous page will be found an account of the abolition of knight-service and its "incidents," and the conversion of all such land into socage.[1]

[1] *Supra*, p. 83.

Socage tenure was the descendant of the old allodial proprietorship of the Anglo-Saxons. When the Conquest placed the whole country at the mercy of the Conqueror, he portioned out amongst his chief followers the land of those Saxons who had fallen at Hastings, such grants being held in chivalry. But many of the Saxon thanes who had taken no very active part in resisting the invader were allowed to retain their lands. They still held them in socage, but it was socage *tenure* and not socage *ownership*. The feature of socage tenure was the *certainty* of the services rendered to the lord. Such services were homage, fealty and a rent. Littleton [1] says, "In times before legal memory a great part of the tenants which held of their lords ought to come with their ploughs . . . and for certain days to plough and sow the demesnes of the said lord. And for that such works were done for the livelihood and sustenance of their lord, they were quit against their lord of all manner of services. And because that such services were done with their ploughs they were called tenants in socage. And afterwards these services were changed. . . . by the consent of the tenants and the desire of the lords [into] an annual rent, &c."

The "incidents" of socage tenure were few and not onerous—in fact the only one of general incidence was Relief—which consisted of a year's rent payable by the heir on the death of the ancestor. The great advantage of the socage tenant was in escaping wardship and marriage. The infant tenant in socage was in ward of the lord, but the wardship was for the benefit of the ward, and the guardian's duty was to manage the estate and account for the profits when the infant came of age, which in this case was fourteen years. If the lord married his ward, he was bound to account for the value of the marriage. In fact, the guardian in socage was a trustee for the ward. At the present time

[1] *Tenures*, 2, 5, § 119.

most of the freehold land in England is held direct from the Crown, which gave up its rights to reliefs, &c., by 12 Car. II. c. 24. There is, however, still some land held in socage from mesne lords, viz. the customary freeholds of manors. This land was all subinfeudated before the Statute *Quia emptores*.[1] The effect of that Act has been that, when land has once come out of the hands of a mesne lord, it can never come into them again, but is held direct from the Crown. In theory of law, homage and fealty are still due from all tenants in socage, but they are not now exacted. It was in consequence of the homage and fealty due to the king by all tenants of land in England that an alien could not hold land here by the Common Law. An alien, being the subject of another prince, could not be the "man" of the King of England; and as he was thus incapable of homage he was incapable of tenure, of which homage is a necessary part. The disability was not removed until 1870.[2]

[1] *Supra*, p. 40.
[2] Naturalization Act, 33 & 34 Vict. c. 14.

CHAPTER X.

The King's Peace.

It has already been shown what the idea of the king's peace was, and how it was at first local, then general but temporary, and, lastly, general and permanent.[1] The violation of the king's peace was the original offence from which the jurisdiction of the sovereign in criminal matters arose; and not only was it that the king's justices should try breaches of his peace, but also that the king should be a party to the plea. This prosecution of violators of the peace by the sovereign sprang not so much from the Norman conception of the king as the foundation of justice, as from the Saxon idea of compensation to the sufferer for a wrong done. If you injured me you must pay the *bót*. If you injured the king by violating his peace, you must pay the *fine* due to him, and he, therefore, prosecuted. It has been shown how at last it became the practice to allege every criminal wrong as being "*contra pacem domini regis*"; but there is good reason to suppose that felonies were at first the only crimes *contra pacem*; or, conversely, that crimes *contra pacem* were originally all felonies. The reasons are (1) that only on a conviction for felony was the criminal's property forfeited to the Crown. In the law of treason promulgated by Alfred, the traitor was declared to forfeit his life and all that he had; and it should be remembered that, in Alfred's time, treason was the only breach of the peace, except crimes of violence, committed during the great feasts of the

[1] *Supra*, pp. 6, 20.

Church, or within the precincts of the king's house. (2) It was always a crime to compound a felony, though not a misdemeanour, because, in the former case, the king was defrauded of his fine or forfeiture. (3) It has always been laid down in the text-books, and was accepted as undoubted law until quite recently, that when a tort was also a felony, the felony must be prosecuted before the tort could be sued upon. This was because the king's right to his fines and forfeitures came before the subject's right to damages.

The rule that the Crown could only prosecute breaches of the peace survived long after the Crown began to prosecute in all cases; and gradually the term *Pleas of the Crown* was applied to all criminal prosecutions, and the Crown prosecuted in every case. But the old theory still lingered in the rule that an indictment was bad in law unless it alleged a breach of the peace—a rule that continued in force until 1861, when it was changed by 24 & 25 Vict. c. 100, s. 24.

The student should remember that the fictional allegation of a breach of the peace was the cause of the discontinuance of trial by combat, and is the foundation of the whole of English criminal jurisprudence. Throughout the Middle Ages two systems of prosecutions prevailed: (1) *Appeals*, instituted by the person aggrieved or his relatives; and (2) Crown prosecutions. Britton (*temp.* Edw. I.) says that, in larcenies, there are two modes of procedure: (a) by the party from whom the goods were stolen, and (b) by the king. It is laid down that when the thief has been sued in trespass by the owner, the king will not proceed against him *even though his peace has been broken.* The change from this state of the law to that described above, when the trespass cannot be sued upon until the felony has been prosecuted, indicates a great development. There is a case of an appeal of felony so late as Elizabeth (*Stroughborough* v. *Biggon*, Moore, 571); but at that time these private prosecutions were very rare.

It was the fact of the breach of the peace which gave the Court of King's Bench jurisdiction in cases of trespass. Blackstone says that this Court had cognizance of all trespasses *vi et armis*, "in which, by strictness of law, a fine was payable to the king"; and, until the Common Law Procedure Acts,[1] in trespass the plaintiff always alleged that the wrong had been committed by force and arms. Here, again, the allegation became fictional, and was permitted to be made in order to give the King's Bench cognizance of the case.

Again, libels defamatory of the character of private persons were criminal in the first instance because they tended to provoke a breach of the peace; and here we find the reason for the maxim, "The greater the truth the greater the libel," which prevailed until Lord Campbell's Libel Act (1843).[2] To the modern mind the maxim is an absurd one. How, we say, can a man complain when we speak the truth about him? But looked at from the point of view of the king's peace the absurdity disappears. If the libel is likely to provoke a breach of the peace, what does it matter whether it be true or false? It is a provocation to violence in the one case as much as the other; for the object of the libel will be equally angry in either case; and the king's peace will equally be violated.

The royal right of pardon probably sprang from the same source. The king had as much right to forgive a breach of his peace as a private person had to forgive an injury or insult; and to ascribe the prerogative of pardon to the king as the "Fountain of Mercy" is probably an historical inaccuracy. So, also, the law that there is no prescription in crime—*i.e.* lapse of time is no bar to a criminal prosecution—is only an application of the maxim, "*Nullum tempus occurrit regi*," based on the idea that a breach of the peace is a personal injury to the sovereign. And to the same idea

[1] *Supra*, p. 146. [2] *Supra*, pp. 140 *et seq.*

must be traced the undoubted law that the consent of the injured party is no defence to a criminal prosecution. Consent would undoubtedly have been a defence to an "appeal" by the injured party, just the same as it is to a civil action of tort; but when the king is wronged also, the consent of the injured party does not affect the right of the Crown to proceed for satisfaction for the wrong.

It may also be that the prerogative of dispensing with the operation of a penal statute originated in the same way. If the object of the law was to preserve the king's peace, why should he not announce that he will not proceed against persons who disregard that enactment, in just the same way that a landowner may announce that he will not sue for trespass anyone who chooses to take a walk over his grounds? It was merely, in law, a waiver by the king of a personal right, and nothing more; but when the notion of the peace of the State began to prevail, Parliament objected to the royal prerogative; because thereby the Crown could render nugatory statutes passed for the good of the country. *Hale's Case* (James II.) was a case in point, where the king dispensed with the Test Act, which was meant to keep Roman Catholics out of the service of the Crown. Here the dispensation was so unpopular that, in 1669, by the Bill of Rights, the exercise of the dispensing power "as it hath been assumed and exercised of late" was declared illegal; and from that time the prerogative, though it still exists, has never been exercised.

APPENDIX.

1. Before the Norman Conquest (1066).

The King's Peace was established in a limited form.

Distinction between crime and tort was not well established.

A fine must be paid to the king for breaches of his peace.

All injuries to private persons could be compounded for by paying *bót*.

2. From William I. to Henry III. (1066—1272).

The King's Peace is declared to extend over the whole realm.

3. From Edward I. to Richard III. (1272—1485).

The Law of Treason is codified and simplified (Edw. III.).

4. From James I. to James II. (1603—1688).

Treason receives great attention and the law is strained by the judges.

Seditious libel and seditious words; the law is much debated and strained as against the prisoner.

5. From William and Mary to the End of Lord Eldon's Chancellorship (1688—1827).

Capital punishment became more common.

Forfeiture and attainder for treason and felony were partly abolished.

The law of treason remained unaltered, but the procedure was modified in favour of the accused, and counsel allowed to defend.

The Riot Act created the law as to unlawful assemblies, and directed a certain method of procedure for dispersing them.

The law of seditious libel, and the question of general verdicts, gave rise to a long controversy between Erskine and Lord Mansfield. Finally *Fox's Libel Act* enabled juries to give a general verdict of guilty or not guilty.

Frivolous applications for writs of *certiorari* to remove causes from Quarter Sessions were checked by compelling the applicant to give security for costs.

6. George IV. to Present Day (1827—1921).

Parts of the Criminal Law are codified, and the procedure made more favourable to prisoners.

Treason is cut down to offences against the person of the sovereign.

Defendants, in prosecutions for defamatory libel, may prove truth, and give evidence.

Right of appeal given in criminal cases.

COURTS OF JUSTICE.

1. Before the Norman Conquest (1066).

The Courts are local.

2. From William I. to Henry III. (1066—1272).

Curia Regis is established, to some extent superseding and supervising ancient local Courts.

The three Courts of Common Law are established separately, and the Common Pleas fixed at Westminster. The other Courts follow the king.

Justices in Eyre are appointed.

3. From Edward I. to Richard III. (1272—1485).

The Court of Chancery is established as a Court of Equity (temp. Edw. III.).

Justices of the peace are created with a local criminal jurisdiction (temp. Edw. III.). Quarter Sessions take the place of the Sheriff's Tourn (temp. Edw. IV.).

Justices of assize are appointed instead of justices in Eyre (temp. Edw. I.).

4. From Henry VII. to Elizabeth (1485—1603).

The Court of Star Chamber is established (temp. Hen. VII.).

The Court of Wards and Liveries (temp. Hen. VIII.).

The Court of High Commission (temp. Eliz.).

The Court of Exchequer Chamber (temp. Eliz.).

5. From James I. to James II. (1603—1688).

The Court of Chancery.

Quarrels arise between the Courts of Law and Equity, and the latter prevail.

Ellesmere, Bacon, and Coventry systematize the law and procedure of the Court.

6. From George IV. to Present Day (1827—1921).

County Courts are established, in 1846, for the trial of small cases.

The Courts of Probate and Divorce take the place of the Ecclesiastical Courts for matrimonial and probate cases. They are merged into the High Court of Justice by the Judicature Act, 1873.

The Court of Bankruptcy is established in 1837; and is superseded by the London Court of Bankruptcy in 1869, which in turn is merged into the High Court of Justice, 1883.

The High Court of Justice is formed in 1873, absorbing all the jurisdiction of the superior Common Law and Equity Courts, as well as Probate, Divorce and Admiralty jurisdiction.

The Court of Appeal, formed in 1873, takes over all appeals from the High Court of Justice.

The House of Lords as an Appellate Court is reconstructed by the Appellate Jurisdiction Act, 1876.

The Privy Council as a whole ceases to have any jurisdiction, and the right is vested in a judicial committee of that body.

Court of Criminal Appeal established.

PROCEDURE,

1. Before the Norman Conquest (1066).

Sworn recognitors "presented" criminals for trial.

All issues of fact were tried by compurgation or ordeal.

2. From William I. to Henry III. (1066—1272).

Real actions begin.

Personal actions are few, only four—viz. trespass, debt, covenant, and detinue—being cognizable in the King's Courts.

Writs in the King's Courts take the place of verbal complaints.

Trial by duel is introduced from Normandy.

Sworn inquest is introduced in civil matters, leading up to trial by jury, but as yet the jurors are only witnesses.

Habeas corpus (perhaps) is introduced.

3. From Edward I. to Richard III. (1272—1485).

Indictments begin to be in writing (temp. Edw. I.), and are ordered to be certain and definite (temp. Edw. III.).

Written pleadings take the place of verbal altercations between the parties in civil cases (circa Edw. I.).

Bills, petitions, and the subpœna are issued in Chancery (temp. Rich. II.).

"Actions on the case" are introduced by virtue of the Statute of Westminster II. (temp. Edw. I.).

4. From Henry VII. to Elizabeth (1485—1603).

Action of assumpsit begins to supersede the action of debt.

Action of ejectment is extended to freeholds by a circuitous procedure, and partly ousts the real actions.

Writs of nisi prius are issued for Middlesex actions (temp. Eliz.).

Action of trover and conversion comes into use, and gradually supplants detinue.

5. From James I. to James II. (1603—1688).

Procedure on the writ of habeas corpus in criminal cases is regulated.

6. From William and Mary to the End of Lord Eldon's Chancellorship (1688—1827).

One judge is enabled to try causes at nisi prius.

Judges are to decide on demurrers without regard to any defect in the writ.

The chief doctrines of modern equity and the practice of the Court is *finally* settled.

7. From George IV. to Present Day (1827—1921).

Common law procedure was greatly changed by the Common Law Procedure Acts, 1852—1860, and the procedure in all cases, whether at common law or in equity, is revolutionized by the Judicature Acts and Rules. Forms of action are abolished; pleadings shortened and simplified, and delay lessened.

A new style of practice is invented for commercial causes.

The absolute right to trial by jury in all civil cases is taken away.

PROPERTY.

1. Before the Norman Conquest (1066).

The distinction in law between land and moveables is small. Property in land is allodial.

The inheritance is divided amongst *all* the children.

A kind of dower and curtesy were in vogue.

2. From William I. to Henry III. (1066—1272).

The distinction between realty and personalty, founded on the difference between the remedies for dispossession, is made.

Real Property.

Tenure takes the place of ownership, and the theory of tenure becomes the basis of the land laws.

Military tenures are introduced.

Dower and curtesy are made absolute legal rights.

The law of primogeniture, with the rules of descent, is gradually introduced.

Alienation of land is checked by Magna Charta.

Personal Property.

Testaments of personalty are freely allowed.

Intestates' effects go to wife and relatives.

Intestates' effects are administered by the Ordinary.

Ecclesiastical courts pronounce on the validity of testaments and legacies.

3. From Edward I. to Richard III. (1272—1485).

Real Property.

Freeholds are made alienable *inter vivos*; but sub-infeudation is put an end to by *Quia Emptores* (temp. Edw. I.).

Entails are established by the Statute *De Donis* (temp. Edw. I.); but the courts in *Taltarum's Case* (temp. Edw. IV.) decide in favour of common recoveries as a means of barring entails.

Copyholders gain security of tenure, and no longer hold at the will of the lord.

Various slight changes take place, *e.g.*, the writ of waste is given against limited owners.

4. From Henry VII. to Elizabeth (1485—1603).

Real Property.

Statute of Uses (temp. Hen. VIII.) was passed to avoid uses of land; but the main object of the statute was defeated by the decision in *Tyrell's Case*, and the trust came into force instead of the use.

Modern conveyancing dates from the Statute of Uses.

Wills of land are permitted—Statute of Wills (temp. Hen. VIII.).

5. From James I. to James II. (1603—1688).

Real Property.

Tenure by knight-service abolished, and the land held in free and common socage.

Conveyances of freeholds to be evidenced by writing.

Leases for over three years to be in writing.

Wills of land to be in writing, signed by testator and attested by witnesses.

Personal Property.

Statute of Distributions settled the succession to intestates' personalty.

6. From William and Mary to the End of Lord Eldon's Chancellorship (1688—1827).

Real Property.

The first Yorkshire Registry Acts are passed.

The Mortmain Act is passed, allowing conveyances in mortmain, *inter vivos*, under certain restrictions.

The law of distress is altered by 11 Geo. II., which gives landlord the right to sell the goods distrained upon and to follow goods improperly removed.

The law regarding wills of copyholds is altered.

Personal Property.

A new kind of property is created by the Copyright Act, 1709.

7. From George IV. to the Present Day (1827—1921).

Real Property.

The law of conveyancing simplified.

Fines and recoveries abolished.

Law of dower amended by giving the wife dower out of equitable as well as legal estates, but only in lands to which the husband is entitled at death, as to which he dies intestate.

Law of prescription simplified.

Alteration of the rules of descent.

Feoffment is practically abolished, and deed of grant substituted.

Law of wills is codified and amended.

Married Women's Property Act, 1882.

The Conveyancing and Settled Land Acts.

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