

Part II: The Rules of Law.

CHAPTER II

CRIME AND TORT

IT is in this period that the foundations of our present law as to Wrongs criminal and civil are laid. I have already indicated some of its salient features. The crown has assumed jurisdiction over the more serious crimes—the felonies. Treason has been made the subject of a special statute and has been differentiated from the other felonies. For offences under the degree of felony there is the writ of trespass, which has, as we have seen, both a criminal and a civil aspect.¹ Such offences when criminally prosecuted will become the misdemeanours of our later law. At the beginning of this period many of the smaller wrongs to person and property were dealt with in the local courts. At the end of this period the writs of trespass and deceit and their offshoots enabled the royal courts to offer better remedies for a varied and growing class of wrongs. Consequently new principles both of criminal and civil liability were being evolved.

The history of the criminal law of the fourteenth and fifteenth centuries is in the main the history of the detailed working out of the principles which had been laid down in the reign of Edward I. If we except the statute of Edward III. relating to treason, we find no great fundamental changes made by the legislature. We see, it is true, the beginnings of the criminal law as to labour and vagrants,² and some small attempts to prevent offences which may injure the state in its relations with foreign states.³ But these branches of law do not attain any great importance in this period. The Statute of Præmunire and the legislation on the subject of heresy I have already dealt with.⁴ As we have seen, most of the statutes of this period which create new criminal offences have no great permanent importance in the history of the criminal law.⁵ It was not till the state renewed its vigour in the following period that we get either in the statutes or in decided cases any great developments. For the present the criminal law is cumbered with decadent survivals. Appeals of felony, approvers, benefit of clergy, sanctuary, abjuration, deodands,—

¹ Vol. ii 357-365, 449-450.

⁴ Vol. i 585-586, 617.

² Ibid 459-464.

³ Ibid 473-474.

⁵ Vol. ii 449-453.

raise many intricate questions ; and the intricacies of process hamper the due administration of the criminal law almost as much as they hamper the administration of the civil law. The king's rights to escheats and forfeitures and the chattels of felons seem sometimes to interest the judges almost as much as the due maintenance of law and order. Nor were the common law judges aroused to greater activity by the existence of the competition of a rival court. We have seen that Parliament had set its face against any interference with the common law in matters of life and limb ;¹ and though the jurisdiction of the council was exercised, and sometimes even recognized by the legislature, the weakness of the central government prevented the fear of its competition from exercising a liberalizing influence upon the doctrines of the common law.² Moreover, at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an Act of the legislature. The fate of Richard II.'s judges, who tried prematurely to invent a doctrine of constructive treason, was somewhat of an object-lesson to the judges of this period ;³ and for many centuries to come the fear of an impeachment held in check even judges of pronounced absolutist tendencies. Thus it has happened that the criminal law has, more than any other branch of the law, been developed by statutes. But those statutes have been interpreted in the light of doctrines which were elaborated in the Middle Ages ; and though the statutes have enlarged the boundaries of the criminal law they took away no one of those half obsolete rules and practices which were cumbering the law in this period. Thus it happened that, till the beginning of the last century, there were probably more archaic survivals both in the substantive and adjective parts of the criminal law than in any other part of the law of England.⁴

The law of tort in this period shows far more progress. This was partly due to the fact that in the writs of trespass and deceit on the case the law had gained forms of action which facilitated development. Partly also it was due to the fact that in giving new civil remedies for admitted wrongs the courts were not hampered by the dread that they were incurring unpopularity by infringing the liberty of the subject—on the contrary, they probably added to the popularity of the common law by thus increasing its efficiency. But above all the courts were met at

¹ Vol. i 486-488.

² Ibid 489-491.

³ Vol. ii 560 ; below 291-292.

⁴ Obvious illustrations are trial by battle, peine forte et dure, deodands, pardons of course, benefit of clergy.

the end of this period by the competition of the Chancery; and, as we have seen, there was every reason to fear that if they sent empty away suitors who complained of obvious wrongs, those suitors would betake themselves to the rival jurisdiction.¹

I shall deal with the history of the more salient features of this branch of the law in the following order:—§ 1. Self-help; § 2. Treason; § 3. Benefit of Clergy, and Sanctuary and Abjuration; § 4. Principal and Accessory; § 5. Offences against the Person; § 6. Possession and Ownership of Chattels; § 7. Wrongs to Property; § 8. The Principles of Liability; § 9. Lines of future Development.

§ 1. SELF-HELP

The first business of the law, and more especially of the law of crime and tort, is to suppress self-help. And so we find that the further back we go into the history of law the more frequent and detailed are the prohibitions against asserting one's rights by force. The law cannot safely allow many exceptions to its general prohibitions, for that would be to weaken the force of a general rule, obedience to which is a condition precedent to its life.² It is only when obedience to law has become the rule that the occasions upon which self-help will be allowed can be safely defined. At the beginning of this period we are still in the state of society when the general rule needs to be firmly enforced. At the end of this period the common law had acquired a large number of rules upon this matter, and, in the Year Books, a still larger number of concrete instances of the manner of their application. There were in fact several reasons why the question whether a litigant's self-help was or was not justifiable had become important. We have seen that the weakness of the executive had led to a recrudescence of feudal disorder.³ We have seen, too, that, alterations in the law, which extended a disseised owner's right of entry, gave opportunities for forms of disorderly self-help which had been sternly prohibited in the thirteenth century.⁴ For these reasons we begin to see some of the leading principles of the law relating to the conditions under which self-help is permitted.

In defence of personal freedom a man imprisoned by another in his house was allowed to break open the house to effect an escape;⁵ and we shall see that the conditions under which corporal

¹ Vol. ii 592-593; below 424, 436, 442, 447.

² Vol. ii 44.

³ Ibid 263, 583-586; cp. P. and M. ii 572.

⁴ Y.B. 9 Ed. IV. Mich. pl. 10 *per* Littleton.

⁵ Ibid 414-418.

injuries to another, in defence of a man's person, or that of his servants or family, were justifiable, were growing more precise.¹ Similarly we see some attempts at defining the conditions under which a man was allowed to help himself if his rights to the quiet enjoyment of his property were attacked.² An illustration of the right to help oneself in these cases is afforded by the remedy of abatement. A man was allowed to enter premises where a nuisance exists and abate it, if the nuisance rendered his land unprofitable or his house uninhabitable.³ Also, within certain limits, an owner, if deprived of his goods, might recapture them, or if disseised of his land might peaceably enter thereon; and in the case of these rights of recapture or re-entry the conditions under which they were permissible were somewhat more liberal at the end of this period than they were at the beginning; and they tended to become still more liberal in modern law.⁴ Of this development in the law I must at this point speak briefly.

In the case of goods, the man who retook them by force committed a trespass, and in the thirteenth century ran considerable risks of being treated as a thief.⁵ At the end of this period the use of force was probably tortious,⁶ and might, if it resulted in the death of the person against whom it had been used, be felonious;⁷ but, of course, if the person wrongfully in possession used violence to defend that possession, the violence of the rightful owner might be justifiable if it could be proved that it was used in the necessary defence of his person.⁸ On the other hand, peaceable recapture was allowed; and it was lawful for this purpose to enter upon the land of the person who had wrongfully taken the goods, but not to break into his house.⁹ But such entry was not permissible if the true owner had bailed them to the person on whose land they were; nor (probably) if the person who had wrongfully taken the goods had sold or bailed them to

¹ Below 312-314, 377-378.

² Below 378; Coke lays it down, *Second Instit.* 316, that a man may justify an assault and battery in defence of lands or goods, but not maiming or wounding or menace of life or member—"and so note a diversity between the defence of his person, and the defence of his possessions or goods;" *Green v. Goddard* (1704 *circ.*) 2 Salk. 641 *per* Powell, J.

³ *Bracton* f. 231b—but in his day only if the nuisance was recent; *Y.B.B.* 20, 21 Ed. I. (R.S.) 462; 9 Ed. IV. Mich. pl. 10 *per* Littleton. As yet the limits of the right to abate are not very clearly defined; the process of limiting this right till it becomes a remedy of very exceptional character has not gone very far in this period.

⁴ *L.Q.R.* xxviii 275.

⁵ *Britton* i 57, 116; cp. *Pollock, Torts* (5th ed.) 362 n. x; below 284 n. 6, 320.

⁶ See *Y.B.* 35 Hy. VI. Mich. pl. 3 *per* Prisot, C.J.

⁷ Below 312.

⁸ *Y.B.B.* 22 Hy. VI. Mich. pl. 12 (p. 8) *per* Pole, *arg.*; 35 Hy. VI. Mich. pl. 3; 9 Ed. IV. Mich. pl. 10.

⁹ *Y.B.B.* 9 Ed. IV. Mich. pl. 10; 21 Hy. VII. Hil. pl. 18.

another and they were on that other's land,¹ unless the wrongful taking amounted to larceny.² But in the case of goods we must always remember that, if the goods had been taken under such circumstances as amounted to a felony, and the thief had been convicted, the right of recapture was subject to the crown's right to have these goods as a forfeiture. It was only under special circumstances that the rights of the true owner overrode the rights of the crown.³

In the case of land the disseised owner could, even in the thirteenth century, re-enter, if he did so at once, i.e. within some four or five days.⁴ But we have seen that this right of re-entry had been largely extended at the end of this period.⁵ There could be no larceny of land; so that the right to re-enter was not limited, as in the case of goods, by the paramount claims of the crown. It was found that the law allowed disseised owners too large a licence for the due maintenance of the peace. Therefore the statutes of forcible entries made forcible entry a criminal offence.⁶ The question of the effect of these statutes upon the right of an owner, who having a right of entry, makes a forcible entry upon his property, has long been an unsettled question. There is clear Year Book authority to the effect that these statutes give only a criminal remedy, and that, as they do not affect the civil remedies of the parties, a person who thus enters gets legal possession.⁷ It follows that, as the person thus in possession is entitled, the person ousted cannot get restored to possession or recover damages for the loss of possession. Though there was weighty authority to the contrary,⁸ this would seem to be right in principle, and has recently been decided to be the better opinion.⁹

¹ *Higgins v. Andrews* (1619) 2 Rolle. Rep. 55; Bl. Comm. iii 5.

² *Ibid.*

³ Vol. ii 361; below 329-331. After 21 Henry VIII. c. 11, which introduced the writ of restitution after the thief had been convicted on indictment, it was ruled that recapture was lawful in cases where the writ of restitution was obtainable, Hale, P.C. i 546. The man who, knowing of the felony, "taketh of the thief his goods again, or amends for the same to favour or maintain him, that is not to prosecute him," Coke, Third Instit. 134, is guilty of theft bote; cp. Stephen, H.C.L. i 502.

⁴ Vol. ii 263; cp. Y.B. 3 Ed. II. (S.S.) 192.

⁵ Above 278.

⁶ Vol. ii 453; in Y.B. 21, 22 Ed. I. (R.S.) 556 Hyham, *arg.*, says, "I may enter my own land with all manner of arms if I please; for I am doing no trespass."

⁷ "On aura action sur le Statute quand on entre l'ou son entre n'est congeable sans parler de fort main s'il veut, *Quod fuit concessum*. Mes on n'aura accion quand il est ouste ove fort main per un autre quand son entre fuit congeable, pur ce que pur le fort main le party convict sera fine au Roy . . . *Quod fuit concessum per tous*," Y.B. 9 Hy. VI. Trin. pl. 12; to the same effect Y.B. 15 Hy. VII. Hil. pl. 12. (See *Addenda* p. xivii).

⁸ *Newton v. Harland* (1840) 1 M. and G. 644; *Beddall v. Maitland* (1881) 17 C.D. 174; *Edwick v. Hawkes* (1881) 18 C.D. 199.

⁹ *Hemmings v. Stoke Poges Golf Club* [1920] 1 K.B. 720, over-ruling the cases cited in n. 8; *Harvey v. Brydges* (1845) 14 M. and W. 437; *Clark and Lindseil, Torts* (4th ed.) 334-335.

The oldest form of self-help is the process of distraint. The essence of distraint is, as Blackstone¹ puts it, "the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed." This expedient is at once ancient, common, and, in early law, used for a variety of different purposes.² It is so useful that it has maintained its place even in mature legal systems; but it has only maintained its place because it has been minutely regulated. In consequence of this regulation it has almost ceased to be a form of self-help, and has risen, even as in Roman law the *Legis Actiones per manus injectionem* and *per pignoris capionem* rose,³ to the dignity of a regular legal process. It is from this point of view that it differs from the forms of self-help which have just been discussed. They are forms of self-help pure and simple, deliberately allowed by a settled system of law as just and reasonable: distraint is a particular form of self-help which has survived from the time when the coercive force of law was weak, because it has been broken in to the service of the law and become a useful part of legal process. But though the law made use of distraint as part of its process to enforce appearance,⁴ and sometimes as a mode of enforcing obedience to the orders of its courts,⁵ there are still surviving some forms of it which recall the days when it was the remedy of the private person—when it was a form of self-help pure and simple. It is with these forms that I must here deal.

The two forms of this kind of distraint which have survived in the common law are (1) distraint damage feasant, and (2) the landlord's right to distrain for rent or other services in arrear.

(1) The person who finds beasts on his land doing damage may keep them or impound them till their owner pays for the damage which they have caused.⁶

(2) The second form—the landlord's right to distrain—is by far the most important of the two. It may be, indeed, that this right of the landlord was not originally a true case of self-help; for it may be a survival from the days when lords of tenants kept a court for those tenants, and distrained by the judgment of that court,⁷ just as in much later days the court

¹ Comm. iii 6.

² P. and M. ii 573.

³ Moyle, Justinian 644.

⁴ Below 626, 675.

⁵ In the case of the sheriff's tourn or the court leet certain fines or amercements might be recovered by distress, "in the nature of an execution," Gilbert, Distresses (ed. 1780) 12-15.

⁶ Y.B.B. 20, 21 Ed. I. (R.S.) 76, 78; 32, 33 Ed. I. (R.S.) 133.

⁷ Cp. Bracton f. 157b, "Cum vero uterque præsens fuerit in comitatu, tunc dicat captor quod juste cepit et *per considerationem curia sua*, pro servitio, quod idem querens et tenens suus ei debuit et ei injuste detinuit, et *inde poterit vocare curiam suam ad warrantum* si voluerit;" P. and M. ii 574.

lect distrained for the amercements inflicted by it. However that may be, the right continued to be the right of the landlord after he had ceased to possess or hold a court. It became so distinct from the right to hold a court that, though it belonged to the landlord *quod* landlord, it was denied to the court baron.¹ As happened in other cases, what had at first been the right of lords high in the feudal scale became the right of all landlords. Thus it comes to be merely an incident of the relationship of landlord and tenant, and so much a part merely of property law that it can be given in certain cases by the agreement of the parties, though no tenure exists between them.² Having been tried, and found an efficient remedy, it has been used, extended, and improved by the legislature.³

We may regard, then, the landlord's right to distrain as a true case of self-help. But because it is a case of self-help, and a form of it which can be easily used to compel almost any kind of performance or even to gratify spite, the law has found it very necessary to watch jealously its exercise and to regulate the conditions under which it will be allowed. When order was restored after the Barons' War, one of the first things to be regulated by the Statute of Marlborough (1267) were various unlawful uses which had been made of the practice of distraint.⁴ It is because distraint was the ready weapon of the lord who wished to usurp jurisdiction and political power over his land that the breach of these rules was regarded as an offence of the most serious character.⁵ The lord who takes distresses and declines to give them up, after the person distrained has offered security to appear and contest the lord's claim in an action, has committed the offence of *Vetitum namii*—

¹ Gilbert, Distresses 15, 16.

² In the case of a rent charge, above 151.

³ Cp. Bl. Comm. iii 7, "For several duties and penalties inflicted by special Acts of Parliament (as for assessments made by commissioners of sewers or for the relief of the poor) remedy by distress and sale is given;" in earlier days it was the usual process by which local courts enforced penalties for breach of their by-laws, vol. ii 378; for the later law as to distresses for breach of such by-laws see Gilbert, Distresses 23, 24.

⁴ 52 Henry III. cc. 1-4, 15, 21; the first clause tells us that, "Tempore turbationis nuper in regno . . . multi magnates et alii . . . de vicinis suis et aliis per seipsos graves ultiones fecerunt, et districtiones, quousque redemptiones receperint ad voluntatem suam. Et praeterea quidam eorum se per ministros Domini Regis iusticiarii non permittunt, nec sustineant quod per ipsos liberentur districtiones, quas auctoritate propria fecerint ad voluntatem suam."

⁵ Thus in the Eyre of Kent the justices were directed to enquire of "great men and their bailiffs, and others, the king's officers only excepted, unto whom special authority is given, which at the complaint of some, or by their own authority have attached others, or their goods, passing through their jurisdiction, compelling them to answer afore them upon contracts, covenants and trespasses, done out of their power and their jurisdiction, where indeed such hold nothing of them, nor be within their franchise," the Eyre of Kent (S.S.) i 45 art. 135.

an offence which Bracton tells us is a form of robbery, and an even greater offence against the king's peace than disseisin.¹ Thus it was necessary to make the rules which regulated the taking of distresses so severe that even a small neglect of them exposed the lord to a heavy liability which was analogous to that of a trespasser or a disseisor.² It is for the same reason that the law has always sternly adhered to the view that the things distrained are merely pledges taken to compel the tenant to satisfy the landlord's claims, and that they must, therefore, be restored when the claim is satisfied. They are in the custody of the law; and the landlord gains no possession of them by the taking.³ Hence neither trespass⁴ nor novel disseisin⁵ lay originally against a person who wrongfully distrained. To meet the case of a wrongful distraint the law provided the special remedy of replevin; and this action became not only the usual action in which to settle disputes between landlord and tenant, but also a means by which chattels which had been seized (even though not seized in the supposed exercise of a right to distrain) could be recovered. The history of this action shows us very clearly the manner in which a right of self-help has been so controlled that it has become simply a peculiar form in which legal proceedings may be initiated.

Probably from the time of Glanvil,⁶ and certainly from the end of the twelfth or the beginning of the thirteenth century,⁷ the plea *de vetito namio*—the proceeding which came to be known as the action of replevin—was a recognized plea of the

¹ f. 157b; P. and M. ii 575.

² Bracton f. 217, cited P. and M. ii 575; Y.B. 3, 4 Ed. II. (S.S.) 195-196 *Bereford*, C.J., considered that, replevin being similar to trespass, the process should be *capias*—"were it not every rascal in the country might take his neighbours' beasts . . . and go fleeing from place to place;" Bl. Comm. iii 14, 15, "I must observe that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding; for, if any one irregularity was committed, it vitiated the whole, and made the distrainers trespassers *ab initio*;" for the rules as to the things privileged from distress (some of which are very old, P. and M. ii 575), see Gilbert, Distresses 25-39; Bl. Comm. iii 7-10.

³ P. and M. ii 574; Y.B. 12 Rich. II. 4 *per* Pynchbek, C.B.; Bl. Comm. iii 10, 13; H.L.R. iii 31. He could not sell the goods till 1659, Pollock, Land Laws, 141.

⁴ Ames, Lectures on Legal History 60 n. 2, citing Plac. Abbrev. 263 col. 2 (32 Ed. I.); for the later change in the law on this point see below 285. Coke's view, Second Instit. 105, which is supported by the Y.B.B., see H.L.R. xxix 390, was that trespass originally lay against a lord for an unlawful distress, but that it was superseded by the remedy provided by the Statute of Marlborough c. 3; the date at which trespass became a common remedy (vol. ii 364) somewhat militates against this view.

⁵ The Eyre of Kent (S.S.) iii 99-102; but see Britton i 281.

⁶ xii c. 12.

⁷ The plea *de vetito namio* is said to date from John's reign in Y.B. 30-31 Ed. I. (R.S.) 222, see P. and M. ii 576 n. 2; and cp. Maitland, Forms of Action 342. Possibly it did not exist as a plea of the crown *eo nomine* in Henry II.'s reign,

crown.¹ No doubt it became a plea of the crown because the irregular taking of distresses was a particularly dangerous practice from the point of view of royal justice. It was not only an excuse for all kinds of oppression,² it was also, as we have seen, an easy and obvious mode of establishing some sort of feudal jurisdiction. In Edward I.'s reign, however, royal justice had got the upper hand; and we can see from the clauses of the Statute of Westminster II. that the action has come to be chiefly a means of settling differences between landlord and tenant.³ The ordinary course of the action was as follows:⁴ The sheriff, on application being made to him by the distrainee, replevies the goods, i.e. redelivers them to the distrainee, upon his giving security to prosecute his action and to return the things distrained if he loses his action. If the sheriff could not replevy the property distrained because it had been eloiigned (removed) by the distrainor, the distrainee could get a writ of Withernam directing the sheriff to take an equal amount of the distrainor's property, and to keep it till the distrainor restored the property which he had taken.⁵ The distrainor could always stop the action of replevin by claiming to be the owner of the goods;⁶ and as this claim was often made merely to delay the proceedings, the writ *de proprietate probanda* was devised early in the fourteenth century which enabled the sheriff to determine summarily the question of ownership.⁷ If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee. The latter then brought his action of replevin against the former. The former defended it by "avowing," i.e. by pleading the circumstances which showed that he had the right to distrain. If he succeeded the court awarded "a

¹ This is strongly asserted by Bracton f. 155b, "Detentio namii pro districtione facienda pertinet ad coronam domini regis et vix conceditur alicui terminandum præterquam ipsi domino regi vel justitiariis suis;" the sheriff holds this plea as a royal justice.

² For illustrations see H. E. Cam, Vinogradoff, Oxford Studies vi, xi 163-165.

³ 13 Edward I. st. 1 c. 2.

⁴ Bl. Comm. iii 147-150.

⁵ F.N.B. 157 G, 158 A, B; cp. Bl. Comm. iii 148, 149 for the tale of how Sir Thomas More puzzled the omniscient German who offered to dispute concerning "de omni scibili et de quolibet ente" by the question, "utrum averia carucæ vetito namio capta in sint irreplegibilia."

⁶ Y.B. 32, 33 Ed. I. (R.S.) 54; though possibly there was some risk that an unfounded claim of ownership might be met by an appeal of larceny, Y.B. 21, 22 Ed. I. (R.S.) 106.

⁷ Ames, Lectures in Legal History 68, thought that the earliest reference to the writ was in 1357, citing Fitz., Ab. *Prop. Prob.* pl. 3; but as Mr. Bordwell points out, H.L.R. xxix 376, there is a reference to the writ in 1326, Fitz., Ab. *Replevin* pl. 26; a case in the Eyre of Kent of 1313-1314 (the Eyre of Kent (S.S.) iii 197-198), which seems to contemplate the issue of such a writ, puts its date back still further; the writ is not mentioned eo nomine, but the procedure outlined seems similar to the procedure on such a writ as described by Fitz., Ab. *Prop. Prob.* pl. 4.

return," i.e. ordered the goods distrained to be restored to him. If he failed he must pay damages for a wrongful distress.

We have seen that at the end of the thirteenth century the spheres of trespass and replevin were distinct.¹ But before the end of the mediæval period the action of trespass was allowed to be used as an alternative to replevin.² This result had been gradually attained during the course of the fourteenth and fifteenth centuries. It seems to have been admitted that this was possible in 1312-1313;³ but in 1342-1343⁴ the question was treated as doubtful; and in 1345⁵ the practice of the King's Bench and Common Pleas was said to differ upon the question. In 1406⁶ Gascoigne, C.J., ruled that the plaintiff could elect which form of action he would use; and in 1441⁷ Newton stated the law as finally settled as follows: "If you should have taken my cattle I can elect to sue by way of replevin which proves that the property is in me, or to sue by writ of trespass which proves that the property is in the taker." Conversely replevin was allowed to be brought instead of trespass *de bonis asportatis*.⁸ But in practice a form of trespass was generally used instead of replevin; and the fact that replevin might be used instead of trespass was almost forgotten till the old learning was recalled by some cases decided in the earlier half of the nineteenth century.⁹

At the latter part of the sixteenth and in the seventeenth and eighteenth centuries the spheres of replevin and trover began to overlap. There are several cases at the end of the sixteenth and the beginning of the seventeenth centuries in which trover was brought by a plaintiff whose goods had been distrained. They were all decided on points of pleading in favour of the plaintiff for reasons which show that it was difficult to plead

¹ Above 283.

² H.L.R. iii 31-33, Essays A.A.L.H. iii 553 and cases there cited.

³ Y.B. 6 Ed. II. (S.S.) 147 *per* Bereford, C.J.

⁴ Y.B. 17 Ed. III. (R.S.) 96-98.

⁵ Y.B. 19 Ed. III. (R.S.) 476.

⁶ Y.B. 7 Hy. IV. Mich. pl. 5 (p. 28).

⁷ "Si vous eussiez pris mes averia est en ma volonte a suer replevin que prouve que le propriete est en moy, ou a suer breve de trespass que prouve que le propriete est en celui qui prist," Y.B. 19 Hy. VI. Pasch. pl. 5.

⁸ Vol. ii 455 n. 1; cp. 6 Ed. II. (S.S.) 143, 148, 149 *per* Bereford, C.J.; Y.B. 6 Hy. VII. Mich. pl. 4 (p. 8) *per* Vavisor; H.L.R. xi. 374-375, Essays A.A.L.H. iii 428, 431-432.

⁹ Shannon v. Shannon (1804) 1 Sch. and Lef. 327; George v. Chambers (1843) 11 M. and W. *per* Parke, B., at p. 159; H.L.R. xi 375, Essays A.A.L.H. iii 431-432; and cp. H.L.R. iii 31, Essays A.A.L.H. iii 553. Even Blackstone (Comm. iii. 146) seems to have thought that it only lay for a distrainee; but as Ames points out (H.L.R. xi 375) there is a clear case against this view in 1608, Godbolt 150 pl. 195; cp. Comyn, Digest, *Replevin* A; Gilbert, *Distress* (4th ed.) 80; 1 Co. Rep. 54a note, where it is said that, "a replevin is a remedy which lies to recover damages for an immediate wrong without force, in taking and detaining cattle and goods whether by distress for rent damage feasant etc. or otherwise."

a distraint duly effected as a defence to such an action.¹ In 1600 there is a dictum that trover or replevin will lie against a trespasser who has taken goods;² and in 1611 it was assumed that trover would lie for a wrongful distress.³ This was finally decided to be good law by Lord Mansfield in 1770;⁴ and so, as Ames has pointed out,⁵ and as the cases recognize,⁶ we get a doctrine applied to the taking of chattels somewhat like the doctrine of disseisin at election as applied to land.⁷ For, as we have seen, the plaintiff, if he brought replevin, elected to consider himself still possessed, while, if he brought trespass or trover, he elected to consider that he was dispossessed. Conversely replevin could in some cases be brought instead of trover—indeed, Lord Ellenborough once ruled that if a plaintiff wanted the return of his chattel in specie replevin was the more appropriate remedy, for by bringing trover only damages could be got.⁸ But trover and replevin never became so completely convertible as replevin and trespass. In one respect perhaps the scope of replevin was, till 1770, wider than that of trover; for at least two cases recognized (and on principle rightly recognized) that it was not every case of wrongful distress which would support an action of trover.⁹ But in most respects trover was much wider

¹ *Dee v. Bacon* (1595) Cro. Eliza. 435; *Salter v. Butler Noy* 46-47; *Agars v. Lisle* (1614) Hutton 10.

² *Bishop v. Viscountess Montague* (1600) Cro. Eliza. 824, S.C. Cro. Jac. 50.

³ *Kenicot v. Bogan* (1611) Yelv. 198, at p. 200.

⁴ *Tinkler v. Poole* (1770) 5 Burr. 2657.

⁵ *Essays A.A.L.H.* iii 553.

⁶ Above n. 1; Y.B. 6 Hy. VII, Mich. pl. 4 (at p. 8) Vavisor says, "Il poit estre hors del properte s'il voile; come on poit estre disseisi de rents, s'il voile per porter del Assise mea ceo est a son volente. Et issint est des biens prises, on poit devester le properte hors de luy, s'il voile, per proces de action de Trespass, on demander properte per Replevin ou brief de detinue, et issint doncque s'il soit a son pleasure;" so in *Bishop v. Viscountess Montague* (1600) Cro. Eliza. 824 it was said, "Although Trespass lies yet he may have this action (Trover) if he will, for he hath his election to bring either. And as he may have detinue or replevin for goods taken by a trespass, which affirms always property in him at his election, so he may have this action;" cp. H.L.R. xxix 386.

⁷ For the doctrine of disseisin at election see vol. vii 36-43.

⁸ *Dore v. Wilkinson* (1817) 2 Starkie 288.

⁹ *Mires v. Solebay* (1677) 2 Mod. at p. 244; *Etriche v. An Officer of the Revenue* (1720) Bunbury 67; S.C. sub. nom. *Israel v. Etheridge* (1721) *ibid* 80; the latter case was characterized as "a very loose note" by Lord Mansfield, and overruled by him in *Tinkler v. Poole* (1770) 5 Burr. 2657, and the former case was not cited; but Lord Kenyon in *Shipwick v. Blanchard* (1795) 6 T.R. 298, though he had some doubts as to whether Trover ought to lie in these cases, followed *Tinkler v. Poole*; in *Clowes v. Hughes* (1870) L.R. 5 Exch. 160 no objection was taken to the form of the action. The law therefore is settled, but it is not generally the case that the taking of a distress is a conversion; the court truly said in *Mires v. Solebay*, "the defendant could be guilty of no conversion, unless the driving the cattle by virtue of the replevin would make him guilty; but at that time the sheep were *in custodia legis* and the law did then preserve them so that no property can be changed; and if so, there could be no conversion;" and Holt, C.J., seems to have been of the same opinion, since he said by way of dictum in *Hartford v. Jones* (1699) 1 Ld. Raym. 393, "Though the detainer [by a person entitled to a lien] be lawful yet it does not amount

than replevin. Replevin would lie only against a defendant who had taken the goods, and not against a bailee or other person to whom the taker had conveyed them.¹

But we must return from this digression into the law of property to the law of crime and tort.

§ 2. TREASON

I have already said something of the main outlines of the law of treason during this period. We have seen that it attained to a statutory definition in 1352—at an earlier period than any other criminal offence—by reason both of its political importance and of its importance in the land law;² and the fact that it was defined thus early caused many archaic traits to be preserved in the statute.³ The fact that the statute itself was a limiting and defining statute, if it has caused its provisions to be often neglected in times of excitement, has caused also a constant tendency all through our legal history to revert to its provisions in quieter times. It is chiefly for this cause that it is still the foundation of the law of treason. In this section I shall endeavour to give a brief account of (1) some of the earlier ideas upon the subject of treason which we see embodied in the statute, and (2) the mode in which the statute was applied in this period.

(1) The earlier ideas.⁴

In the provisions of Edward III.'s statute we can see at least four distinct ideas which have gone to make up the offence of treason: (a) the idea of treachery; (b) the idea of a breach of the feudal bond; (c) the idea that the duty to king as king is higher than the feudal duty to a lord; (d) an admixture of ideas taken from the Roman law of *læsa majestas*.

(a) The idea that treachery is a peculiarly heinous offence appears as far back as Alfred's law; and it was perhaps helped by the recollection that it was the sin of Judas Iscariot.⁵ The idea survived in the fact that an indictment for treason always

to a conversion, *no more than a distress for rent*;" for as Rolfe, B., said in *Fouldeas v. Willoughby* (1841) 8 M. and W. at p. 550, "in every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession."

¹ *Mennie v. Blake* (1856) 6 E. and B. 842; at pp. 847-849 the court seemed rather to agree with Blackstone's view (above 285 n. 9) but this was only a dictum; the decision was that "replevin was not maintainable unless in a case in which there has been first a taking out of the possession of the owner;" cp. *Bishop v. Viscountess Montague* (1600) Cro. Eliza. 824.

² Vol. ii 449-450.

³ For a summary of the statute see vol. ii 449 n. 7.

⁴ For the best account of these ideas see P. and M. ii 501-507; for the general history Hale, P.C., i 87-252; Stephen, H.C.L. ii 248-297.

⁵ Vol. ii 48.

contained the words "*proditorie*," and "*contra ligeantiae suae debitum*."¹ But it came out more clearly still in the fact that the statute recognized, side by side with the offence of high treason or treason to the king, the offence of petit treason—"that is to say, when a servant slayeth his master, or a wife her husband, or when a man, secular or religious, slayeth his prelate to whom he oweth faith and obedience."² As we have seen, this particular branch of treason was not abolished till 1828.³

(b) The clauses which make it treason to violate "the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir,"⁴ were probably due to the fact that these were peculiarly aggravated breaches of the feudal bond.⁵ But it is not so much what the statute contains as what it omits that shows the influence of these ideas. As is well known, there is no mention in the statute of a conspiracy to levy war; and, as Maitland points out, this is probably due to the fact that such a conspiracy was hardly regarded as an offence if the war was properly declared.⁶ In fact, all through the first three centuries after the Conquest the manifold complications of the feudal bond hindered the development of a law of treason. Many English barons owed allegiance both to the king of France and to the king of England; and the king of England himself had sometimes cause to know that he was a vassal of the king of France. In case of war between England and France it was hardly possible to deal with the offences of such persons merely from the point of view of municipal law. An international element was present which could fairly be made the subject matter of a treaty.⁷

(c) These difficulties tended to disappear when the kings of England lost their continental possessions; and Edward III. himself could deny that he owed allegiance to anyone, seeing that he claimed to be the king of France. But, though former English kings had as Dukes of Normandy been the vassals of the king of France, in England they had claimed from the time of the Conquest to be above any of their feudal barons. They

¹ Hale, P.C. i 59, 77 n. a; Coke, Third Instit. 4.

² 25 Edward III. st. 5 c. 2 § 10; see Saunders and Browne's Case (1574) Dyer 332a.

³ Vol. ii 449 n. 9.

⁴ § 3.

⁵ P. and M. ii 503.

⁶ Ibid 503, 504; below 461.

⁷ For these difficulties see Hale, P.C. i 65-70—as Hale points out, when in 1170 Henry II. crowned his eldest son, to whom the king of Scots did homage, we get three kings to whom allegiance was due in different degrees. For such treaties see *ibid* 69; it is noted, Hale, *loc. cit.*, that in 18 Ed. I. the petition of the Earl of Eu in France for the castles of Hasting and Tikehill is answered by saying that he shall have them when the French king has restored the possessions in France of which he has deprived the English barons.

had, as we have seen, asserted their right to be kings of subjects, and not merely lords of vassals;¹ and the victory of the common law over all its rivals realized the theories of the king's lawyers, that all political power flows from him,² and enabled statutory force to be given to many of their ideas touching the contents of treason. Hence we can see that in Edward III.'s statute high treason is the important matter, petit treason merely an archaic survival. The king is really coming to represent the state. He must be guarded with the utmost care, and it must be made an offence not only to kill him, but even to plot against his life. It will be an offence to be adherent to his, that is to the state's, enemies; to levy war against him; or to slay his chancellor, treasurer, or judges whilst acting as his servants.³

(d) From the time of Glanvil the king's lawyers had imported a Roman element into the law. They not only defined as treasonable, practices which were obviously dangerous to the peace of the state; they also held that certain kinds of forgery were also treason.⁴ To the Romans "falsifying Cæsar's image was a kind of sacrilege;"⁵ and to this idea we owe the clauses of the statute which make it high treason to counterfeit the king's great or privy seal or his money, or to bring false money into the realm, knowing it to be false.⁶

But these ideas of the king's lawyers were elastic; and the victory of the common law caused their elasticity to become dangerous. We have seen that all the more serious crimes had come to be regarded as offences against the king's peace, his crown, and dignity.⁷ That being so, it was becoming a little difficult to draw the line between the mere ordinary felony and the crime of treason. Both were offences against the king. What, it might be asked, was the element which differentiated treason from felony? At the present day we should have little difficulty in answering the question. We should say that the essence of treason consisted in the fact that it was an offence against the safety or well-being of the king as representing the safety or well-being of the state. We shall see that such an

¹ Vol. i 33-34; above 56 n. 1.

² Vol. i 87-88.

³ §§ 2, 4, 7 of Edward III.'s statute; cp. with the older authorities—Glanvil, xiv 1, puts down as three of the heads of treason, *mors regis*, *sedition regni*, *sedition exercitus*; Bracton, f. 118b, says, "*Habet etiam crimen læsæ majestatis sub se multas species, quarum una est, ut si quis ausu temerario machinatus sit in mortem domini regis, vel aliquid egerit vel agi procuraverit ad seditionem domini regis, vel exercitus sui, vel procurantibus auxilium et consilium præbuerit vel consensum;*" *sedition* in this context probably means "betrayal," P. and M. ii 501 n. 3.

⁴ Glanvil xiv 7; Bracton f. 118b, "*Continet etiam sub se crimen læsæ majestatis crimen falsi, quod quidem multiplex est: ut si quis falsaverit sigillum domini regis, vel monetam reprobam fabricaverit et hujusmodi;*" cp. 119b.

⁵ P. and M. ii 503 n. 6.

⁶ § 6.

⁷ Vol. ii 358.

answer would have been impossible at this period.¹ The idea that the king had two capacities—a natural and a politic capacity—was not clearly grasped; and the idea itself had come to be associated with excuses for treasonable practices. In fact, to hold this opinion had come to be regarded as in itself treasonable. The use of it attributed to Piers Gaveston and the Despensers had discredited it;² and it would almost appear that in Edward II.'s reign the charge of holding this opinion was used for the purpose of founding vague charges of treason, in much the same way as the charge of "accroaching the royal power." But, as there was thus no clear distinction between treason and felony, it was the easier to extend the scope of treason; and there were good reasons why the king should desire to see this extension.

The vagueness of the offence made it a valuable political weapon. It was easier to get a conviction for treason than for any of the more precisely defined felonies; and in case of such conviction it was coming to be thought that no clergy could be pleaded.³ The consequences of a conviction were far more serious, and, as we have seen, more profitable to the king.⁴ Therefore we are not surprised to find cases in which the law was extended for these various reasons. The case of Segrave (1305), who had deserted the king's army and sued in the court of the French king, thus subjecting the king and kingdom of England to France;⁵ the cases of the Despensers (1321 and 1326) and of Roger Mortimer (1331) who were convicted of accroaching the royal power;⁶ the case of Matravers (1330), who was convicted of treason because he falsely told Edmund, Earl of Kent, the half-brother of Edward II., that Edward II. was still alive, and thereby induced him to commit treason by raising an army for his deliverance⁷—are all illustrations of the manner in which the law of treason was stretched for political objects.⁸

¹ Below 466-467.

² Chronicles of Edward I. and II. (R.S.) i 153; ii 33, 65; Statutes (R.C.) i 182; the argument was that "homagium et sacramentum ligiantia potius sunt . . . ratione coronæ quam personæ regis . . .," hence "si rex aliquo casu erga statum coronæ rationabiliter non se gerit, filii sui per sacramentum factum coronæ regem reducere et coronæ statum emendare juste obligantur" . . . and, as the forms of law are not much use in such a case, "judicatum est quod error per asperitatem amoveatur," because the king's subjects must maintain the law; for a similar idea in Magna Carta and Bracton see vol. ii 213, 255; cp. Harcourt, the Steward and Trial of Peers 152-153; Coke, Calvin's Case (1608) 7 Rep. 112, calls this opinion "damnable and damned;" see below 466.

³ Below 297, 299.

⁴ For the punishment of treason see P. and M. ii 499; for the forfeiture which was the consequence of it see above 70.

⁵ Parliament Roll 1305 (R.S.) 255; Hale, P.C. i 79; Stephen, H.C.L. ii 245.

⁶ Hale, P.C. i 80, 81.

⁷ Ibid 82.

⁸ The Despensers in their answer in 1321 say, "De cunctis sibi oppositis nihil tangit feloniam aut prodicionem;" and that "omnes illi, per quos iudicium exstitit ordinatum, fuerunt capitales inimici."

The case of Gerberge (1348), who was convicted of treason for highway robbery,¹ and the case of John at Hill (1349), who was convicted for the murder of a king's messenger,² are illustrations of the extensions of treason for other objects.³

It was doubtless with these cases in their minds that the framers of Edward III.'s statute set to work. Except in the one case of plotting the king's death, they declined to make any mere conspiracies treason—they required an overt act; and they expressly enacted that, "if any man ride armed covertly or secretly with men-of-arms against any other to slay him or rob him or take him or retain him till he have made fine or ransom," it is not treason;⁴ they expressly guarded the lord's right to escheat in cases of petit treason;⁵ and they attempted to guard against the creation of fresh treasons by judicial interpretation by a clause which required that the statute should be interpreted not by the judges, but by Parliament.⁶

We must now turn to the law of treason as administered under the statute during this period.

(2) Treason in the fourteenth and fifteenth centuries.

The reign of Richard II. was productive of new treasons. As Hale says,⁷ "Things were so carried by factions and parties in this king's reign that this statute was little observed; but as this or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of 25 E. 3 had not been made or in force." The judges, at the king's bidding in 1388, declared it to be treason to impede the exercise of the royal prerogative.⁸ As we have seen, they were themselves

¹ Hale, P.C. i 80.

² Ibid 81.

³ Hale tells us that Gerberge pleaded his clergy, but was ousted of it because the charge was treason; and cp. Y.B. 21 Ed. III. Trin. pl. 16, where killing a man who was on his way to help the king at the war was represented as treason.

⁴ 25 Edward III st. 5 c. 2 § 13; Hale says, P.C. i 137-138, that "the especial reason of the express adding of this clause seems to be in respect of that judgment of treason given against Sir John Gerberge."

⁵ § 11.

⁶ § 12; see vol. i 377-378 for the clause and the interpretation put on it; it is fairly clear that, whether it refers to interpretation by the whole Parliament or by the House of Lords, the framers of the statute were, in the light of past experience, not inclined to entrust the manufacture of new treasons to the judges. The case of John Imperial (1380) was decided under this clause; he was a public minister who had come into the country with a royal safe-conduct and had been murdered, Hale, P.C. i 83, and vol. ii 450, 473.

⁷ P.C. i 83.

⁸ Ibid 84, they were asked, "Qualiter sunt illi puniendi, qui impederunt regem, quo minus poterat exercere quæ ad regalia et prærogativam suam pertinuerunt," and they replied, "Quod sunt ut proditores etiam puniendi."

appealed of treason, under the general charge of accroaching the royal power.¹ In 1397 it was enacted that it should be treason to compass or purpose the death or deposition of the king, or to render up one's liege homage, or to assemble persons together and ride against the king in order to make war within the realm, or to procure the repeal of statutes made in that Parliament.²

The history of treason in this reign in many ways anticipates the growth of the constructive treasons of later law, just as it anticipates later absolutist theories of the prerogative.³ But the new treasons so created had but a short life. As we have seen, they were repealed in Henry IV.'s reign; and the law laid down in the statute of Edward III. was again restored.⁴ All through this period that statute continued to contain the law of treason. The other statutory additions were insignificant.⁵ As I have said, the time was not yet ripe for the later growth of constructive treason. In order that it may be possible to extend this, the most important branch of the criminal law, by judicial construction, there must be a law-abiding habit in the nation; and this in the fifteenth century was conspicuous by its absence. Acts of attainder were, as we have seen, a more congenial weapon. But we can see at the end of this period a certain development in the doctrines relative to the prerogative.⁶ The king was coming to be regarded less exclusively as a person, more as the official at the head of the state. It is, when the prerogative, having restored law and order, had become the most important power in the state, and when legal doctrine had invested it with attributes of a superhuman character, that we get the conditions which will make for a large judicial expansion of the law of treason. As at the end of this period we are but at the beginning of this development of the prerogative, we do not see many signs of the corresponding development in the law of treason.

We do, however, see some signs of the manner in which it will be possible to expand it. Edward III.'s statute had declared, not that killing the king, but that compassing or imagining his death, was treason. In other words, it had made the essence of this species of treason not the act of killing but the intention to kill.⁷ We shall see that in the latter half of the fourteenth century certain judges were inclined to take the will for the deed

¹ Vol. ii 360.

² Ibid 450.

³ Ibid 414.

⁴ Ibid 450.

⁵ Ibid.

⁶ Below 463-468.

⁷ "Donc il fuist demand si on sera mort pur chose que il ne jamaïs fist. *Newton* dit ouy, que on sera mort, trait, pend, et disclos pur chose que il ne jamaïs est fait ny consentant ny aidant. Come si on en son fame (? ame) imagine la mort le Roy, et ne ad fait plus, pur cet imaginacion il sera mort come devant," Y.B. 19 Hy. VI. Mich. pl. 103.

and punish felonious intentions, though no act was done.¹ If this was possible in the case of felony, much more was it likely that the judges would, from motives of public policy, give a wider construction to the words of Edward III.'s statute, and declare to be treason any intention which pointed at the death or deposition of the king, however manifested. There are a number of mediæval precedents from Henry IV., Henry VI., and Edward IV.'s reigns which seem to show that the judges were inclined to take this view, and to hold that mere words which showed such intentions were treasonable.² In some of them no doubt other overt acts were joined to the speaking of words; but in several the mere speaking of words seems to have been adjudged to be treasonable.³ We shall see that in the seventeenth century it was held that the mere speaking of words could not amount to treason;⁴ but we shall see also that, just as the wording of Edward III.'s statute had made these mediæval decisions possible, so that same wording was in the sixteenth and seventeenth centuries the basis on which was erected the modern doctrine of constructive treason.⁵ These mediæval decisions cannot be regarded as the basis of that doctrine. They seem rather to be a different manifestation of a similar idea; and they may by suggestion have helped the judges to arrive at it.

We must now turn from treason to the felonies and other lesser wrongs to person and property. But, before I discuss the history of these different offences, I must deal with two topics which are important chiefly in connection with the law as to felony—firstly, Benefit of Clergy, and Sanctuary and Abjuration; and secondly, Principal and Accessory.

§ 3. BENEFIT OF CLERGY, AND SANCTUARY AND ABJURATION

Benefit of Clergy and the institution of Sanctuary and Abjuration are the two most important instances in which ecclesiastical law influenced the mediæval criminal law. Benefit of

¹ Below 373 n. 4.

² These cases are noted and discussed, and the records in two of them are given in an article by Isobel D. Thornly, *E.H.R.* xxxii 556-561; for other cases see Hale, *P.C.* i 111-115; and the collection of precedents in *Cro. Car.* 118-261.

³ See e.g. *Cro. Car.* 121. The accused had not only uttered words, but had calculated the king's nativity and had published seditious ballads; cp. *E.H.R.* xxxii 556-557.

⁴ *Vol. viii* 312-313—unless they disabled the king's title.

⁵ *Ibid.* 314-321. I cannot agree with the view put forward in *E.H.R.* xxxii 556-557 that the mediæval decisions were founded on the theory that treason could be committed by words at common law, and that Edward III.'s statute had not superseded the common law; this seems to me to be contrary to the whole history of the law of treason since the statute, and a wholly unnecessary supposition in view of the wording of the statute.

Clergy was, in the earlier part of the Middle Ages, the privilege of the ordained clerk accused of felony; but it was ceasing to be merely this at the latter part of the mediæval period; and it only secured the prolongation of its life till the nineteenth century by becoming a clumsy set of rules which operated in favour of all criminals to mitigate in certain cases the severity of the criminal law. The institution of Sanctuary and Abjuration existed for the benefit of all persons except clerks. It was wider in its extent than Benefit of Clergy in that it applied to a greater variety of cases of wrongdoing; and it was a local rather than a personal privilege. Like Benefit of Clergy, it was radically modified in later law; and, because it was thus modified, it secured a new lease of life. But even in its modified form it gave rise to many abuses; public opinion in many countries turned against it; and so it was abolished some two centuries before the Benefit of Clergy.

Benefit of Clergy

As the result of Becket's murder the royal courts had been obliged to abandon their claim to try and punish a clerk who was guilty of felony; and this abandonment gave rise to the "Benefit of Clergy."¹ Thus it happened that "an ordained clerk who commits any of those grave crimes that are known as felonies, can be tried only in an ecclesiastical court, and can be punished only by such punishment as that court can inflict."² This benefit of clergy had a long and curious history; and, in the course of it, it completely changed its meaning. It ceased to be a special privilege of the clergy, and became, as I have said,³ a complicated series of rules exempting certain persons from the death penalty incurred by those found guilty of certain felonies.⁴ In this section I propose to trace the history of this transformation. We shall see that in the thirteenth century it was really a clerical privilege, and to a large extent, it retained its original character all through the Middle Ages. But in consequence mainly of the growing strength of the royal courts, we can already see signs, at the latter part of the mediæval period, of a change in its character. It is not, however, till the sixteenth century that it began to lose its original character of a privilege of the clergy. This change was due mainly to the action of the legislature; and a series of statutes of the two following centuries finally completed the

¹ See vol. i 615 for some account of this controversy.

² P. and M. i 424.

³ Vol. i 615-616.

⁴ Till the beginning of the nineteenth century nearly all felonies were punishable with death; the only exceptions were petty larceny (below 366) and mayhem (below 316-317); see Stephen, H.C.L. i 463, 471.

change, and made it a clumsy and intricate set of rules which operated to modify in a very unsatisfactory manner the undue severity of the criminal law. It will be necessary therefore to deal separately with its mediæval and its later history.

Mediæval history.

In the first place, I shall describe shortly the nature of the benefit of clergy in the thirteenth century, and secondly the modifications which were made in the two succeeding centuries.

(1) *The thirteenth century.*

We must consider (i) the procedure when clergy was claimed; (ii) the manner in which the church dealt with its criminals; (iii) the persons who could claim the privilege; and (iv) the cases in which it could not be claimed.

(i) At the beginning of the thirteenth century a clerk arrested on a charge of crime must be delivered up to the bishop if he demands him, and the bishop is bound under a heavy penalty to produce him before the itinerant justices.¹ When the justices come, and the clerk is brought before them, he does not answer the charge, but pleads his clergy, and the official of the bishop demands him as a clerk. He is then delivered to the bishop, and no enquiry takes place in the king's court as to his guilt.² But before the end of Henry III.'s reign the king's court, before the clerk is delivered up, takes an inquest as to his guilt.³ This change may be due partly to the view put forward by Bracton that the king's court can try the clerk; but that it must, if he was convicted, hand him over to the bishop that he may inflict the punishment of degradation which the lay court is incompetent to inflict.⁴ Bracton's theory was not completely accepted, for, as Maitland points out,⁵ this inquest taken by the king's court is not a trial. It merely ascertained the view of the royal court as to the clerk's guilt or innocence on the evidence before it; and it was for that reason that the taking of such an inquest was allowed to be compatible with a plea of clergy.⁶ If the inquest thinks the accused guilty he is delivered to the bishop as guilty, if it thinks him not guilty he is delivered to him as not guilty. If he is delivered as not guilty his lands and goods, if they have

¹ P. and M. i 424; but a man arrested in a liberty with stolen property on him must be sent to the king's prison, though claimed by the ordinary, apparently because a franchise court cannot allow such a claim, the Eyre of Kent (S.S.) i 148.

² P. and M. i 424-425, citing Bracton f. 123b.

³ Ibid.

⁴ P. and M. i 429, citing Bracton ff. 401, 401b, 407, 411.

⁵ Ibid 425.

⁶ The Eyre of Kent (S.S.) i 119 *per* Beresford, C.J.; at this period a man could not plead not guilty, take his trial, and then, if convicted, plead his clergy, below 298.

been seized, will be at once restored; and if he is delivered as guilty, they will be retained till the result of the trial in the ecclesiastical court is known.¹

(ii) We know little of the manner in which the church dealt with its criminals. But "we have reason to believe that before the end of the thirteenth century its procedure in criminal cases was already becoming little better than a farce."² It never adopted the new inquisitorial procedure of the canon law,³ but continued to employ the old fashioned compurgation.⁴ So inadequate a method was this to secure convictions that the royal courts sometimes adopted the device of handing over a clerk *absque purgatione*—that is, they ordered that the clerk should not be allowed to clear himself by compurgation.⁵ "In these cases if the ordinary admitted him to his purgation, he was fineable for it as a great misdemeanour, and the party delivered by such purgation shall be again committed to prison."⁶ In 1350 the Archbishop of Canterbury had promised the king that he would make an ordinance for the safe keeping and due punishment of clerks delivered to the ordinaries "so that no clerk shall take courage to offend for default of correction;"⁷ and there is no doubt that the ecclesiastical courts could sentence to imprisonment for life or to corporal punishment short of death if the clerk failed to clear himself.⁸ But it is quite clear that in the ecclesiastical, as in other courts,⁹ such a failure was rare, and so the clerks went unpunished.¹⁰

(iii) The only persons who could claim the privilege were ordained clerks, monks, and nuns.¹¹ At this period the claimant must prove that he was an ordained clerk by the production of the bishops letters of ordination. The mere claim of the ordinary without this proof was not sufficient.¹² Because the privilege was really the privilege of the ordained clerk no woman (other than a nun) could claim it;¹³ and for the same reason it was possible for the church by its legislation to exclude persons from the

¹ P. and M. i 425; see the Eyre of Kent (S.S.) i 107, 141, 154.

² P. and M. i 426.

³ For this see vol. v 170-176.

⁴ For this see vol. i 305-308.

⁵ An instance of a delivery *absque purgatione* will be found in Y.B. 12 Rich. II. 40; it is said in the Eyre of Kent (S.S.) i 83 lxxv that a convicted clerk who was a monk was never admitted to purge himself; for other cases where a clerk was delivered *absque purgatione* see Hale, P.C. ii 384-385.

⁶ Ibid 329.

⁷ 25 Edward III. st. 3 c. 4.

⁸ P. and M. i 427-428.

⁹ Vol. i 306.

¹⁰ P. and M. i 427-428.

¹¹ Ibid 428; as to the nun see ibid n. 2.

¹² The Eyre of Kent (S.S.) i 149—"The Justices must ask the ordinary who claims him where he was ordained, and if he have letters of orders; notwithstanding that the ordinary claims him as a clerk;" it would seem too that the person claiming on behalf of the ordinary must produce authority not only to claim the accused but also to receive him, ibid 123.

¹³ Stephen, H.C.L. i 46r.

privilege. Thus at the Council of Lyons the "bigamus," that is the man who has married a second wife, or who has married a widow, was excluded from the privilege;¹ and this rule was received in England and given statutory force in 1276.²

(iv) Before the end of the thirteenth century the process of excluding certain offences from the benefit of clergy had begun. Henry II. had excluded offences against the forest law;³ and, after considerable opposition⁴ on the part of the clergy, minor offences—transgressiones—were excluded by the beginning of Edward I.'s reign.⁵ As it is from these transgressiones that the misdemeanours of our modern law originate, it followed that the benefit of clergy never applied to misdemeanours. It was coming to be thought that the treasons which directly concerned the king were also excluded.⁶ But we have seen that in the thirteenth century the offences included within the scope of treason were not accurately defined;⁷ and so it was not till Edward III.'s reign that the rule excluding treason was finally settled.⁸

(2) *The fourteenth and fifteenth centuries.*

During these centuries three tendencies are apparent. Firstly, the privilege was extended to persons who were not ordained; secondly, the control of the royal courts both over the conditions under which, and of the procedure by which it was claimed, was enlarged; and thirdly, additional offences were excluded from it.

(i) By the statute *pro clero* of 1350⁹ the privilege was extended to secular as well as religious clerks, i.e. to persons such as door-keepers, readers or exorcists, who merely assisted the clergy in the services of the church.¹⁰ It seems to have been in consequence of this statute that the privilege was later extended to all who could read. But this extension is connected with the greater control assumed by the royal courts over the conditions under which the privilege could be claimed.

(ii) We have seen that all through this period the royal courts kept a very strict control over the ecclesiastical courts.¹¹ This led them to assume control over the question whether the person

¹ P. and M. i 428.

² 4 Edward I. st. 3 c. 5; see Y.B. 30, 31 Ed. I. (R.S.) 530; the Eyre of Kent (S.S.) i 140-141.

³ P. and M. i 429.

⁴ For the controversy over this question see *ibid* 430 n. 1.

⁵ Hale, P.C. ii 325, citing a case of 7, 8 Ed. I.

⁶ P. and M. i 429; probably a distinction was taken between those treasons which were immediately against the king's person and others, see Hale, P.C. ii 326 n. (p).

⁷ Above 290; vol. ii 360.

⁸ Hale, P.C. ii 326-327 cites a case of 17 Ed. II. in which, as he says, "a kind of allowance is made of clergy in high treason;" below 299.

⁹ 25 Edward III. st. 3 c. 4.

¹⁰ Stephen, H.C.L. i 461.

¹¹ Vol. ii 304-305.

claiming the privilege was entitled to it or not. This control was an usurpation, for, as Hale says, this was originally a matter for the ordinary;¹ and it could hardly have been exercised by the royal courts till the privilege had become, not a privilege of the clergy, but of all persons, not otherwise disqualified, who could read. It is clear that both the extension of the privilege to all who could read and the control of the royal courts was complete by the end of the fifteenth century. "If," says Hale,² "the ordinary had challenged one as a clerk that the court judged not to be such, the ordinary or bishop should be fined, and his temporalities seised,³ and the felon shall be hanged. Again, if the ordinary refuse one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read sufficiently, the prisoner shall be saved, notwithstanding the refusal and the return of the ordinary."⁴ These propositions are supported by abundant authority from this period; and they show that the ordinary is already taking the place of "the minister or at most the assistant to the court, and not the judge."⁵

Similarly, the control of the royal courts was tightened by a change in the procedure by which the privilege was claimed. At the beginning of the fourteenth century the courts refused to allow an accused person to plead to the indictment, and afterwards, if convicted, to plead his clergy. When a person put himself on his country "saving his clergy," Bereford, C.J., said, "What do you suppose is the good of such a putting yourself upon the country as that amounts to? Suppose the jury convicts you; what will have been the use of trying you at all if you can then set up the plea of clergy?"⁶ But in 1388 a person who had pleaded not guilty to an appeal of felony was allowed his clergy after conviction;⁷ and in the reign of Henry VI. this course was sanctioned by Prisot, C.J.⁸ in the case of prisoners indicted, and was usually pursued. The prisoner, instead of pleading his clergy on his arraignment, pleaded not guilty and was tried; and then, if he was convicted, he pleaded his clergy. This course was said to be better for the prisoner as he thereby got a chance of being acquitted by the royal courts.⁹ It was also to the advantage of the crown as, on conviction, the crown got the goods of the person convicted; and it was settled at the beginning of the fifteenth

¹ P.C. ii 380.

² Ibid 381.

³ As early as 1313-1314 the whole lay fee of an ordinary who had claimed as a clerk one who was really a layman was seised into the king's hand, the Eyre of Kent (S.S.) i 86.

⁴ Note that in the Eyre of Kent (S.S.) i 154, before the king's courts had assumed this control, a clerk who was not claimed by the ordinary was hung.

⁵ Hale, P.C. ii 381.

⁶ The Eyre of Kent (S.S.) i 119; see also *ibid* 112, 115, lxxv-lxxvii.

⁷ Y.B. 12 Rich. II. 40.

⁸ Hale, P.C. ii 378.

⁹ *Ibid*.

century that the goods should not be restored upon the clerk's subsequently making his purgation.¹ Obviously this change in practice increased the hold of the royal courts over these criminous clerks.

(iii) It seems to have been settled before the close of the fourteenth century that "insidiatores viarum" and "depopulatores agrorum" could not claim the benefit of clergy.² It was said also that those charged with the wilful burning of houses were also excluded; but there seems to be no clear proof of this.³ In one case reported in the Eyre of Kent of 1313-1314 a clerk, who had been delivered to the ordinary as guilty, and who had escaped from the bishop's prison, was hung—"for he that breaks the law cannot have the advantage of the law."⁴ But this does not seem to have become a recognized case in which the privilege was taken away.⁵ In the case of sacrilege clergy was allowed, unless the ordinary refused to claim the accused.⁶ In Edward III.'s reign it was settled that those charged with high treason as defined by Edward III.'s statute could not claim clergy.⁷ Thus the privilege still extended to petty treason and to nearly all the felonies. It is not till the following period that the list of felonies excluded from it is enlarged.

The later history.

It was inevitable that benefit of clergy should be affected by the changes in the relations of church and state which came in the sixteenth century. Even before these changes the process of modification had begun. A statute of Henry VII.'s reign had attempted to restrict its scope by drawing a distinction between those who were actually in orders and those who were not. In the case of the former no change was made; but the latter, on conviction, were to be branded, and disabled from claiming the privilege a second time.⁸ In Henry VIII.'s reign much more radical changes were made. Statutes of 1513,⁹ and 1531-1532¹⁰ took away the privilege in a large number of cases from persons who were not actually in orders; and the ordinary was given power to degrade those actually in orders, and to hand them over

¹ Hale, P.C. ii 384.

² Ibid 333.

³ Ibid 333, 346.

⁴ The Eyre of Kent (S.S.) i 86.

⁵ It is not mentioned by Hale, P.C. ii 332-333; and at p. 385 he points out that it is enacted by 23 Henry VIII. c. 11 that this offence was made felony without benefit of clergy for those not in orders, and that those in orders were to be imprisoned *absque purgatione*.

⁶ Hale, P.C. ii 333. (See *Addenda p. xlvii*) ⁷ Ibid 332; see also *ibid* 327-328.

⁸ 4 Henry VII. c. 14.

⁹ 4 Henry VIII. c. 2.

¹⁰ 23 Henry VIII. cc. 1 and 11; the former statute excluded from clergy petty treason, murder, robbery of holy places, robbery in dwelling houses and putting the owner in fear, robbery on or near the highway, burning of dwelling houses or barns where grain is stored; the latter statute deals with breaking the prison of the ordinary.

to be hanged like laymen.¹ By later statutes the privilege was taken away in certain cases from all persons whether in orders or not.² If this course of legislation had been pursued benefit of clergy would probably soon have disappeared; and the reform in the law advocated in Italy by Fra Paolo Sarpi in 1613 would have been anticipated in England by nearly a century.³ But the reaction against the severity of Henry VIII.'s statutes, which produced the abolition of many of the new treasons and felonies created in his reign, produced also the partial restoration of the benefit of clergy,⁴ and set in motion the process which made it a complicated set of rules which exempted certain persons from the punishment incurred by the commission of certain felonies.

The history of these changes I shall summarize shortly under the following heads: firstly, the persons who could claim the privilege; secondly, the consequences of successfully claiming the privilege; and, thirdly, the growth of the non-clergyable felonies.

(i) The class of persons who could claim the privilege was extended, and distinctions were drawn between them. In 1547⁵ "bigami," and in 1692⁶ women were allowed to claim it. In 1705⁷ the necessity for reading was abolished. The distinction drawn in 1489 between those actually in orders and those not⁸ was preserved; and in 1547⁹ a peer was for a first offence given the privilege of a clerk actually in orders.

(ii) We have seen that the Act of 1489 had enacted that every person not actually in orders who was convicted of a clergyable felony should be branded;¹⁰ and in 1576¹¹ the court was given power to imprison such persons for any term not exceeding one year. In 1717¹² it was enacted that such persons, if convicted of clergyable larcenies, were to be transported for seven years instead of being branded. It followed that those actually in orders and peers for a first offence escaped all punishment, and that in the case of all others their punishment was mitigated in the manner prescribed by the Acts just mentioned.

¹ 23 Henry VIII. c. 1 § 4; 23 Henry VIII. c. 11 § 3; see 25 Henry VIII. c. 3 for an amending Act to prevent certain evasions of these two Acts by standing mute, challenging over twenty, or by escaping to another country.

² 27 Henry VIII. c. 17; 28 Henry VIII. c. 1; 32 Henry VIII. c. 3.

³ For an account of his work on the Immunity of the Clergy see Alexander Robertson, *Fra Paolo Sarpi* 226-228; below 307 n. 9.

⁴ 1 Edward VI. c. 12 § 9; but it was soon found necessary again to deprive certain offences of the benefit of clergy, see 2, 3 Edward VI. c. 33; 5, 6 Edward VI. cc. 9 and 10.

⁵ 1 Edward VI. c. 12 § 15.

⁶ 4 William and Mary c. 9; 21 James I. c. 6 had allowed women the privilege in the case of the larceny of goods under 10s. in value.

⁷ 5 Anne c. 6.

⁸ 1 Edward VI. c. 12 § 13.

⁹ 18 Elizabeth c. 7.

¹⁰ Above 299.

¹¹ Above 299.

¹² 4 George I. c. 11; 6 George I. c. 23.

Till 1576 the person who successfully pleaded his clergy was handed over to the ecclesiastical court to make his purgation. It is true that he might have been handed over *absque purgatione*; but Hale cites no instances of such a proceeding later than 1487.¹ During the sixteenth century it was realized that the process of making purgation was a mere farce which turned "the solemn trial of truth by oath into a ceremonious and formal lie."² For this reason the ceremony of delivering to the ordinary and purgation was abolished in 1576;³ and, as we have seen, the court was given power to order that those not actually in orders should, on conviction, be imprisoned for a year.

(iii) During the sixteenth and seventeenth centuries a large number of felonies were excluded from benefit of clergy. The series begins in 1496,⁴ when a statute was passed which deprived laymen of clergy if they committed petty treason. By successive statutes passed during the sixteenth and seventeenth centuries the following offences were deprived of the benefit of clergy—petty treason, murder in churches or highways, and later all murders, certain kinds of robbery and arson (except in the case of clerks in orders), piracy, burglary and house-breaking if any one was in the house and put in fear, horse-stealing, rape, abduction with intent to marry, stealing clothes off the racks, or stealing the king's stores.⁵ And the list was largely increased during the eighteenth century. Blackstone in 1769 says that at that date no less than 160 offences had been declared to be felonies without benefit of clergy.⁶

It was to a large extent due to the manner in which these statutes dealt with the benefit of clergy that the law relating to it came to be so complex. It is clear from Hale's Pleas of the Crown that in his day, though certain general rules could be stated, it was not possible to give a complete account of this branch of the law without a careful study of the statute law applicable to each particular felony.⁷ The main reason has been clearly pointed out by Stephen. He says:⁸ "A trial might end either by the accused person standing mute and being pressed to death, or by his challenging too many jurors and being hanged,

¹ P.C. ii 328, citing Y.B. 3 Hy. VII. Mich. pl. 5, where it was said that those who had confessed, abjured the realm, been outlawed, or had become approvers, were to be handed over *absque purgatione*.

² "The perjuries indeed were sundry: one in the witnesses and compurgators; another in the jury, compounded of clerks and laymen. And of the third, the Judge himself was not clear, all turning the solemn trial of truth by oath into a ceremonious and formal lye," Searle v. Williams (1620) Hob. at p. 291.

³ 18 Elizabeth c. 7.

⁴ 12 Henry VII. c. 7.

⁵ Stephen, H.C.L. i 464-466; for some illustrations see 8 Elizabeth c. 4; 18 Elizabeth c. 7; 39 Elizabeth cc. 9 and 15; 1 James I. c. 8.

⁶ Comm. (2nd ed.) iv 18, cited Stephen, H.C.L. i 470.

⁷ P.C. ii 323-390, cc. xlv-liv.

⁸ H.C.L. i 466.

or by his pleading guilty, or by his being convicted and pardoned, or by his being convicted and attainted. If a statute taking away clergy did not expressly mention all these possible cases, and take away clergy in all of them, both from the principal and from his accessories both before and after, clergy remained in every omitted case. Hence questions arose on the special wording of every statute, as to whether it ousted an offender of clergy not only if he was convicted, but if he pleaded guilty, if he stood mute, etc., and similarly as to his accessories."¹ Some simplification was made by a statute of 1691,² which in effect provided that an exclusion from the benefit of clergy should extend to a conviction upon any of these grounds; and by a statute of 1702³ which made a similar rule in the case of accessories. But though the law had been considerably simplified it was still very technical. In particular it appears from Blackstone that the question whether a statute took away clergy from the accessory as well as from the principal turned upon the somewhat fine distinction between words which took it away from the offence and words which took it away from the person committing the offence.⁴

Blackstone's habit of praising somewhat indiscriminately all the laws and institutions of England is perhaps most strikingly illustrated by his panegyric on the benefit of clergy as it existed in his day. "The wisdom of the English legislature," he says,⁵ "has, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients, and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law with respect to capital punishment." It never seems to have occurred to Blackstone that a penal system which needed such a corrective was obviously defective, or that the correction thus administered was to the last degree absurd and capricious. It was not till 1827 that these obvious facts induced the legislature to abolish the benefit of clergy.⁶

¹ A good illustration of the difficulties thus caused will be found in the discussion in Foster, *Crown Law* 332-336, of the question whether 25 Henry VIII. c. 3 was revived wholly, as Coke maintained (*Powtler's Case* (1611) 11 Co. Rep. 29), or only partially, by 5, 6 Edward VI. c. 10.

² 3 William and Mary c. 9 § 2.

³ Comm. iv. 366-367.

⁴ 1 Anne st. 2 c. 9.

⁵ Ibid 364.

⁶ 7, 8 George IV. c. 28; Stephen tells us, *H.C.L.* i 462, that when this Act was passed the clause of the Act of 1547 which gave a special privilege to peers (above 300) was overlooked; and that on the occasion of Lord Cardigan's trial in 1841 it was a question whether, if convicted, he might not claim his clergy; the case of peers was specially dealt with by 4, 5 Victoria c. 22 which repealed this clause of Edward VI's Act.

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*Sanctuary and Abjuration*¹

This institution was a striking feature of the criminal law of the Middle Ages. The form which it had assumed during the period which stretches from the thirteenth to the first half of the sixteenth century, can be described shortly as follows: A person who has committed a crime can flee for refuge to consecrated soil. The coroner must then be summoned, to whom the criminal must confess his guilt. Then, on taking an oath to abjure the kingdom, he will be allowed to proceed in safety to a port assigned to him. He must reach this port, and he must embark from it within a certain number of days, unless prevented by causes beyond his control.² This institution has obviously two quite distinct and almost contradictory roots—the principle that certain places are sanctuaries which will protect from human punishment those who take refuge there, and the rule that the person so taking refuge there must, as punishment for his crime, abjure the kingdom.³

The principle that certain places are sanctuaries which will protect from human punishment is, as M. Reville has said, not a product of Christianity, but a legacy from antiquity. "But the Church made of it a universal institution; the converted barbarians accepted it along with their new faith; . . . and so at the beginning of the mediæval period it had become part of the public law of the kingdoms which had been founded on the ruins of the Roman Empire."⁴ It appears in the Anglo-Saxon laws;⁵ and, having been taken over by the Conqueror, it appears in those collections of Anglo-Norman laws which purported to state the laws of Edward the Confessor⁶ and William I.⁷ But, as was the case on the Continent,⁸ none of these laws promised complete immunity to the criminal. They merely saved him from capital punishment. How then was he to be punished? As regular prisons did not exist, the only alternative was exile and forfeiture of property. It was probably this fact that connected the institution of abjuration with that of sanctuary.⁹

It is possible that the origin of abjuration is to be sought in the institution of outlawry.¹⁰ Outlawry was the penalty for various

¹ The best account of this institution is to be found in a paper on *Abjuratio Regni* by Andre Reville, *Revue Historique* vol. 50 1-42 (1892).

² See P. and M. ii 588-589.

³ Reville 4, 5.

⁴ Op. cit. 10-11.

⁵ Laws of Ine c. 5; Laws of Alfred c. 5; Laws of Athelstan IV. 4; Laws of Ethelred VII. 5.

⁶ "Quicumque reus vel noxius ad ecclesiam pro presidio confugerit, ex quo atrium ingressus fuerit securus sit, et a nemine insequente ullo modo apprehendatur, nisi per pontificem loci illius, vel ministros ejus," c. v.

⁷ "Cujuscumque criminis reus, si ad ecclesiam confugerit, pacem habeat vitæ et membrorum," c. l.

⁸ Reville 12.

⁹ Ibid.

¹⁰ Ibid 5-8.

offences in the Anglo-Saxon laws. It involved forfeiture of goods, and necessitated removal from the state, the protection of which had been withdrawn; and in the laws of Ethelred and Canute the outlaw and the banished man are spoken of as if they were identical.¹ But there is one obvious distinction between them. A decree of outlawry is generally pronounced against a person who will not appear. On the other hand, a man who has been arrested can be banished—can be forced, that is, to abjure the realm. And such a man, if he is forced to abjure the realm, can be made to take an oath that he will depart and will not return. Such abjuration was known as a definite punishment in the twelfth and thirteenth centuries.² Two well-known persons punished in this way by Edward I were Piers Gaveston and Thomas de Weyland.³ But, at the end of the thirteenth century, it seems to have dropped out of use as a definite punishment, and was not revived as such till the practice of transporting criminals to the colonies began in 1597.⁴ It survived only as an appendage to the right of sanctuary, for it supplied exactly the punishment which was needed for those who had escaped the capital penalty by reaching a place of refuge.⁵

The books of Bracton,⁶ Britton,⁷ and Fleta,⁸ show that by the end of the thirteenth century the institution was well established; and, as thus established, it had passed over to France—perhaps from England.⁹ It is not surprising therefore to find that some legal learning was beginning to accumulate round it.

It seems to have been the rule that only consecrated ground could afford a sanctuary;¹⁰ but apparently other places might get the privilege by papal bull or royal charter.¹¹ Naturally the problem of the man in the sanctuary who refused to abjure soon presented itself. Bracton denied that he could be forcibly removed, but asserted that, after the lapse of forty days, he could be starved into surrender;¹² and his view prevailed,¹³ except in the

¹ *Institutiones Ethelredi* I. 1 (Thorpe ii 511); *Cnuti Institutio Legum Secularium* c. 13 (Thorpe ii 531).

² Thus as Reville points out, *op. cit.* 9, the assizes of Clarendon and Northampton provided this penalty for those accused of murder, theft or arson who were found guilty by ordeal, and even for those found not guilty if they were suspect.

³ Reville 10, citing Rymer, *Fœdera* (Rec. Com.) I. pt. i 209-210, and R.P. i 283b.

⁴ *Ibid.* 41-42—"Or au debut, on les expédiait, non dans un colonie pénitentiaire ni en un lieu speciale, mais seulement au delà des mers, à charge de vivre où ils pourraient et comme ils l'entendraient. Sous cette forme première, n'était ce pas une reminiscence plutôt, qu'une innovation? C'était l'antique abjuration, moins le serment, mais avec les mêmes sanctions."

⁵ "Elle offrait le triple avantage de satisfaire l'Eglise, vu qu'elle respectait la personne des condamnés, d'enrichir le roi, qui s'attribuait leurs dépouilles, et de prévenir les recidives par l'expulsion des coupables," *ibid.* 12.

⁶ ff. 135b-136a.

⁷ Vol. i 61.

⁸ I. c. 29.

⁹ Reville 13, 14.

¹⁰ *Ibid.* 15.

¹¹ *Ibid.*; and *cp.* Brooke, *Ab. Corone* pl. 181.

¹² f. 136a.

¹³ Staunford, P.C. 118b, 119.

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case of the northern sanctuaries, such as that of St. John of Beverley, where the criminal, on taking the oath to the lord of the liberty, could remain all his life.¹ If the criminal took the oath of abjuration he must not diverge from the route which was assigned to him. If he did, he was liable to be arrested and executed out of hand; and the same results followed if he returned to England without the royal licence.² No doubt many, either because they could not find means of transport, or because they were willing to take the risk, disappeared on their journey, and swelled the ranks of roving brigands with which the country was infested.³ Probably it was only a small proportion of these who were caught; but if they were caught they were always hung.⁴ The effects of abjuration were exactly the same as those of a condemnation to death except that the criminal's life was spared. His goods were forfeited, his lands escheated, and his wife was treated as a widow.⁵

Certain persons were not allowed to take sanctuary—those who had been condemned whether or not sentence had been passed, those taken with the stolen property on them,⁶ and clerks.⁷ The last named must, as the church had successfully insisted in the thirteenth century, be handed over to the ecclesiastical courts.⁷ Certain offences also, such as felonies committed in churches,⁸ prevented the offender from taking sanctuary. But, with this exception, the extent of the privilege was considerably wider than the extent of the privilege conferred by the benefit of clergy. It perhaps extended to treason;⁹ and it was made use of by those who were guilty of minor offences,¹⁰ and even by debtors who wished to evade payment of their debts. Several petitions were presented to Parliament against this abuse of sanctuary by fraudulent debtors;¹¹ and in 1379¹²

¹ Reid, *The King's Council in the North* 13-14.

² Renville 17, 18; but if he had been compelled to leave the road through no fault of his own he was sent on his way again, *ibid* 27, citing Fitzherbert, *Ab. Corone* pl. 14.

³ Renville 23, 26; *cp.* *The Eyre of Kent* (S.S.) i lxxiii.

⁴ Fitzherbert, *Ab. Corone* pl. 14 (P. 21 Hy. VI.); pl. 65 (7 Hy. VII.); pl. 72 (8 Hy. IV.).

⁵ Renville 18, 19.

⁶ Bracton f. 136a; Brooke, *Ab. Corone* pl. 110.

⁷ Renville 20; *Articuli Cleri*, 9 Edward II. st. 1 c. 15.

⁸ Staunford, P.C. 117a; Coke, *Third Instit.* 115.

⁹ This is denied by Staunford, P.C. 116a; but see Y.B. 1 Hy. VII. 23-24; R.H.S. Tr. 3rd Ser. xi 113; it was necessary to provide by 26 Henry VIII. c. 13 § 2 that it should not apply to treasons created by that Act.

¹⁰ This is reasonably clear from R.P. iii 37, below 306 n. 1; but it is denied by Brooke, *Ab. Corone* pl. 181, who says that it was confined to cases where the criminal was in jeopardy of his life; considering the serious consequences of abjuration it was probably mainly used in these cases.

¹¹ R.P. ii 369 (50 Ed. III. no. 51); iii 37 (2 Rich. II. no. 28).

¹² 2 Richard II. st. 2 c. 3.

it was enacted that if a debtor thus seeking to evade his creditors had been summoned to the door of the sanctuary once a week for five weeks, judgment should be given against him, and that his creditors should have execution against his property.

In 1378 an unsuccessful attempt was made to restrict it to crimes capitally punished;¹ and, during the fifteenth century, it was several times attacked,² and the abuses arising from it in particular cases pointed out.³ But in the face of the opposition of the clergy nothing could be effected. It was not till the sixteenth century that any serious changes were made; and, as we shall now see, these changes prolonged its life for nearly a century.

The existing law was enforced in 1529,⁴ with the addition that the abjuring criminal should, for purposes of identification, be marked in the hand with the letter A. In the following year came a great change.⁵ Banishment was beginning to lose some of its terrors; and the legislature discovered that these criminals who thus voluntarily banished themselves were often "expert mariners" or "very able and apt for the wars and defence of this realm." It was therefore enacted that persons who had abjured should go to such sanctuary as they should choose and remain there for life, on pain of death if they left it. It was further provided that sanctuary men who again committed felony should lose all privilege of sanctuary. In 1535-1536 further provision was made for the discipline of these sanctuary men while in sanctuary.⁶ Finally, in 1540,⁷ the places which should be regarded as sanctuaries were defined by the Act; and, where the boundaries of existing sanctuaries were ill-defined, a commission was appointed to ascertain them. Only twenty inmates were to be allowed in each privileged place. They were to be mustered daily; and, if they failed without excuse to appear for three days in succession, they lost their privilege. The same result followed if, while in sanctuary, they committed felony. No privilege of sanctuary was to be allowed for those guilty of murder, rape, burglary, robbery, arson, or sacrilege.

Henry VIII.'s legislation as to the privilege of sanctuary did not suffer the same fate as his legislation as to the benefit

¹ The petitioners stated that the judges had said that the church ought to have no immunity for debts or trespass, but for crime only; and that the doctors of the civil and canon law had said "*que en cas de dette, d'acompte, ne pur trespass fait, si homme n'y doit perdre vie ou membre, nully doit en Sainte Eglise avoir Immunité*," R.P. iii 37 (2 Rich. II. no. 28).

² R.P. iii 503-504 (4 Hy. IV. no. 70); R.P. iv, 291 (3 Hy. VI. no. 39).

³ R.P. v 247-248 (31, 32 Hy. VI. no. 45); R.P. vi 110 (14 Ed. IV. no. 6).

⁴ 21 Henry VIII. c. 2.

⁵ 23 Henry VIII. c. 14.

⁶ 27 Henry VIII. c. 19.

⁷ 32 Henry VIII. c. 12.

of clergy.¹ It is true that Edward VI.'s legislation restored the privilege of sanctuary, as it restored the benefit of clergy, in the case of certain crimes which had been excluded from it by Henry VIII.'s legislation.² But the other restrictions imposed by that legislation remained; and in at least one case a statute which took away the benefit of clergy also took away the privilege of sanctuary.³ But the modified system of sanctuary introduced by Henry VIII.'s legislation did not work well.⁴ It was repealed in 1603⁵ and so the common law was restored. But this restoration was hardly tolerable in the seventeenth century. Public opinion in all countries, Roman Catholic and Protestant alike, was turning against it. Innocent VIII. had, as early as 1487, declared that it should not be available for fraudulent debtors;⁶ Francis I. had abolished it in France in 1539;⁷ the papacy in 1591 withdrew it from assassins, heretics, traitors, brigands, and those who stole in churches or on the highways;⁸ and in 1613 Fra Paolo Sarpi advocated a series of restrictions very similar to those effected by Henry VIII.'s legislation.⁹ This changed state of public opinion made it possible to effect that abolition of the whole institution which had been vainly urged in the fifteenth century; and so it was abolished in 1623-1624.¹⁰

The result of this statute was that sanctuary with its pendant abjuration ceased to exist as a legal institution. But we shall see that certain so called sanctuaries existed till the eighteenth century, which gave practical immunity to fraudulent debtors and even to criminals.¹¹ They existed in spite of statutes passed to suppress them; and did not wholly disappear till the arm of the law was strengthened by the establishment of an efficient police system.

§ 4. PRINCIPAL AND ACCESSORY

The common law knows four kinds of parties to the commission of felonies. There is the principal in the first degree, i.e. the man who actually commits the felony; the accessory at the fact, or the principal in the second degree, i.e. the man who is present at the commission of the felony aiding and abetting; the

¹ Above 300.

² 1 Edward VI. c. 12 § 9.

³ 2, 3 Edward VI. c. 33.

⁴ "To say the truth, Abjuration was exceedingly intricate and perplexed by the said Act of 22 H. 8 c. 14 and other statutes," Coke, Third Instit. 115.

⁵ 1 James I. c. 25 § 7.

⁶ Reville 33.

⁷ Ibid 34.

⁸ Ibid 40.

⁹ He wrote a book on "Sanctuaries for Offenders" in 1613, which Grotius called a great book, in which he advocated a reduction of the number of sanctuaries, and that they should be placed under the control of the state, Alexander Robertson, Life of Sarpi, 226-228.

¹⁰ 21 James I. c. 28 § 7.

¹¹ Vol. vi 408, and n. 4.

accessory before the fact, i.e. the man who counsels, procures, or commands the felony; and the accessory after the fact, i.e. the man who "receives and comforts" the felon, thus aiding him to escape from justice.¹

This classification of the parties to a crime is only important in the case of felony. The rule was very early laid down that in the case of treason² and trespass³ (which, as we have seen, became the misdemeanour of later law) all concerned were principals. No doubt in the case of treason the reason for this rule was primarily the desire to suppress the greatest crime known to the law; and a technical reason could be found for it in the fact that the essence of the most important head of treason lay, not in the act of killing, but in the intention to kill the king. The trespasses had, as we have seen, their civil as well as their criminal side; and, seeing that all concerned in a trespass were equally liable to pay damages if sued by the injured party in a civil action, it was only logical to make them all equally liable to punishment if prosecuted by the crown.

The common law had at the end of this period reached the conclusion that no distinction could be drawn between principals and accessories at the fact. Both were principals in the first and second degree respectively.⁴ In the case of accessories before and after the fact the law started from two leading principles. The first was that the accessory cannot be tried until the principal has been convicted.⁵ No doubt the stringency of this rule was, as Maitland has pointed out, due to the fact that the older methods of trial were appeals to the judgment of God; and, "what could we think of the God who suffered the principal to come clean from the ordeal after the accessory had blistered his hand?"⁶ The second principle was that accessories, whether before or after the fact, deserved the same punishment as the principals.⁷

The cases in the Year Books are concerned for the most part in (1) elaborating the distinctions between principals and

¹ Kenny, Criminal Law chap. vi.

² Y.B. 19 Hy. VI. Mich. pl. 103.

³ Y.B. 30, 31 Ed. I. (R.S.) 106-108; cp. Y.B. 20, 21 Ed. I. (R.S.) 392. Nor could there be any accessories before the fact in the case of manslaughter, "for manslaughter ought to ensue upon a sudden debate or affray," *Bibith's Case* (1597) 4 Co. Rep. 44a.

⁴ Below 309.

⁵ Y.B. 33-35 Ed. I. (R.S.) 54; in Y.B. 30, 31 Ed. I. (R.S.) 506 a decision to the contrary is noted as having been rather "ad appuyamentum regis," than "ad legem manutenendum;" Y.B. 19 Ed. III. (R.S.) 176 the rule is stated as well settled.

⁶ P. and M. ii 508; cp. vol. i 302-311.

⁷ This principle is as old as the Assize of Clarendon (1166), see P. and M. ii 508. Is it possible that we see here a faint trace of the old principle of the liability of the family as a group (see vol. ii 36; and cp. Brissaud ii 1370, 1371)? The extension of the activities of the state makes for individual responsibility; but reminiscences of the old principle might well lead to this result where several were concerned in the commission of a crime.

accessories, and (2) in working out the consequences of the rule that you cannot try the accessory unless the principal has been convicted.

(1) A distinction was drawn between those who were present aiding, or prepared to aid, in the commission of a felony, and those who were merely bystanders and simply remained passive. The first were principals in the second degree; the second, though they were finable for not raising the hue and cry, were not guilty of felony as principals or accessories.¹ The distinction between principals in the second degree and accessories before the fact was not at first clearly drawn. Bracton regarded the former as accessories;² and his view seems to have been acted on at least once in Edward III.'s reign.³ But there are earlier cases which lay down the modern rule;⁴ and it was clearly established in Henry VII.'s reign.⁵ Its practical importance lay in the fact that if a man was principal in the second degree he could be tried whether or not the principal in the first degree had been convicted. The question what assistance would render a man accessory after the fact was discussed in several cases. It was settled that the assistance must be of such a kind as to aid the man to escape from justice by illicit means. Mere advice or petitions for release were innocent,⁶ and so was the mere receipt of stolen property, as that did not amount to help given to the prisoner himself.⁷ Some difficult questions arose in the case where the unlawful assistance had been given in a county different from that in which the crime had been committed, because knowledge of the crime could not be presumed in the accessory, and because he could not be tried by a jury of either county.⁸

(2) The varieties of the modes of trial; the intricacies of procedure; the possibility that a person, though convicted, might escape by pleading his clergy, or by getting a pardon; the difference between a pardon after a verdict of *se defendendo* or misadventure, and a pardon which was not so much a matter of course—all made the application of the rule that you cannot try the accessory unless the principal has been convicted exceedingly complicated.⁹ Indeed, the technicality and complexity of the rules upon this subject will bear comparison even with the rules

¹ Fitz., Ab. *Corone* pl. 395 (8 Ed. II.).

² In his day these principals in the second degree were appealed, not *de facto*, but *de vi et forcia*—you must convict the chief culprit before you try them, P. and M. ii 508 n. 1; Plowden at pp. 99-100 gives a clear account of the history of the development of the law on this matter.

³ Fitz., Ab. *Corone* pl. 90 (40 Ed. III.).

⁴ Ibid pl. 314 and 350 (3 Ed. III.); and cp. pl. 86 (11 Hy. IV.).

⁵ Y.B. 4 Hy. VII. Mich. pl. 10 = Fitz., Ab. *Corone* pl. 60; Hale, P.C. i 437.

⁶ 26 Ass. pl. 47.

⁷ Staunford, P.C. i c. 46.

⁸ 27 Ass. pl. 69.

⁹ See ibid cc. 49 and 50.

of procedure which governed the working of the real actions. Though some of the points debated in the Year Books were settled in the later law, the complexity of the rules tended to increase in consequence of the provisions of the numerous statutes which created new felonies, and of the mode in which those statutes were interpreted by the judges.¹ It would be both tedious and useless to enter into a detailed account of them. No doubt, as Stephen says, they helped to mitigate the harshness of a code which meted out to accessories the same severe punishments as it meted out to principals. For, "The result of them was that if the principal died, stood mute, challenged peremptorily more than the proper number of jurors, was pardoned, or had his clergy, the accessory altogether escaped."² It was not till Anne's reign that these rules were in any way changed.³ Even then the accessory could not be tried "till the guilt of the principal had been legally ascertained by conviction or outlawry, unless both were tried together."⁴ In 1826 it was enacted that accessories before the fact should be able to be indicted of a substantive felony independently of the principal;⁵ and in 1847 a similar provision was made in the case of accessories after the fact.⁶ Accessories after the fact had always had the benefit of clergy.⁷ When this was abolished, in 1827,⁸ statutory provision was made for the punishment of the felonies to which this privilege had been attached;⁹ and in 1862 special provision was made for the punishment of all accessories after the fact.¹⁰

§ 5. OFFENCES AGAINST THE PERSON

In this section I shall deal firstly with the common law felony of homicide and the statutory felony of rape, and secondly with offences against the person under the degree of felony. The few additional statutory felonies created during this period have already been mentioned,¹¹ and do not call for further comment.

Homicide.

At the present day we can divide homicides into two great classes—those which are innocent and those which are felonious. Under the first class fall justifiable homicides, e.g. those committed

¹ Stephen, H.C.L. ii 234, 235.

² Ibid 232; see Syer's Case (1590) 4 Co. Rep. 43b; Bibithe's Case (1597) *ibid*.

³ 1 Anne st. 2 c. 9.

⁴ Foster, Crown Law 360, cited Stephen, H.C.L. ii 235; cp. Lord Sanchar's Case (1613) 9 Co. Rep. at f. 120b.

⁵ 7 George iv c. 64 § 9.

⁶ 11, 12 Victoria c. 46 § 2.

⁷ Stephen, H.C.L. ii 237.

⁸ 7, 8 George iv c. 28 § 6.

⁹ Ibid § 8.

¹⁰ 24, 25 Victoria c. 95 § 4; 24, 25 Victoria c. 100 § 67.

¹¹ Vol. ii 451.

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in the execution or the advancement of justice, or in defence of life,¹ and excusable homicide, e.g. killing in the course of a sudden combat (*chance-medley*) when there is no other means of escape, or killing by misadventure in the course of a lawful act. Under the second class fall suicide, murder, and manslaughter.²

All through this period the law is only feeling its way tentatively towards this classification. It has but recently emerged from the stage in which any kind of homicide gives rise to a criminal appeal at the suit of the murdered man's kin³—a state of the law not far removed from that in which homicide gives rise sometimes to claims to *wer* and *bot*, and sometimes to *wite* or blood feud.⁴ As we have seen, all through this period appeals were known;⁵ and their prosecution often gave rise to some pretty legal problems as to who were entitled to bring them and the like.⁶ But they were gradually giving place to the royal procedure by way of indictment; and that procedure is founded on the modern notion that the repression of homicide is the affair of the state. Moreover, as we have seen, the royal lawyers were beginning to distinguish between the guilt of various forms of homicide by reference to the circumstances under which they were committed.⁷ No doubt Bracton's speculations, which he derived from Bernard of Pavia, were too fine-drawn to suit the common law of this period, or indeed any system of merely human law.⁸ No doubt, too, there were peculiar difficulties in England, where, although the procedure by way of indictment was superseding the procedure by way of appeal, yet the substantive law as to the offences for which men could be indicted retained many traits of its ancient origins in the atmosphere of deodand, *wer*, and blood feud. In spite of this we can see that throughout this period the work of discriminating between homicide and homicide goes on; and, at the end of it, we are not very far from the main outlines of the scheme of later law. But even then the outlines are very bare. The production of the finished picture will require many centuries of judicial labour, with occasional assistance from the legislature.

We start, then, with the broad rule that homicide is an offence, felonious or otherwise. Practically the only exceptions are the

¹ See *The Eyre of Kent* (S.S.) i 98-99.

² Kenny, *Criminal Law* chaps. viii and ix.

³ Vol. ii 197, 362; as we have seen, a person if appealed of homicide must swear that he had done nothing whereby the deceased was "further from life or nearer to death."

⁴ Vol. ii 43-46; P. and M. ii 474.

⁵ Vol. ii 362-364.

⁶ Y.B. i, 2 Ed. II. (S.S.) 42; Fitz., Ab. *Corone* pl. 41, 322, 385; vol. ii 362 n. 1.

⁷ Bracton f. 104b, "Item crimen homicidii, sive sit casuale vel voluntarium, licet eandem poenam non contineat, quia in uno casu rigor et in alio misericordia."

⁸ Vol. ii 258-259.

cases where it is committed in execution of the sentence of a competent court, in the arrest of felons when such arrest cannot be otherwise effected,¹ and by statute in the case of foresters or parkers who slew a trespasser whom they were attempting to arrest.² The narrowness of these exceptions is, as Maitland points out, illustrated by the fact that it was thought advisable in 1532 to pass an Act to make it clear that a person who killed another who had tried to rob him in his house or on or near the highway did not incur a forfeiture of his goods.³ Apart from these exceptions there is abundant authority for the proposition that all other homicide was an offence. The most striking illustration of this fact is the rule that the man who had committed it by misadventure or *se defendendo* (though not guilty of felony) needed a royal pardon.⁴ The Statute of Gloucester (1278) regulated the procedure to be followed in such cases.⁵ It enacted that a person accused of homicide "without felony" must remain in prison till the coming of the justices in eyre or of gaol delivery; that he must then plead to the indictment; and, "in case it be found by the country that he did it in his defence or by misfortune, then by the report of the justices to the king the king shall take him to his grace if it please him." Even then, however, the accused would forfeit his chattels if he had fled on account of his act, and later, whether he had fled or not.⁶ Moreover, the royal pardon, when obtained, did not shelter the accused from proceedings by way of appeal.⁷ In the old days of *wer* and *bot* the person who slew another, even though it was by misadventure or in self-defence, had been liable to pay the statutory sums to the deceased's kin. In the old days therefore he would not have escaped scot free if "appealed" of the death by the kin; and therefore he

¹ Bracton's Note Book case 1084; Northumberland Assize Rolls (Surt. Soc.) 94; Y.B. 30, 31 Ed. I. (R.S.) 512; Fitz., Ab. *Corone* pl. 179 *per* Thorpe; cp. also *ibid* 192, 194, 261, 288; Hale, P.C. i 489-492.

² 21 Edward I. st 2; P. and M. ii 477 n. 2.

³ 24 Henry VIII. c. 5; P. and M. ii 477 n. 5. Maitland says, citing North. Assize Rolls 85, that he does not think that a homicide in self-defence would have been justifiable, even though perpetrated in the endeavour to prevent a felony, and this is borne out by the Eyre of Kent (S.S.) i 131-132, 139, 150; but in Edward III.'s reign the point was discussed and it was decided that the accused did not require a pardon, but went quit, 26 Ass. pl. 23 and 32; cp. also Y.B. 21 Hy. VII. Mich. pl. 50; Henry VIII.'s statute was passed, as the preamble states, to clear up the doubt and make the law more precise, Cooper's Case (1640) Cro. Car. 544; Hale, P.C. i 487; Stephen, H.C.L. iii 39, 40.

⁴ For examples see P. and M. ii 478; Register ff. 309, 309b; Stephen, H.C.L. iii 37-39; cp. Select Pleas of the Crown (S.S.) pl. 114, 188; Fitz., Ab. *Corone* pl. 302 and 354—in the latter case there is a special direction that the man is not to be put in irons. As no felony was committed, no one could be indicted as accessory, Y.B. 15 Ed. III. (R.S.) 262.

⁵ 6 Edward I. c. 9.

⁶ P. and M. ii 479; Stephen, H.C.L. iii 76, 77.

⁷ Vol. ii 54, 363 n. 2; Y.B. 30, 31 Ed. I. (R.S.) 514; P. and M. ii 481.

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cannot escape scot free if indicted by the crown. The fact that the result of conviction upon an appeal or an indictment was no longer a money payment, but death or mutilation, made no difference to the liability; and the mercy of the king would suffice where it was clearly wrong that such liability should be enforced. When appeals went out of use, and the royal pardon became a matter of course, the need for getting it became a mere formality. The simpler course was adopted of allowing jurors to return verdicts of not guilty in such cases.¹

The rules as to what would amount to misadventure or self-defence were gradually evolved. In early days "there could be little law about this, for all depended upon the king's grace."² We can see from the Year Books of Edward IV.'s and Henry VII.'s reigns that a person could establish the defence of misadventure if he could show that, while engaged in a lawful act,³ he had accidentally killed another; and this, it was pointed out, was the great distinction between criminal and civil liability. A man is cutting his trees and by accident they fall on some one's head and kill him; or a man is shooting at the butts, and by accident his hand shakes and his arrow kills another;⁴ or one kills another in a tournament which is lawfully held because it is held by the king's command⁵—in these cases there is no felony, though there is liability to a civil action of trespass. With regard to the plea of self-defence it was laid down in Edward III.'s reign that the man must not use force unless he can escape in no other way. "At the gaol delivery at Newgate before Knivet and Lodel it was found by verdict that a chaplain killed a man *se defendendo*. And the Justices demanded to know how: and the jury said that the deceased pursued him with a stick and struck him; and the accused struck him again so that he died; and they said further that the accused could have fled from his assailant if he had wished. And the Justices adjudged him to be a felon, and said that he was bound to flee as far as he could to save his life."⁶ Such force might be used not only in the strict defence of one's own person, but also in the defence of one's master's person.⁷ We

¹ Stephen, H.C.L. iii 76, 77, citing Foster, Discourse of Homicide 288, 289; it should be noted, however, that Hale, P.C. i 471, said that the proper course was for the jury to find the facts specially in such cases, "et sic per infortunium or *se defendendo*," "because the court must judge upon the special matter whether it be per infortunium or *se defendendo*, and the jury is only to find the fact, and leave the judgment thereupon to the court."

² P. and M. ii 483.

³ Y.B. 11 Hy. VII. Pasch. pl. 14 *per* Fineux, C.J.

⁴ Y.B. 6 Ed. IV. Mich. pl. 18; *cp.* below 373-374.

⁵ Y.B. 11 Hy. VII. Pasch. pl. 14.

⁶ 43 Ass. pl. 31; Y.B. 2 Hy. IV. Mich. pl. 40; Fitz., Ab. *Corone* pl. 284, 286; *cp.* Bracton's Note Book case 1216; Select Pleas of the Crown (S.S.) pl. 70.

⁷ 26 Ass. pl. 23; Y.B. 21 Hy. VII. Mich. pl. 50. (*See Addenda p. xlvii*).

have seen that in Edward III.'s reign it would probably have been a good defence if the killing had been done to prevent the commission of such offences as robbery, arson, or burglary; and that certain cases of killing on such occasions were declared to be justifiable by a statute of Henry VIII.'s reign.¹

Homicide which was neither justifiable, nor by misadventure, nor *se defendendo* was felonious. But it was obvious that such felonious homicide might be of very various shades of moral guilt. It might be the result of carelessness, and that carelessness might be of very various degrees; or it might be deliberate and intentional—the result of “*malicia præcogitata*.”² This expression “malice aforethought” gradually came to be the expression used to describe the worst form of felonious homicide; and, from the latter part of the fourteenth century, homicide of this kind came to be known by the name of murder; while later, felonious homicide, which is not murder, came to be known as homicide by chance-medley, and, later still, as manslaughter.³

The history of the term “*murdrum*” is curious. Germanic peoples treat more severely, under the head of *morth*, certain forms of secret homicide. The word itself implies concealment, and both the word and the thing lived on under the name *murdrum*.⁴ As Maitland has pointed out, Glanvil treats *murdrum*, or secret homicide, differently from open and intentional killing.⁵ But by that time the legislation of William I. had given a new technical meaning to the term. As we have seen, the hundred must pay a murder fine whenever a dead body was found within its limits which could not be proved to be that of an Englishman, and the delinquent was not produced, or natural cause of death proved. Murder, therefore, came to mean that secret killing for which a murder fine was payable.⁶ When, in 1340,⁷ the murder fine was abolished, the term was released from its former technical meaning, and seems soon to have reverted to what was its earliest and perhaps had always been its popular meaning—the most serious form of homicide. But by that time the most serious form

¹ Above 312.

² The expression is used in Fitz., Ab. *Corona* pl. 284 (1330).

³ Staunford, whose book on the pleas of the crown was published in 1560, contrasts (i 10) “homicide par chance medley,” and “homicide par voy de murder;” Coke, writing a little later, uses the term “manslaughter” in its modern sense. It would appear from the Oxford English Dictionary that the word was already in use as a popular term; but that it was coming into use as a legal term during the latter half of the sixteenth century; Lambard, *Eirenarcha* ii vii (1581) is cited as saying, “Using manslaughter as a sort of Felonie that comprehendeth under it all manner of Felonious homicide whatsoever;” and it seems to have been used in this sense by the legislation as early as 1547, see 1 Edward VI. c. 15 § 6.

⁴ Stephen, H.C.L. iii 25-27; P. and M. ii 484.

⁵ P. and M. ii 484 n. 5, citing Glanvil xiv 3.

⁶ Vol. i 15.

⁷ 14 Edward III. st. 1 c. 4.

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of homicide was not concealed as opposed to open killing, but killing with malice aforethought. Murder then was applied to felonious killing; and more especially to killing with malice aforethought.¹ But the growing precision which was coming to be attached to misadventure and self-defence on the one side, and to malice aforethought on the other, caused it to be necessary to distinguish further between the various forms of felonious homicide. This necessity was recognized just after the close of this period by the statutes which excluded from the benefit of clergy killing by malice aforethought, but left other forms of felonious homicide still clergyable.² Thus we get the line drawn between murder and the manslaughter of later law. The further elaboration of this distinction does not here concern us. It has been the work of several succeeding centuries.³

It was recognized from an early period that to constitute homicide there must be a voluntary act directly causing the death. Thus a doctor, whose patient died within three days after he had begun to treat him, could not be said to be guilty of felonious homicide.⁴ Similarly it must be shown that the death was sufficiently connected with the act. At an early date the rule was laid down that if death ensued within a year and a day sufficient connection would be presumed.⁵ Perhaps this period was connected with the fact that it was the length of time within which the relatives of the murdered man were able to bring their appeal. An injury to a child not yet born is not murder;⁶ nor, in spite of a little authority to the contrary, is a frustrated attempt to murder.⁷ It is only by express statutory enactment that such an attempt has been made felony.⁸ It was settled during this period that the person who intentionally took his own life was guilty of felony, in spite of Bracton's doubts.⁹ Probably, as Maitland says, the practice of always exacting a forfeiture of goods in such cases determined the question. Such forfeiture was the usual accompaniment of felony. But the severity of the law was

¹ So quickly did the new meaning of the term become popular that in 1348, Y.B. 21 Ed. III. Hil. pl. 23, the judges stated that before the year 1267 a man who committed murder in self-defence or by misadventure was hanged, referring to the Statute of Marlborough, 1267 (52 Henry III. c. 25), which stated that killing by misadventure was not to be judged "murdrum;" cp. Hale, P.C. i 425; Stephen H.C.L. iii 42.

² 12 Henry VII. c. 7 (Petit Treason); 23 Henry VIII. c. 1 § 3, "wilful murder by malice prepensed."

³ See vol. viii 436-437.

⁴ Fitz., Ab. *Corone* pl. 163 (1330).

⁵ Ibid. pl. 303 (1330); Hale points out, P.C. i 426, that "the title of the lord by escheat to avoid mesne incumbrances relates to the stroke given, and not only to the death."

⁶ Ibid. pl. 263; 3 Ass. pl. 2; 22 Ass. pl. 94—either because he has not been baptized and has no name, or because he "nunquam fuit in rerum natura."

⁷ As to this see below 373.

⁸ 24, 25 Victoria c. 100 § 11.

⁹ Fitz., Ab. *Corone* pl. 301; P. and M. ii 486 n. 6 for the earlier law.

relaxed in the case of the man who was of unsound mind,¹ or the man who slew himself by misadventure.² In later law the freedom with which juries found "temporary insanity" has rendered the crime of very infrequent occurrence.³

Rape.

Rape from the earliest times was remedied by the appeal of the injured woman; and it may perhaps in early days have comprehended abduction as well as *violentus concubitus*.⁴ From the time of the Conquest onwards the two things tended to fall apart; and rape became the name for the more serious offence.⁵ If prosecuted by the woman by way of appeal it was a felony, and the penalty was loss of limb; but the appeal might be compromised, and sometimes was compromised, on the basis of a marriage.⁶ If the woman brought no appeal and the ravisher was indicted, the crime was not regarded as a felony, and could be expiated by fine and imprisonment.⁷ The Statute of Westminster I.⁸ lengthened the period within which the woman could bring her appeal to forty days, and increased the punishment if the guilty person was indicted. The Statute of Westminster II.⁹ made the offence in all cases a felony; and it was after this period that its essentials were clearly defined.¹⁰ The precision of that definition has caused the necessity in later law for the enactment of many statutes dealing with such offences as abduction and forcible marriage.

Mayhem.

Mayhem was an injury to the person that amounted to the deprivation of some member that was useful for the purposes of fighting.¹¹ Like rape, it could be prosecuted by an appeal of

¹ Fitz., *Ab. Corone* pl. 412 (1315), in this case the goods were confiscated; pl. 244 (1349) they were not.

² *Ibid.* pl. 304.

³ Kenny, *Criminal Law* 113, 114.

⁴ P. and M. ii 488, 489; for a curious precedent of such an appeal see *Novæ Narrationes* ff. 71, 72.

⁵ Bracton f. 148, "Item excipere potest et dicere quod non abstulit ei pucillagium suum;" Bracton, it would seem (f. 147), would have restricted it to violent intercourse with a virgin.

⁶ *Ibid.* 148, "Cum igitur mulier habeat electionem, et spreto iudicio petat ipsum in virum, conceditur ei ex gratia regis, ob favorem matrimonii;" P. and M. ii 489 n. 7; Y.B. 30, 31 Ed. I. (R.S.) 500; *The Eyre of Kent* (S.S.) i 134-135.

⁷ *Northumberland Assize Rolls* (Surt. Soc.) 92, 94, 329, cited P. and M. ii 490 n. 1.

⁸ 3 Edward I. st. 1 c. 13.

⁹ 13 Edward I. st. 1 c. 34; for the connection of this statute with that of 1275 see P. and M. ii 490 n. 2.

¹⁰ Hale, P.C. i 628.

¹¹ Bracton f. 145b; Fitz., *Ab. Corone* pl. 458 (citing H. 8 Ed. IV. 21).

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felony; but unlike rape it never became an indictable felony. The result was that it gradually dropped out of the list of felonies with the disuse of appeals.¹ We have seen that in such cases Britton recommended complainants to bring the action of trespass rather than the appeal.² Appeals were, however, sometimes brought in this period; and it was for the judges to decide, either by personal inspection³ or by medical evidence,⁴ whether the injury amounted to a mayhem. But as a rule proceedings for trespass were taken, with the result that "till late in the seventeenth century the most violent crimes against the person were treated as misdemeanours punishable with fine and imprisonment."⁵ Even in this period the laxity of the law occasioned one piece of special legislation against certain gross forms of injury.⁶

The number and variety of the precedents of writs of trespass in the Register show us how extensive was the use made of it. Insults, beating, wounding, ill-treatment such as to endanger life, and "*alia enormia*," are the common allegations.⁷ Another common complaint is of imprisonment till a ransom is paid,⁸ till an oath is given not to sue for the trespass,⁹ or till some claim is released.¹⁰ Less common complaints are of the abduction of a wife,¹¹ apprentice,¹² or monk;¹³ of a dogbite;¹⁴ of attempts to poison,¹⁵ waylay, or kill;¹⁶ ill-treatment by a gaoler of a prisoner;¹⁷ even a contempt of court.¹⁸ Moreover, there are many other precedents of causes of action founded partly upon wrongs to the person, partly upon wrongs to property—cattle have been driven off, tenants threatened, and the land cannot be cultivated.¹⁹

These writs of trespass are a striking testimony to the narrowness of the criminal law. They show us that the interposition of the council was needed to supply its defects, quite as much as the interposition of the Chancery was needed to supply the defects of the civil law. It is true that trespass had its

¹ Vol. ii 361.

² Ibid.

³ Fitz., Ab. *Corone* pl. 63, 74.

⁴ Ibid 209.

⁵ Stephen, H.C.L. iii 109.

⁶ Vol. ii 451; for the later statute law see Stephen, H.C.L. iii 112, 113; vol. iv 514; vol. vi 403-404.

⁷ See e.g. the Register f. 93, "*Quare vi et armis in ipsum A apud N insultum fecit, et ipsum verberavit, vulneravit, imprisonavit, et male tractavit, et alia enormia, etc.*;" App. Ib (5) (6) (7).

⁸ Ibid f. 93.

⁹ Ibid f. 95b.

¹⁰ Ibid f. 93.

¹¹ Ibid f. 97.

¹² Ibid f. 109.

¹³ Ibid f. 99.

¹⁴ Ibid f. 97.

¹⁵ Ibid f. 102.

¹⁶ Ibid f. 102.

¹⁷ Ibid ff. 100, 100b.

¹⁸ Ibid ff. 95, 95b, the marginal note runs, "*De quodam brevi de prohibitionem in luto projecto et pedibus conculcato*;" for the development of the law as to such contempta see below 391-394.

¹⁹ Ibid f. 94b.

criminal side. Trespassers could be prosecuted, if presented at the tourn or before the king's judges; and the trespasses which were so prosecuted became the common law misdemeanours of our later criminal law.¹ But as early as Edward II.'s reign the civil aspect of trespass was gaining ground;² and we have seen that in this period more reliance was placed upon the action of the injured individual than upon the presentment of a jury.³ The weakness of the executive, the decay of the old communal system of presentment in the tourn and leet, the ease with which juries were corrupted or terrorized, caused the criminal aspect of trespass to dwindle in importance, and prevented any important development in the law as to crimes under the degree of felony.⁴ A large gap was thus left in the criminal law which in later times will be filled by the creation of many statutory misdemeanours.⁵ Without the aid of the legislature it would have been impossible to win back to the field of criminal law the territory which, in this period, had been annexed by the law of tort. Even these statutory misdemeanours retain many traces of the days when crime and tort were not clearly separated. They recall the double nature—criminal and civil—of the old writs of trespass.⁶

We must now turn to the various wrongs to property recognized by the law. But before we can understand their nature, we must first deal with the principles of the law as to the possession and ownership of chattels; for it is in connection with this branch of the law of crime and tort that the earliest developments of these principles were made, and it is on these principles that this branch of the law depends.

§ 6. POSSESSION AND OWNERSHIP OF CHATTELS

The origins of our modern law as to the possession and ownership of chattels must be sought in the history of the personal actions, just as the origins of our modern law as to the possession and ownership of land must be sought in the history of the real actions. In the case both of chattels and land the development of the mediæval law on this subject has been

¹ The gradual way in which the term "misdemeanour" became the technical term for crimes under the degree of felony can be seen in the Oxford English Dictionary. It was clearly not used in this way till well on in the sixteenth century.

² "Although 'with force and arms' be contained in the writ, she does not expect to recover damages for that, but rather for the trespass done to her," *per* Brabazon, C.J., Y.B. 4 Ed. II. (S.S.) 29, cited H.L.R. xxix 389.

³ Vol. ii 453-454.

⁴ Below 389-390.

⁵ Vol. ii 365; below 390; vol. iv 512-521; vol. vi 402-404.

⁶ Professor Kenny, *Criminal Law*, at p. 99 says, "A prosecution for misdemeanour is hardly distinguishable from an action for tort in which the king is plaintiff, and which aims at punishment and not at damages."

shaped by these two sets of actions; and it is therefore dominated by the accidents of their evolution. And, just as in the case of land we can see at the end of the mediæval period a new action of trespass—the action of ejectment—which will replace the real actions and create our modern law as to the possession and ownership of land; so, in the case of chattels, we can see, also at the end of the mediæval period, the beginnings of another offshoot of trespass—the action of trover and conversion of our modern law—the development and working of which will make important additions to the law as to the possession and ownership of chattels. In this section I shall begin by tracing the development of the older personal actions which protected the possession or ownership of chattels, and the origins of the modern action of trover and conversion. I shall then say something of the mediæval theory of the possession and ownership of chattels which resulted from the development of these actions.

The Development of the Personal Actions

In the twelfth century the remedies of the dispossessed owner of a chattel were essentially similar to those which he had in Anglo-Saxon times.¹ No new royal remedies, such as had been invented to protect the seisin of the freeholder, had come to the aid of the possessor of a chattel. As in the Anglo-Saxon period, therefore, we must distinguish the case where the owner involuntarily lost possession from the case where he voluntarily parted with it. This distinction runs all through the law of this period, because it is the foundation of two very different sets of remedies; and our modern law, having been shaped by these remedies, still bears the marks of this distinction. I shall therefore deal (1) with the case of involuntary loss of possession; (2) with the case of voluntary parting with possession; and (3) with the origins of the modern action of trover and conversion. That action will, in the following period, to a great extent supersede the older actions, and to some extent blur the sharpness of the mediæval distinction between the involuntary loss of and the voluntary parting with possession.

(1) Involuntary loss of possession.

When Glanvil and even when Bracton wrote, theft and the remedies for its prevention were the starting-point of the law. The man who has been deprived of his goods should follow the trail. The thief, if captured “hand-having” or “back-bearing,” might

¹ Vol. ii 110-114.

be executed without being allowed to defend himself.¹ If such a summary measure was not possible, two courses were open to the man who had lost his goods. Either (i) he might bring the appeals of robbery² or larceny (called respectively by Bracton the *actio vi bonorum raptorum* and *actio furti*)³ against the person whom he had found in possession of his goods; or (ii) he might omit the charge of larceny and claim the goods as *res adiratae*, i.e. as his goods which have gone from his possession against his will.⁴

(i) If the owner brought his appeal the appellee might, as under the old practice, either prove that the thing was his by showing, e.g. that he had bought it, or that it had always been his; or he might vouch to warranty; or he might admit the appellor's title, give up the goods, and confine himself to proving that he came honestly by them.⁵ It is clear, therefore, that the appeal was a remedy available against any one who was in possession of the goods, whether he came by them honestly or not; and that the result of this proceeding might be to give the appellor the goods—not merely damages.⁶ In fact, as I have said, up to 1529⁷ this was the only proceeding known to the law which had this result. It is for this reason that Bracton's identification of the *actio furti* with the appeal of larceny was mistaken; for the *actio furti* was a purely penal action.⁸ It could be brought, not necessarily by the owner, but by the person who had an interest in the safety of the goods. Therefore it was open to bailees,⁹ and we shall see that the fact that it was thus identified with an action which was open to bailees may have had something to do with fixing the position of the bailee in later law.¹⁰

(ii) Bracton tells us the owner may omit the words of felony and charge the defendant with being in the possession of his *res adiratae*. A person who has elected this remedy may, if he likes, abandon it and proceed by appeal of larceny; but the converse

¹ Bracton ff. 137, 150b; Britton i 56; Sel. Pleas of the Crown (S.S.) pl. 173; Northumberland Assize Rolls (Surt. Soc.) 70; cp. Borough Customs (S.S.) i 72, 73; ii xxi, xxii.

² It is probably the appeal of robbery that is historically the most important, as it seems to have been more especially the precursor of trespass, see the authorities cited by Mr. Bordwell, H.L.R. xxix 507-508.

³ Bracton and Azo (S.S.) 182.

⁴ Bracton f. 150, "Cum autem sit qui sequatur possit ab initio agere civiliter vel criminaliter utrum voluerit: poterit enim rem suam petere ut adiratam per testimonium proborum virorum, et sic consequi rem suam quamvis furatam. Et si ille qui seistus fuerit in hoc ei non obtemperaverit, poterit accrescere et petere eam ut furatam (sed non e contrario) et dicere quod ille qui tenet latro est;" Bracton's Note Book case 824 gives a good example of the procedure; cp. Britton i 55-56; see vol. ii 366 n. 8 for the derivation of the word "adirata."

⁵ P. and M. ii 161-163; Bracton f. 151.

⁶ See Eyre of Kent (S.S.) i 109, 142-143 for cases where goods were thus recovered.

⁷ 21 Henry VIII. c. 11; vol. ii 361.

⁸ Ibid iv 1. 13-17.

⁹ Institutes iv 6. 18.

¹⁰ Below 340-341.

course cannot be pursued, because, though you may go from the lower to the higher remedy, you cannot go from the higher to the lower. We can see from a case reported in Bracton's Note Book that the gist of such an action is the wrongful detention after a request by the owner for delivery.¹ The same thing clearly appears from the count in such an action which is contained in the *Novæ Narrationes*.² "W., who is here, showeth, etc., that whereas he had as his own a horse of such a colour and worth so much, on such a day and year and in such a place the horse was lost to him, and he went seeking him from one place to another, and caused him to be demanded in fair and market, and he of his horse could not be certified, nor could he hear, till on such a day he came and found his horse in the custody of W. of E., who is there, and in the custody of the same W. in the same vill, and he (the plaintiff) told him (the defendant) how that the horse had gone from him, and of this he brought sufficient proofs to prove the said horse to be his before the bailiffs and the people of the vill, and prayed him to deliver over the horse to him, and this he was not willing to do nor is he now willing to do, to the wrong and damages of the said W. 20s." Ames says that we have no instance of such an action being brought in the royal courts.³ Doubtless the small value of most of the things so sought to be recovered would cause the majority of such actions to be brought in the local courts. But a note in the Year Book of 21, 22 Edward I.⁴ would seem to show that some information about the action was considered to be useful to the practitioners in the royal courts. "Note," it is said, "that where a thing belonging to a man is lost, he may count that he (the finder) tortiously detains it, etc., and tortiously for this, that whereas he lost the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law by his own hand the twelfth, that he lost the thing."

It is clear that this action, just like the appeal of larceny, lay against any one who detained the goods, and that the result of the action was to give the plaintiff the goods which he claimed as

¹ Case 824, "Editha de Wackfordia . . . dixit quod Wilelmus Nutach . . . injuste detinuit ei tres porcos qui ei fuerunt addirati, et inde produxit sectam quod porci sui fuerunt et ei porcellati et postea addirati;" William denies the charge; thereon Edith goes out and takes counsel, and having returned, counts against William as a thief; see Y.B. 17 Ed. III. (R.S.) 214 for what is possibly another instance of this procedure; Liber Mem. de Bernewelle 88, 89 gives an account of a similar proceeding in 1274, in which an inquest was taken as to the title.

² ff. 65b, 66.

³ Essays A.A.L.H. iii 439. (See *Addenda* p. xivii).

⁴ At pp. 466-468.

his own, or their value.¹ We should note, however, that the plaintiff does not necessarily recover the thing. He may be obliged to content himself with its value. Bracton expressly says that in actions to recover a movable the defendant is bound to restore alternatively the thing or its price; and that if the plaintiff names no value the action fails.² It is no doubt true that the circumstances under which the appeal or the action for *res adirata* was brought, in practice ensured the return of the chattels in specie; but even if his words do not apply to the appeal of larceny, there seems no reason why they should not apply to this action for *res adirata* as well as to the action of detinue.³ However that may be, Bracton's words show that when he wrote there was no real action for movables; and therefore, as Maitland has pointed out, we see one of the roots of our modern distinction between realty and personalty.⁴ We also see the origin of that which in later times came to be known as a "sale by operation of law."⁵

Such, then, were the old remedies for an involuntary loss of possession. It was inevitable that they should decay and finally change their shape with the development of the common law. The history of this process I shall consider under the following heads: (i) The appeals of robbery and larceny and the action of trespass; (ii) The action for *res adirata* and the action of detinue; and (iii) Legal doctrines resulting from the development of these actions.

(i) The appeal was, as I have said, a criminal prosecution. As the idea grew up that to constitute a crime there must be some sort of a *mens rea* on the part of the accused, it came to look unjust to accuse a man of theft merely because he happened to be in possession of goods to which another had a better right.⁶ Moreover, as we have seen,⁷ the technical difficulties in the way

¹ Ames, *Essays A.A.L.H.* iii 437-438; Ames thinks that a plaintiff could only formally demand his *res adirata* in the court, and that on refusal he could bring the appeal; in other words, that the proceeding to recover a *res adirata* was in the nature of a formal request, not of a contested action; but the precedent from Y.B. 20, 21 Ed. I. looks as if it was a regular action.

² f. 102b, "Si quis rem mobilem vindicaverit ex quacunque causa ablatam vel commodatam, debet in actione sua definire precium et sic proponere actionem suam . . . alioquin non valebit rei mobilis vindicatio, precio non appposito;" cp. Y.B.B. 14, 15 Ed. III. (R.S.) 30; 1 Hy. V. Hil. pl. 4; and for the rule in modern law see *Peters v. Heyward* (1624) Cro. Jac. 682; *Donald v. Suckling* (1866) L.R. 1 Q.B. at p. 601.

³ The complaint might be, "Conqueror quod talis mihi injuste detinet vel robbavit talem rem tanti precii," f. 102b; but cp. P. and M. ii 173 n. 1.

⁴ P. and M. ii 173.

⁵ See ex pte. *Drake* (1877) 5 C.D. at p. 871, *Fessel, M.R.*, said, "The theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the court gives him the next best thing, that is, the value of the goods."

⁶ Vol. ii 259, 359, 452; below 373-374.

⁷ Vol. ii 198, 256-257.

of an appeal caused it to be a risky remedy. Though the appellor, if successful, might get the goods, many things might happen to prevent this result. If there had been no fresh pursuit; if the thief had not been captured by the appellor or one of his company; if the goods were not found in the possession of the thief; if for any reason, e.g. the suicide of the thief or his abjuration, he was not convicted as a result of the appeal—in all these cases the appeal failed, and the king got the goods in the event of the thief being subsequently convicted of felony as the result of an indictment.¹ Consequently the place of the appeal was taken by the semi-criminal action of trespass *de bonis asportatis*. Britton,² as we have seen, recommended this action to be brought rather than an appeal. But we should note that this action differed from the appeal both in its scope and in its consequences.³ It differed in its scope because the action could be brought, not against any one in possession of the goods, but only against the actual person who had taken them out of the possession of the plaintiff.⁴ It differed in its consequences because the plaintiff if successful got, not the thing taken, but only damages.⁵ Although, therefore, trespass was a convenient action compared with the appeal, if we look at the speediness and efficiency of its process, it was very much inferior to the appeal in the variety of persons who might be attacked by it, and in the completeness of the remedy which might be thereby obtained. In 1489 Hussey and Fairfax agreed that, "appeal is for recovery of one's goods and affirms property continually in the party, but it is otherwise of trespass, for that is not for recovery of his goods but for damages for the goods. And I have learnt that if one take my goods and another take the goods from him I shall have appeal against the second felon; but it is otherwise of trespass."⁶ It was thus

¹ The special difficulties in the way of the appeal of larceny are summed up and illustrated from the Y.B.B. by Ames in H.L.R. xi 279-281; and cp. Hale, P.C. i 539-540; for some of the illustrations there cited see Fitz., Ab. *Corone* pl. 162, 318, 319, 379, 392; in *The Eyre of Kent* (S.S.) i 84. Mutford, J., thus states the law: "All stolen goods are forfeit to the king, except the thief be shortly afterwards convicted;" and the judges were angry when a royal bailiff gave up stolen cows to the owner, on what they considered to be inadequate proof of ownership, *ibid* 109.

² i 123.

³ P. and M. ii 165-167.

⁴ Y.B.B. 2 Ed. IV. Pasch. pl. 9, "Si le cas soit que jeo baille biens a un F a garder a mon oep, et F eux done a un G, jeo voille bien que jeo n'avera trespass versus G, car il avait loial possession de eux per reason del bailment, et per son don le property est vesté en le donee," *per* Choke; 13 Ed. IV. Trin. pl. 7; 4 Hy. VII. Pasch. pl. 1, *per* Hussey and Fairfax; so too if A takes B's goods, and C takes the same goods from A, B cannot sue C in trespass, Y.B. 21 Ed. IV. Hil. pl. 6 (p. 74).

⁵ See Y.B. 19 Ed. III. (R.S.) 124 for the measure of damages recoverable in this action as compared with the action of detinue *per* Moubray; substantially the modern rule seems to be laid down, see *Balme v. Hutton* (1833) 9 Bing. at p. 477.

⁶ Y.B. 4 Hy. VII. Pasch. pl. 1 (p. 5); the translation is from Pollock and Wright, *Possession* 156, where other authorities pointing out the differences between the appeal and trespass will be found; see also H.L.R. xxix 387.

a personal action for damages against a wrongdoer which took the place of an action which, though essentially criminal in its nature, possessed in the range of persons who might be attacked, and sometimes in the character of the remedy which might be obtained, two of the marks of a real action.

(ii) The action for *res adiratae* probably fell out of use with the disuse of the appeal. What took its place? This is a difficult question to answer. The received view is that the owner who had involuntarily lost possession of his property had, after the decay of the older actions, no action save the action of trespass, which, as we have seen, lay only against the actual taker; and that it was not till the invention of the actions of detinue and trespass sur trover that he got any available action against a person who was in possession of his goods, but who was not an actual trespasser. The action of detinue, it is thought, lay originally only against a bailee, i.e. it was available only to an owner who had voluntarily parted with the possession of his goods to another.¹ Some words of Littleton in 1455, describing a count in trover as a "new found haliday," are taken to mean that the action of detinue was practically confined before that date to actions against bailees.²

It is, however, difficult to believe that the rights of owners of goods were so curtailed during the fourteenth century. No doubt the action of detinue was an action which was used chiefly against bailees; and some dicta perhaps would seem to imply that the action lay only against a bailee. But such dicta, if spoken in course of an action of detinue sur bailment, would not negative a possibility of bringing such an action against some one other than a bailee.³ We want a precise statement to the effect that

¹ Holmes, Common Law 169, "We find it laid down in the Year Books that, if I deliver goods to a bailee to keep for me, and he sells or gives them to a stranger, the property is vested in the stranger by the gift, and I cannot maintain trespass against him; but that I have a good remedy against the bailee by writ of detinue for his failure to return the goods. These cases have been understood, and it would seem on the whole rightly, not merely to deny trespass to the bailor, but any action whatever;" P. and M. ii 174, "Despite the generality of the writ (of detinue), the bailor of a chattel can never bring this action against any one save his bailee, or those who represent his bailee by testate or intestate succession."

² Y.B. 33 Hy. VI. Trin. pl. 12 (p. 27), "*Littleton dit secrettement que cest declaracion per inventionem est un new found haliday: car l'ancien declaracioun et entree ad ete tout temps en tiel cas coment les chartres [the things in dispute in the case] ad manus et possessionem defendantis devenerunt generalment, et ne monstra coment: mes s'il fuit sur un bailment perenter le pleintif et defendant auter sera.*"

³ See Y.B. 16 Ed. II. f. 490—Detinue against B, alleging a bailment to D, and that after D's death the thing came to B's hands. The action failed; but the ground of failure was, not that there could be no action of detinue except against a bailee, but that, the plaintiff having brought detinue sur bailment, the defendant must be made privy to the bailee; see especially *Aldesburgh's* argument where he says, "Jeo pose que vous eussiez counte que a tort nous detenons l'escript, et pur ceo a tort que l'escript devynt en nostre main, votre counte ne vaudra rien *donque quant vous*

the action lies against a bailee and no one else. To borrow the precise language of the pleaders, we must have, not only an averment that an action of detinue lies only against a bailee, but also an averment that it lies only against a bailee "sans ceo que" it lies against any one else. It is just this averment which it is difficult to find.¹ There are in fact some cases which would seem to show that the action of detinue was sometimes allowed to do part of the work of the old action for *res adirata*, and that the owner who had involuntarily parted with the possession of his goods might sometimes sue one who was not the actual taker.

The gist of the old action for *res adirata* was the fact that the plaintiff had lost his goods, that they had come into the hands of the defendant, and that the defendant on request refused to give them up. Just as in the action of detinue, it is the wrongful detention which is the gist of the action.² This is brought out in the precedent from the Novæ Narrationes, the Year Book of Edward I., and the case from Bracton's Note Book which I have referred to above.³ It is not therefore inconceivable that this old action should have been superseded by a form of detinue, just as the appeal was superseded by trespass. Besides the case from the Year Book of Edward II.'s reign which I have cited above,⁴ the following cases would seem to show that a form of detinue was recognized which enabled a man, whose property had gone from him involuntarily, to recover it from the persons

commencez vostre counte du baille fait a certain persone, et puis . . . vous ne persuez mye sur le baille come fesaunt nous prive a celui a qui vous baillastes eins nous faises tout estrange a cel bayl." Thus the possibility of suing on a devenerunt ad manus—"devynt en nostra main"—which Littleton said was the old manner of pleading—is clearly recognized at this early date.

¹ It is true that in Y.B. 6 Hy. VII. Mich. pl. 4 (p. 9) *Brian*, arguing as to the nullity of a gift of goods by one out of possession, says, "Cesty de que les biens sont pris ne poit avoir accion de detinue . . . car en Detinue on doit mettre que le defendant vient a eux loyalment;" but he admits that he can "s'il voile porter accion de Detinue et count sur trover ou bailment pur ce que ce n'est traversable;" and cp. Y.B. 12 Ed. IV. Mich. pl. 2 the same judge says, "Si jeo baille biens a un home a garder icy en queconque mains les biens deviendra il est chargeable a moy . . . mes si cestui a qui les biens sont bailles baille les biens a un autre cest seconde baile n'est chargeable forsque durant le possession, etc., car s'il baille ouster il est discharge;" so Y.B. 43 Ed. III. Mich. pl. 11 (p. 29) *Belknap's* words clearly refer to a case where there has been a bailment—he is not thinking of a case where there has been none. The fact that for some time when there had been a bailment the bailor could only sue the bailee in detinue sur bailment (below 348-349) is consistent with the fact that there may have been another form of detinue open to a person whose goods had left his possession involuntarily. The only direct statement I have seen that no action lies at common law against a person to whose hands goods had come, "because he was not party nor privy to the delivery," comes from a plaintiff's bill in Chancery (1413-1417), *Select Cases in Chancery* (S.S.) 113-114; but we cannot always trust the statements in these ex parte allegations.

² Y.B. 20, 21 Ed. I. (R.S.) 192; cp. Y.B. 9 Hy. V. Mich. pl. 22 *per* Cottesmore; and 32 Hy. VI. Mich. pl. 20; below 327 n. 2.

³ Above 321.

⁴ Above 324 n. 3.

into whose hands it had come. In 1313, in an action of detinue of charters, *Toudeby*, arguing for the defendant, objected that the plaintiff had not shown that he had bailed the charter to him, or that he (the defendant) received it by bailment from any of the plaintiff's ancestors. To this *Scrope*, the plaintiff's counsel, replied, "If you disseise me and carry off my charters and I bring my writ and demand these same charters, it is then no answer to my writ to say that I did not bail you any charter. Likewise if you should find my charters you would answer for the detinue."¹ In 1329² it was stated that the owner of a charter might recover against one who had "found it in the way and defaced it," and it was ruled that a person who had defaced it while in his possession might be sued in trespass—though apparently he had not taken it from the plaintiff's possession. In 1343 detinue for a horse was brought against executors personally. *Grene* afterwards said, "In whatever way it (the horse) came into your possession, whether as executors, or because you took it out of the possession of some one else, or because you found it, if you detain it I shall have an action; whereupon, inasmuch as you do not answer as to the detinue, which is the principal matter of the action, judgment." The other side were driven to traverse the fact that the horse had come into their possession and the detention.³ In 1344 there was another case in which the ground of the action was not a bailment but a devenerunt ad manus.⁴ In 1371 detinue was brought for an ass.⁵ The plaintiff counted that the ass strayed into the seignory of the defendant, who took the animal as an estray, that he had tendered a reasonable sum, and that the defendant had refused to deliver up the ass. Issue was taken on the sufficiency of the tender. No one seemed to suppose that detinue did not lie in such a case; and this is just such a case as would in older time have supported an action for *res adirata*⁶—the man had lost his property and it had come to the defendant's hands. In 1410 *Thirning* and *Hill* agreed that detinue lay against a stranger who found another's property and declined to restore it.⁷

¹ Y.B. 6 Ed. II. (S.S.) 167.

² Y.B. 2 Ed. III. Hil. pl. 5 *Aldeburgh* argued, "Vous poiez avoir votre *Pracipe quod reddat* (i.e. detinue) vers celui a qui vous baillastez votre chartre, et il ouster vers nous et issint votre recoverie vers nous per auter voy;" *Scrope* says, "Si vous ussez trove la chartre en le voy, jeo avera mon recoverie vers vous per le *Pracipe quod reddat*;" no one seems to deny this.

³ Y.B. 17, 18 Ed. III. (R.S.) 514, 516.

⁴ Y.B. 18 Ed. III. (R.S.) 214 seqq.

⁵ Y.B. 44 Ed. III. Pasch. pl. 30.

⁶ H.L.R. x 379; The Court Baron (S.S.) 144.

⁷ Y.B. 11 Hy. IV. Hil. pl. 20 (p. 46), "Queconque que soit en possession de mon escript ou per bailler, ou que il trovast en le chemin j'avera accion vers luy pur le possession et le deteiner . . . quod *Hill* concessit;" in Y.B. 9 Hy. V. Mich. pl. 22 *Cottesmore* says much the same thing; cp. also Fitz., Ab. *Briefs* pl. 644—a case of Mich. 13 Rich. II.

These cases show that *detinue sur trover* was known early in the fourteenth century. In fact, the "finding" was merely a common mode in which the property, which the owner had lost, got into the hands of the defendant.¹ The action (whether brought on a bailment, a *devenerunt ad manus*, or a finding) was not based upon the mode in which the defendant had acquired the possession, but upon the fact that he detained another person's property which had got into his hands, by finding or in some other manner. The plaintiff must of course show how the property got into the defendant's hands—by bailment, by finding, or as executor.² If he proved the necessary facts he recovered in *detinue* even though he had parted with the goods involuntarily. In Henry VI.'s reign this count in *detinue*—*sur trover*, on the finding, became common form. To allege a finding was an easy and a usual way of showing how goods had come to the defendant's hands.³ Littleton's words probably only refer to this improvement in pleading. Coke, at any rate, seems to have attached this meaning to them.⁴ They certainly do not imply that before that time *detinue* only lay *sur bailment*; for he admits in so many words that it lay on a "*devenerunt ad manus et possessionem defendentis*."⁵ The effect of his words was perhaps greater than the effect of most casual utterances by counsel. They seem to have given authority to the growing practice of using this count in *trover*. Henceforward the count in *trover* and the count in *bailment* are the two great types of the action of *detinue*.

Thus the older remedies for an involuntary loss of possession were practically superseded by various newer remedies. If the property was stolen the owner might still bring the appeal if he cared to risk this very doubtful remedy. It was still the only remedy by which he might recover the thing itself from third persons. Otherwise the thief must be indicted, and if he were convicted the owner lost all chance of restitution or of compensation until Henry VIII.'s statute.⁶ If the property

¹ Cp. Y.B.B. 7 Hy. VI. Pasch. pl. 3; 9 Hy. VI. Hil. pl. 4.

² Brooke, Ab. *Detinue de Biens* pl. 50 (3 Hy. IV.)—*detinue sur bailment*; Y.B. 35 Hy. VI. Mich. pl. 33 (p. 27) *per* Wangford—*trover* is merely one way of pleading an action of *detinue* based on a *devenerunt ad manus*. cp. L.Q.R. xxi 46, where Sir John Salmond clearly points this out. Ames has pointed out that while in the old action for *res adirate* the plaintiff alleges that he is the finder (above 321), in *detinue sur trover* he alleges that the defendant found the things, *Essays*, A.A.L.H. iii 440; but in view of the fact that it was not the finding, but the detention that was the gist of the action, this difference would not seem to be very material.

³ See e.g. Y.B. 12 Ed. IV. Mich. pl. 2.

⁴ *Isaack v. Clarke* (1513) 2 Bulstr. at p. 312, "And a man may count either upon a *devenerunt ad manus* generally, or specially *per inventionem*, and one may at this day declare upon a *devenerunt ad manus*, but the latter (*per inventionem*) is the better . . . This is the most certain and better count."

⁵ Above 324 n 2.

⁶ Vol. ii 361.

was taken from the owner without felonious intent he could bring trespass against the taker. As against third persons into whose hands the property had come he could bring detinue either on a "devenerunt ad manus" or in trover. But by bringing these personal actions he could only get damages. The owner of goods has a real right; but it can only be enforced in a personal action for damages. He can get no specific restitution at common law.

(iii) Legal doctrines resulting from the development of these actions.

I have already called attention to one of the consequences resulting from the fact that the law gave no real action for the recovery of chattels, but only these personal actions of trespass and detinue—the consequence that it has helped the formation of the modern distinction between real and personal property.¹ Another consequence, which has coloured the whole future history of the law as to the ownership and possession of chattels, has resulted from the fact that these personal actions were delictual in character. Their delictual character has closely bound up this branch of the law with the law of tort, because it is through these personal actions in tort that it has been developed.² Besides these two general consequences which flowed from the development of these actions, other consequences of a more technical kind have resulted from the overlapping of these various remedies—criminal, semi-criminal, and civil—in which we can see the origins of important rules of English law.

We have seen that it might well happen that, on the same facts, an appeal, an indictment, and an action of trespass might be open to the aggrieved party. Sometimes also a plaintiff might consider that an action of detinue on a devenerunt ad manus or a finding would be better suited to the facts of his case.³ Naturally a good deal of law of a somewhat technical kind arose from this overlapping of remedies old and new. It was the sort of subject with which the mediæval common

¹ Above 322.

² Maitland, *Forms of Action* 369—"I think we are obliged to say that the mere possessing of a movable thing by one who is not entitled to possess it is a tort done to the true owner. It would surely have been far more convenient if we could have said that the owner's action is *in rem*, that he relies merely on the right of ownership, and does not complain that the possessor, who came by the thing quite honestly, has all along been doing him a wrong. The foundation for all this was abolished by the Common Law Procedure Act of 1854 which enabled a judge to order execution to issue for the return of a chattel detained without giving the defendant the option of paying the value assessed. . . . But I think we must still say that an action whereby an owner claims his chattel is an action founded on tort."

³ Thus in *Y.B. 33 Hy. VI. Trin. pl. 12* (pp. 26-27) Prisot, C.J., and Littleton differed on the question whether trespass or detinue should be brought against a finder; cf. Ames, *Essays*, A.A.L.H. iii 439.

lawyers were very familiar; for the various real actions provided a parallel case of a hierarchy of actions of varying dates which were open, sometimes alternatively, and sometimes in succession, to a person claiming to be entitled to land.¹ In the case of these criminal or quasi-criminal remedies the order of superiority was chronological. The appeal was the oldest remedy. Therefore it was, as we have seen,² given priority to the indictment; and when this priority was taken away, it was provided that, in the case of an appeal of murder, an acquittal on an indictment should be no bar to an appeal.³ On the other hand, trespass was a more recent remedy than an indictment; and therefore the indictment took precedence of it. It would seem too that trespass, perhaps because of its semi-criminal character, was given precedence to the action of detinue.⁴

It was the precedence of the indictment to the action of trespass that was the most rigidly insisted on, because a conviction for felony on an indictment was most advantageous to the king. Unless the king had granted to some lord the right to the chattels of felons within his manor or other area, he was the person entitled to these chattels.⁵ This was the direct result of the assumption by the crown in the twelfth century of jurisdiction over all felonies. The process was nearly complete when Glanvil was writing;⁶ and the claims of the crown were tacitly admitted by those who drafted Magna Carta.⁷ It has been very truly said that, in the Middle Ages, the royal prerogative often appears to be simply some advantage over the subject which the law gives to the king when their rights conflict.⁸ The manner in which the king asserted his claims to the goods of felons is one of the most striking instances of the truth of this saying. Some very good illustrations of this fact are afforded by the Pleas of the crown

¹ The lawyers then and later often appealed to this analogy, see e.g. *Hudson v. Lee* (1589) 4 Co. Rep. 43a.

² Vol. ii 362; it was said by counsel in 1346 that "an action of appeal" was of an "higher nature" than an action of trespass, Y.B. 20 Ed. III. (R.S.) i 432; Y.B. 12 Rich. II. 147 *per* Rickhill, *arg.*

³ Vol. ii 362; 3 Henry VII. c. 1.

⁴ In Y.B. 1, 2 Ed. II. (S.S.) 170 there is a case in which an action of detinue is adjourned because the defendant alleges that she is bringing the semi-criminal action of trespass.

⁵ P. and M. ii 164.

⁶ Glanvil vii 17; he expressly contrasts land with chattels from this point of view—"sin autem de alio quam rege tenuerit is qui utlagatus est vel de felonia convictus, tunc quoque omnes res sue mobiles regis erunt. Terra quoque per unum annum remanebit in manu domini regis, elapso autem anno, terra eadem ad rectum dominum . . . vertetur;" but the process was not quite complete, for, "Præterea si de furto fuerit aliquis condemnatus res ejus mobiles et omnia catalla sua vicecomiti provincie remanere solent."

⁷ McKechnie, *Magna Carta* (2nd ed.) 339-340.

⁸ Hallam, *Middle Ages* (ed. 1860) iii 148; below 460.

heard in the Eyre of Kent in 1313-1314.¹ As we have seen, it was only if the owner made fresh pursuit, captured the thief with the goods in his possession, and convicted him as the result of the appeal, that the owner saved his goods from forfeiture.² So far did the claims of the crown go that, when in a quarrel about certain coins a man was killed, the king claimed the coins, and the judges took time to consider what judgment they should give.³ It would seem that the severity of the law as to theft-bote—the retaking of one's chattels from a thief in order to favour or maintain him—was due to this cause. The owner guilty of this offence was said at one time to have been punished capitally;⁴ and it is probable that we must look to these ideas for one of the roots of the modern rule that agreements which have the effect of stifling a prosecution are illegal. It is not till the beginning of the fifteenth century that we begin to hear of any mitigations of this rule in favour of goods found in the possession of a thief which were obviously not his property.⁵ Even when Staunford wrote the old strict law seems to have been still in force;⁶ and it was not till the seventeenth and eighteenth centuries that we hear of any substantial modifications of the crown's claims.⁷

In so far as these claims by the crown hastened the disuse of appeals, by inducing the judges to be astute to quash them, the greed of the crown had beneficial results. But it had other results which have been less beneficial. It has confused men's ideas on the subject of ownership and possession; and it is the source of two rules of our modern law of tort—the rule that if a tort amounts to a felony the injured person cannot sue for damages unless the tort-feasor has been prosecuted, and the rule that “in a civil court the death of a human being cannot be complained of as an injury.”⁸ Of these three consequences of

¹ The Eyre of Kent (S.S.) i 78-79, 82, 84, 89, 151-152; and for other illustrations see Fitz., Ab. *Corone* pl. 317-319, 334; in the case last cited goods bailed were forfeited.

² Above 323 and n. 1.

³ The Eyre of Kent (S.S.) i 95-96.

⁴ Winfield, *Present Law of Abuse of Legal Procedure* 117, 146-147.

⁵ Y.B. 12 Rich. II. 4, “and it was said if a man pledge certain goods to another, who commits felony and is attainted, etc., the king shall not have those goods, because the property in those goods is throughout in the pledgor.”

⁶ *Prærogative* 45b.

⁷ Thus Hale says, *Pleas of the Crown* i 251, that “at common law the king by attainder of treason was not entitled to any chattels that the party had *en autre droit*”; Hawkins, *P.C.* ii c. 49 § 9 says, “It seems agreed that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture;” he admits, however (§ 17) that stolen property waived is, as a rule, forfeited; he tries (§ 9 n. a) with very little success to impugn the correctness of Staunford's statements; it is probable that the process of modification began with terms of years limited to the felon's executors, see *Cranmer's Case* (1572) *Dyer* 309.

⁸ *Baker v. Bolton* (1808) 1 Camp. 493 *per* Lord Ellenborough, C.J.

the manner in which the crown insisted on the preference of the indictment to the action of trespass I must at this point say a few words.

(a) It is probable that the crown's claims to the goods of felons was one of the causes which led the lawyers to ascribe "property" to thieves. The thief has the possession of the stolen goods; and the terms "possession" and "property" were often used convertibly in the Year Books.¹ When it is said that the thief has property in the stolen goods, all that is meant to be asserted is the obvious fact that he has possession of them. But the king continued to take and keep the goods, though the distinction between property and possession was coming to be more clearly recognized.² Therefore it begins to be said that because the king can acquire property in the stolen goods the thief himself must have had such property. This, as Maitland has pointed out, is, from the historical point of view, an inversion of logic, due to the gradual manner in which the distinction between possession and the right to possession (i.e. property in the modern sense of the term) has arisen.³

(b) The rule that if a tort amounts to a felony the injured party's right of action is barred does not seem to be expressly stated in the Year Books. Perhaps the judges in the Middle Ages considered it to be unnecessary to state what they would have regarded as an elementary rule of procedure. The earliest express statement of the rule occurs in the case of *Higgins v. Butcher* in 1607.⁴ In that case a husband brought an action of trespass for assault on his wife from the effects of which she had died on the day following the assault. Tanfield, J., said: "If a man beats the servant of J.S. so that he dies of the battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost;" and in this reasoning Fenner and Yelverton, J.J., concurred.

¹ In the Y.B.B. the term "property" is used (1) to signify possession, Y.B.B. 12 Rich. II. 4 *per* Pynchbek, C.B., 2 Ed. IV. Pasch. pl. 9, cited above 323 n. 4; or (2) to signify the thing possessed, Y.B. 1 Hy. V. Hil. pl. 4, "L'ou home demande certain chateaux, et per son bref est prove que la propertie est devastue de son possession per le prisel;" or (3) to signify the right to possession, Y.B. 18 Ed. IV. Hil. pl. 5, "Si jeo baille a vous mes robes pur garder, et vous eux spendez issint qu'ils perishes, j'averai action de Detinue, car le property n'est altere;" and cp. below 356.

² The boroughs sometimes secured some modification of this principle by charter, see Borough Customs (S.S.) ii xli, lviii, lix.

³ P. and M. ii 164, "One of the reasons why the thief is said to have "property" in these goods is that the king has acquired a habit of taking them and refusing to give them up;" cp. Ames, Essays A.A.L.H. iii 542-543.

⁴ Yelv. 89.

It was for some time very doubtful whether, in such circumstances, the cause of action in tort was wholly lost, or whether it was only suspended. At a time when all felonies were punished by death, when all the felon's chattels were forfeited to the crown, who was not liable to his debts, and when his lands escheated to his lord, this was a purely academic question.¹ But in the sixteenth century it was ceasing to be entirely academic. Hale² tells us that, as a result of statutes of 1566 and 1576,³ a person convicted of a clergyable felony and burnt in the hand, though he forfeited all the goods belonging to him at the time of conviction, "Yet by his burning in the hand he is put into a capacity of purchasing and retaining other goods"; and that "presently upon his burning in the hand he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof." It might, therefore, be a very practical question whether the injured person had lost his right of action in tort, or whether that right of action was only suspended.

There seems at first to have been a considerable body of opinion in favour of the view expressed in *Higgins v. Butcher*⁴ that the right of action was wholly lost; and there was something to be said for it. It was clear that the appeal and the action of trespass were alternative remedies;⁵ and it was clear also that, except in the case of the appeal of murder, acquittal or conviction upon an indictment was a bar to an appeal.⁶ Was it not reasonable, therefore, to hold that trespass and indictment were alternative remedies, so that a conviction or an acquittal upon an indictment would bar an action for trespass, just as it would bar an appeal, other than an appeal of murder? This would seem to have been somewhat the line taken by the dissenting judgment of Jones, J., in *Markham v. Cobb*;⁷ and there was clearly a widespread opinion that this was the law. Among the proposals for the reform of the law put forward in 1653⁸ was a proposal that, "It shall not be lawful for any person who shall have goods feloniously taken away, to bring any civil action for the recovery thereof, or for damage for the same, before he have proceeded criminally, with effect, against the offenders; but that he may bring his action after such effectual prosecution."

¹ In 1621 a bill passed the House of Commons which provided that the estates of attainted persons should be liable to their debts, but it failed to pass the House of Lords, Hist. MSS. Com. 3rd Rep. App. 25.

² P.C. ii 387-389.

³ Yelv. 89.

⁴ Above 329; *Markham v. Cobb* (1625) W. Jones at pp. 148, 149.

⁵ Vol. ii 363; Hale, P.C. i 249, 251.

⁶ W. Jones at pp. 149, 150.

⁷ 8 Elizabeth c. 4; 18 Elizabeth c. 7.

⁸ Somers Tracts vi. 239.

Similarly, in the set of proposals for the amendment of the law, published in 1657 by William Shepherd, under the title of "England's Balme," it is said, "that it is an hard law that no recompense is given to a man's wife or children for killing of him, whereas for the beating or wounding of him while he was alive, he should have had recompense for the wrong."¹ Buller, J., in 1791 considered that the question was open;² and Lord Eldon in 1810 seems to have been in favour of the view that the right of action was wholly lost.³ Nevertheless, from the first quarter of the seventeenth century, there had been a series of cases in which the contrary view was taken. In 1625 in the case of *Markham v. Cobb*⁴ trespass was brought for breaking into the house of the plaintiff and the taking of £3000. The defendant pleaded that he had been convicted of that felony, and that he had had his clergy. Doderidge, J., held that the action lay, and that the conviction for felony did not take away the action for trespass. To this opinion he adhered after hearing a second argument; and Whitlock, J., agreed with him. This decision was followed in 1652 by Rolle, C.J., in the exactly parallel case of *Dawes v. Coveleigh*;⁵ these decisions seem to be approved by Hale in his Pleas of the Crown;⁶ and it is now settled law that the fact that a tort to property⁷ or to the person⁸ amounts to felony does not destroy, but only suspends, the right of action. In such cases the plaintiff's action is stayed till the felony has been prosecuted.⁹

(c) The broad rule laid down by Lord Ellenborough at nisi prius in 1808 to the effect that "in a civil court the death of a human being cannot be complained of as an injury,"¹⁰ admits of two perfectly distinct applications. Firstly, it covers part of the ground covered by the maxim *actio personalis moritur cum persona*—the representative of the deceased victim of a tort, which has caused his (the victim's) death, cannot sue in his representative capacity.¹¹ Secondly, it makes it impossible for a plaintiff to sue a defendant for a wrong committed by the defendant to the plaintiff, when that wrong consists in damage causing the death

¹ At p. 148.

² *Master v. 4*, Miller, T.R. at pp. 332-333.

³ *Cox v. Paxton*, 17 Ves. 322; he remarked, at p. 331, "those who obtained this Act of Parliament, making the embezzlement of their clerks felony, are much surprised at the consequence, that they cannot recover their money."

⁴ Latch 144; S. C. W. Jones 147.

⁵ Style, 346.

⁶ P.C. i 546-547.

⁷ *Wells v. Abrahams* (1872) L.R. 7 Q.B. 554; cp. *Midland Insurance Co. v. Smith* (1881) 6 Q.B.D. 561.

⁸ *Smith v. Selwyn* [1914] 3 K.B. 98.

⁹ Ibid.

¹⁰ *Baker v. Bolton* (1808) 1 Camp. 493.

¹¹ For this maxim and its history see below 576-583, 584.

of a person in the continuance of whose life the plaintiff had an interest. It is clear that the second application of the principle has nothing to do with the maxim *actio personalis*, etc., as both plaintiff and defendant are still alive. The death is simply an element in the cause of action. It is with the second of these applications of the principle that I am here concerned. At this point I am only concerned with the first in so far as it has affected the development of the broad principle which we are considering.

It is probable that the origin of the second application of this principle is to be found in the rule, which has just been discussed, that, if a cause of action in tort disclosed a felony, the right of action in tort was affected.¹ This was suggested in *Osborn v. Gillett*,² and no other suggestion has ever been made. But we have seen that it is now settled that this rule only suspends, but does not destroy, the right of action in tort. It would seem to follow, therefore, that the mere fact that a felonious tort to the person results in death should not debar a person who has suffered loss by the death from suing in tort for such damages as he can prove that he has sustained, provided that the felony has been prosecuted. *A fortiori* he ought to be able to sue if the tortious act causing death does not amount to a felony. In 1668, in the case of *Cooper v. Witham*, Levinz, the reporter, seems to think that this was the logical result of the cases of *Markham v. Cobb* and *Dawes v. Covenigh*.³ But logic has been disregarded; and in cases where the tort results in death a right of action is denied. What, then, is the reason for a rule which, even on technical grounds, seems to be illogical? The absence of all authority between the seventeenth-century cases and Lord Ellenborough's dictum in *Baker v. Bolton* makes it impossible to give a certain answer to this question. I would suggest tentatively that the two following causes may have helped its growth:

(1) In the great majority of cases in which death ensues as a result of a tort felony has been committed. In a large number of cases also the persons damaged by the tort are the deceased's near relations. I would suggest, therefore, that the rule based upon the maxim *actio personalis*, etc., became confused with the rule based upon the fact that the tortious act was a felony. It is true that in *Higgins v. Butcher*⁴ the Court seems to have been perfectly well aware of the distinction between the husband's

¹ Above 331-333.

² (1873) L.R. 8 Exch. at p. 96.

³ 1 Lev. 247: "Twysden said, that an action did not lie for the master for beating of his servant to death, for that he lost his service; for the party ought to be indicted for it, as is Yelv. 90. But see Latch 144, *Markham* against *Cobb*, Style 346, 347, *Dawes* against *Covenigh*, that trespass lies for a felonious taking money after the party has been convicted and burnt in the hand."

⁴ (1607) Yelv. 89.

claim to sue as representing his wife and his claim to sue in his own right. The first claim was disallowed, and then the Court decided that the second must also be disallowed for the reasons set out above.¹ But we can see signs of this confusion in the passage from Shepherd's book cited above.² It is equally apparent in the preamble to the Fatal Accidents Act, 1848,³ which recites that "No action is now maintainable against a person who by his wrongful acts may have caused the death of another person." But Bramwell, B., pointed out in *Osborn v. Gillett*⁴ that the general statement contained in that preamble must be cut down by reference to the subject-matter of the statute, and that it must be taken to refer to the survivorship of the cause of action which the deceased would have had if he had survived; and in this view Lord Alverstone concurred in *Clark v. General Omnibus Co.*⁵ I should like to suggest, therefore, that when Lord Ellenborough gave his ruling in *Baker v. Bolton* he was the victim of the same confusion of ideas. As we have seen, his statement, like the statement in the preamble to the Fatal Accidents Act, 1848, is so wide that it covers these two wholly distinct rules of law. (2) This wide principle was laid down by Lord Ellenborough at nisi prius. It was not the considered judgment of the court; and it was uttered at a time when there was very considerable doubt whether the fact that a civil wrong was also a felony destroyed or only suspended the right of action in tort.⁶

We have seen that the criminal appeal of murder was in practice so used that it afforded a partial mitigation of this rule of law.⁷ But criminal appeals are now things of the past.⁸ At the same time it is now well recognized that the rule based on the maxim *actio personalis moritur cum persona* is quite distinct from this rule.⁹ All the evidence points to the fact that the rule is based ultimately on the principle that no action will lie for a tort which is also a felony till the felon has been prosecuted—a principle which, as we have seen, is ultimately traceable to the preference which, in the pecuniary interest of the crown, was given to the indictment over the action of trespass.¹⁰ If the rule rests on this basis it follows that it cannot be supported in the form in which it was propounded by Lord Ellenborough. On the contrary there is no reason why a civil action should not lie for a tort which results in death, provided that, if a felony has been committed, the felon is first prosecuted.

¹ Above 331.

² 9 and 10 Victoria c. 93.

³ [1906] 2 K.B. at pp. 658-659.

⁴ Vol. II 363.

⁵ The Admiralty Commissioners v. S.S. Amerika [1917] A.C. at pp. 43, 44.

⁶ Above 329-330.

⁷ Above 333.

⁸ (1873) L.R. 8 Exch. at p. 95.

⁹ Above 332-333.

¹⁰ Ibid 364.

The rule as laid down by Lord Ellenborough is obviously unjust;¹ it is technically unsound because, as we have seen, it is based upon a misreading of legal history;² and yet it is the law of England to-day, for it was upheld by the House of Lords in 1917 in the case of *The Amerika*.³ The House of Lords attempted to justify its decision by an appeal to legal history. But the display of historical knowledge which was made on this occasion is an object lesson both in the dangers of hastily acquiring such knowledge for a special occasion, and in the consequences of the neglect of this branch of legal learning.⁴ It is not the only case in our books which shows that the historical continuity of English law demands a thorough knowledge of its history if those "apices juris," upon which the courts are sometimes called to adjudicate, are to be correctly determined.

But we must return from this modern chapter of accidents to the Middle Ages.

(2) *Voluntary parting with possession.*

The general term used to express any voluntary parting with possession is the term "bailment." This term covers many different kinds of transactions—loans for use or consumption, pledges, hirings, and deliveries for many special purposes, such as safe custody or carriage. Any person to whom an owner delivers possession of his goods for a special purpose is a bailee;⁵ and, if we except the case of such persons as servants,⁶ anyone who has the de facto control of another's goods is in possession of them. We have seen that the bailee, being in possession, was the person who could pursue all the remedies of an owner, such as the appeals of robbery or larceny or the action for *res adirata*. Indeed, the character of these remedies almost necessitated their being brought by the person, who, being in possession, knew at once of his loss. Nevertheless the bailee was never regarded as the owner. "If," as Maitland has said,⁷ "the bailee had been conceived as owner, and the bailor's action as purely contractual, the bailor could never have become the owner by insensible degrees and without definite legislation. But we know that this happened; we know that before the end of the Middle Ages the

¹ *Osborn v. Gillett* (1873) L.R. 8 Exch. at pp. 93-99 *per* Lord Bramwell; Pollock, *Torts* (10th ed.) 67-68.

² Above 334.

³ *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38.

⁴ For some criticism of that case see App. VIII.; it is clear that the rule owes nothing to Roman law, as is admitted in *The Amerika* [1917] A.C. at p. 44; indeed, the Roman rule was less harsh than the English rule, and was based on social conditions very different from those prevailing in a modern state, see L.Q.R. xxxii 436-437.

⁵ P. and M. ii 168, 169.

⁶ Below 363-365.

⁷ P. and M. ii 176.

bailor is owner, has 'the general property' in the thing, and no Act of Parliament has given him this." The bailor then, is the owner. But the conception of ownership is not as yet the conception which is familiar to modern lawyers. As we have seen, the definite outline of such conceptions as ownership and obligation is the product of a mature legal system; and the outline becomes more and more blurred as we go back to primitive times.¹ And so, although the bailor was the owner, the sum of his rights as owner was originally his better right as against the bailee to get possession; for this better right to get possession was the only form of ownership which the mediæval common law recognized. He could assert this right by the action of detinue in which he claimed "his" things detained by the bailee; but this was the extent of his rights. Till he had recovered possession his position was like that of the disseised owner of land.² He was deprived of most of the fruits and consequences of ownership, while the bailee in possession was, as against all the world except his bailor, treated as owner.³ English law starting from that common basis of Germanic custom of which there are traces in the Anglo-Saxon period,⁴ gave all the rights of ownership—rights of action and powers of disposition—to the bailee; and it still retains a substantial link with this primitive idea. A bailee can, and always could, sue one who has taken goods from, or damaged goods in his possession, as though he were owner, and the defendant cannot set up the *jus tertii* of the bailor unless he claims through it.⁵

It is for this reason that originally the liability of the bailee to the bailor was absolute. The bailee, having been given the position of owner as regards third parties, it was only fair that he should be held liable to the bailor;⁶ and in the primitive

¹ Vol. ii 79.

² Above 92.

³ Y.B. 11 Hy. IV. Mich. pl. 39—this was an action of replevin against a defendant who pleaded that the cattle distrained belonged to another; and it was suggested that, as this was the case, the plaintiff should not have said the cattle were his, but that they were in his "custodia;" to this suggestion Thirning, C.J., said "Ne pledes plus de cest matter, car vers vous il ad property;" cp. Bordwell, Property in Chattels H.L.R. xxix 502, 737. On the other hand, in Y.B. 11 Hy. IV. Mich. pl. 2, where a villein brought Trespass, a plea that the goods were another's, i.e. his owner's, was upheld—but this was probably due to the fact that he was a villein; as to this see Y.B. 18, 19 Ed. III. (R.S.) 500-502; Select Pleas of the Crown (S.S.) pl. 138 p. 90; for another explanation of this case see below 346.

⁴ Vol. ii 79-80.

⁵ The Winkfield [1902] P. 42.

⁶ Holmes, Common Law 166-167; "that the bailor has no action against any person other than his bailee, no action against one who takes the thing from his bailee, no action against one to whom the bailee has sold or bailed the thing—this is a proposition which we nowhere find stated in all its breadth. No English judge or text writer hands down to us any such maxim as *Mobilis non habet sequelam*. Nevertheless we can hardly doubt that this is the starting point of our common law," P. and M. ii 171; I think that this is true in spite of Mr. Bordwell's reasons, H.L.R. xxix 505-508; it seems to me that Mr. Bordwell underrates the amount of continuity existing between the ideas of older law and the new law laid down by the

period, when these rules originated, we must not expect to find a nice discrimination between degrees of liability. Liability and strict liability are all one. Thus the position of the bailor and the bailee with respect to the chattels bailed was governed by principles which were both logical and definite. The extent of the bailee's powers was compensated for by the extent of his liability to the bailor: the meagreness of the bailor's powers was compensated for by denying to the bailee any defence against his bailor's action for the return of the goods.

Glanvil is perhaps the latest authority in which we can catch a glimpse of this state of the law. He does not, it is true, say that if the goods are stolen the bailee alone can sue. But he does say that the appeal of larceny could not be brought by the bailor against the bailee, even if the bailee misused the goods, because the bailor had delivered the goods to the bailee;¹ and he is clearly very uncertain whether the bailor had any rights against the bailee if the bailee misused the goods. Since it is quite clear that under the older law a bailee could bring the appeals of robbery or larceny, and that such appeals were brought by bailees in the period when Glanvil wrote and afterwards,² it is possible that it was only the bailee who could bring these appeals if the goods were stolen from him; and this rule could be justified on Roman principles; for we may remember that the Roman law, though as a rule it refused possession to bailees, originally allowed them and not the owner to bring the *actio furti*,³ if and when they were liable over to their bailor. That English law in the time of Glanvil followed the same rules, is the more probable in that Glanvil states definitely that the bailee is absolutely liable. He makes it quite clear that no care, no accident, no *vis major* excused him if the goods were lost or damaged while in his custody;⁴ and his statement of the law is

king's court in the thirteenth century; in fact, the mixture of the old ideas and the new seems to me to have given rise to a conception of the bailee's position which owes something both to the primitive period and to the thirteenth century ideas, below 342-343.

¹ "Præterea si quis usque ad certum locum rem suam, vel usque ad certum tempus alii commodaverit, et is qui eam ita recepit ultra illum locum vel illud tempus eadem re usus fuerit, an quantum id emendare debeat, vel sub qua probatione vel cujus idem sit judicandum quero. A furto enim omni modo excusatur per hoc quod initium habuerit suæ detentionis per dominum illius rei," Glanvil x 13; but an appeal would lie if and when the bailee ceased to be a bailee, *Select Pleas of the Crown* (S.S.) pl. 126.

² *Select Civil Pleas* (S.S.) pl. 8 (1200); *Select Pleas of the Crown* (S.S.) pl. 105 p. 60 (1212); below 339-340.

³ Justinian, *Instit.* iv 1. 13-17; vol. ii 279.

⁴ "Sin autem res ipsa interierit vel perditâ fuerit, quocunque modo in custodia tua, omni modo teneris ad rationabile pretium mihi restituendum," Glanvil x 13; cp. P. and M. ii 169.

borne out by a case of the year 1200.¹ We have seen that Glanvil's book was inspired by the influence of the legal renaissance of the twelfth century.² But, just as when dealing with the older restraints upon the alienation of land, he preserves the memory of rules which, when he wrote, were on the point of becoming obsolete;³ so, in dealing with the position of bailor and bailee, he adheres very closely to the old legal conceptions which the new Roman learning was rapidly undermining.

The new ideas introduced by this learning tended to dislocate both parts of this primitive scheme for the regulation of the rights of bailor and bailee. As we have seen, these new ideas operated in England both quickly and powerfully through the royal central courts.⁴ Two ideas in particular exercised a disturbing influence upon the two parts of this scheme. The first was the influence of the Roman conception of *dominium* which, as we have seen,⁵ early made its influence felt in the land law. The second was the influence, which filtered through the canon law, that liability should be based on some fault.⁶ Both these ideas were beginning to make their influence felt at the beginning of the thirteenth century. Let us look at their effects.

(i) *The influence of the Roman conception of dominium.*

In the thirteenth century there are numerous instances of appeals of robbery or larceny brought by bailees, in which the bailee alleged, not that the goods were his, but that they were in his *custodia*.⁷ The bailor is regarded as the owner; and it is probable that both Bracton,⁸ and Britton⁹ considered that either

¹ Select Civil Pleas (S.S.) pl. 8, where it was held that the fact that a bailee was robbed of the goods, for which robbery he is bringing an appeal, was no defence.

² Vol. ii 203.

³ Above 73-75.

⁴ Vol. ii 146, 176-177.

⁵ Above 77.

⁶ Vol. ii 258-259, 451-452.

⁷ "Omnia ista habuit ipse in custodia per balliam matris suæ, et de custodia sua ea robata fuerunt," Select Pleas of the Crown (S.S.) pl. 105, p. 60 (1212); Bracton's Note Book, cases 723 (1225), 824 (1233); Bracton f. 146a; later it seems to have been immaterial whether a bailee alleged custody of or property in the goods, Y.B.B. 48 Ed. III. Mich. pl. 8; 11 Hy. IV. Mich. pl. 39; in Y.B. 11 Hy. IV. Mich. pl. 46, p. 24, it was said that the Chancery clerks would not grant a writ for goods "in custodia," for which reason doubtless the phrase dropped out; see H.L.R. xxix 731.

⁸ "Et non refert utrum res, quæ ita subtracta fuit, extiterit illius appellantis propria, vel alterius, dum tamen de custodia sua," f. 151a; it may be noted, however, that at f. 103b Bracton seems to be trying to distinguish larceny from robbery in this respect—"Sciendum quod actio furti sive conductio domino rei competat contra furem et ejus successorem et contra quemlibet detentorem. Actio vi bonorum raptorum de rebus mobilibus vi ablati sive robbatis datur domino rerum vel de cujus custodia surreptæ sunt, et qui intravit in solutionem erga dominum suum, ita quod ejus intersit agere;" as to this see Maitland's comment, Bracton and Azo (S.S.) 182; Bracton's treatment of robbery and larceny at f. 157 does not lead me to think that he really meant to put great stress on the distinction between robbery and larceny; on this matter I do not agree with Mr. Bordwell, H.L.R. xxix 507-508, 748-749, though I think he is probably right in thinking that it is the appeal of robbery which is the prototype of trespass.

⁹ Bk. i c. 16 (Nichols i 55), "Let careful enquiry also be made concerning

the bailor by virtue of his ownership, or the bailee by virtue of his custodia, had the right to bring these appeals. The Mirror of Justices also seems to say that this is the law.¹ But these statements are not quite precise; and in particular, they leave it uncertain whether the bailor could sue if the goods were taken from the custody of the bailee.² It may, however, be remembered that Bracton identifies the appeal of larceny with the *actio furti*;³ and, following Justinian's Institutes,⁴ he perhaps meant to give the bailor the right to elect whether he would sue his bailee or the thief. However that may be, it is clear from his and from other contemporary statements that the rights of the bailor were gaining recognition; and, as we shall see, it is probable that this recognition had something to do with the permission, given to the bailor in the first half of the fourteenth century, to bring trespass against a third person who had taken the goods from the bailee.⁵ But when the custodia of the bailee was thus distinguished from the ownership of the bailor, it was inevitable that the right of the bailee to sue as if he were owner should begin to appear somewhat anomalous. Therefore the bailee usually alleged in these appeals that he was accountable to the owner;⁶ and Bracton perhaps thought that this allegation was necessary.⁷ Here again he was perhaps influenced by his identification of the appeal of larceny with the *actio furti*; for Roman law gave the *actio furti*

robbers, thieves and such like offenders; as to whom our will is that if those who rob or steal the goods of another amounting to twelve pence or more, be freshly pursued for the same by the owners, or by those out of whose custody the things were stolen or robbed . . . they shall forthwith be taken, etc."

¹ "In these actions (the appeals of robbery and larceny) two rights may be concerned—the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance where the thing has been lent, bailed, or let); and the right of property, as is the case where the thing is stolen or robbed from the possession of one to whom the property in it belongs," the Mirror (S.S.) 57, cited H.L.R. xxix 509.

² "These statements are brief and unsatisfactory. They were incidental to an account of criminal proceedings, and lack the precision they would have had if they had been part of an exposition of the law of bailments. They allow the appeals to the owner and to the one having custody, and leave us to speculate as to whether the owner whose goods were taken from the custody of another was allowed them or not," Bordwell, H.L.R. xxix 510.

³ Above 338.

⁴ Instit. IV. i. 16.

⁵ Below 348.

⁶ Bracton f. 103b cited above 339 n. 8; we see such an allegation in Select Pleas of the Crown (S.S.) pl. 126 p. 81—"ipse (the appeller) intravit in solutionem versus dominum suum pro predicto firmaculo et anulo."

⁷ "Appellat quandoque quis alium de alterius rebus, quam de suis propriis, ut si ab aliquo robbata fuerint res aliquæ, quas habuerit in custodia sua, de rebus domini sui vel alterius, et quo casu, oportet eum docere, quod sua intersit appellare, quia alias appellum non habebit, non magis quam de morte alicujus extraneæ personæ. . . . De re vero aliena docere oportet, quod de custodia sua robbata fuerit simul cum rebus suis propriis, vel sine, et quod ipse custos appellans intravit in solutionem de tanta pecunia erga dominum suum," f. 146; Bracton's Note Book case 1664; above n. 6; H.L.R. xxix 731; P. and M. ii 170 and n. 5.

to the bailee because he was answerable over.¹ Thus the view that the bailee's responsibility over to the bailor was the reason for his right to sue was introduced into the law; and that it rapidly became the view universally accepted both in England and abroad is illustrated by the fact that Beaumanoir, whose book was written slightly later in the thirteenth century than that of Bracton, and under much the same set of influences, adopted a similar explanation of the bailee's right of action.²

(ii) *The influence of the Roman ideas of liability.*

Under this same influence Bracton was prepared to modify the extent of the bailee's responsibility.³ "It is plain," says Maitland,⁴ "that already in his day English lawyers were becoming familiar with the notion that bailees need not be absolutely responsible for the return of the chattels bailed to them, and that some bailees should perhaps be absolved if they have attained a certain standard of diligence." In this he was followed by Britton. Britton would excuse a bailee if the goods were lost "by accident of fire, water, robbery, or larceny," for, "against such accidents no one ought to answer for things lost, unless they happened by his fault or negligence;"⁵ and effect was given to this view in 1299 when robbery was allowed as a good defence to a bailee in an action of detinue.⁶ But, as we have seen, these Roman ideas ceased in the course of the fourteenth century to influence English law.⁷ Therefore Bracton's rules did not in the Middle Ages become part of English law; and, in spite of Chief Justice Holt's efforts,⁸ they are not even now thoroughly acclimatized.

There are indeed, some indications in the Year Books of the fourteenth and fifteenth centuries of a tendency to introduce some modifications of the bailee's liability. In a doubtful case of 1315, which has been very variously interpreted, there is

¹ Instit. iv 1. 13-17; Bracton and Azo (S.S.) 183.

² Holmes, Common Law 167; for its speedy adoption in England see below 342.

³ "Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti mercedem dederit, vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus pater familias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad eam restituendum non tenebitur," f. 62b; with regard to a person "qui utendum accipit" he says, f. 99b, "ad vim majorem vel casus fortuitos non tenetur quis nisi culpa sua intervenerit," though in a preceding sentence he has apparently made the commodatarius almost if not quite absolutely liable, see vol. ii 275; the pledgee is under the same liability as "is qui utendum accipit," *ibid.*; while the depositary is not even liable for his negligence; as to the confusion of ideas in this passage see vol. ii 275-276; and Maitland's note, Bracton and Azo (S.S.) 147, *there cited*.

⁴ P. and M. ii 170.

⁵ Bk. i c. xxix, Nichols i 157.

⁶ Brinkburn Cartulary p. 105, cited P. and M. ii 170.

⁷ Vol. ii 287.

⁸ Coggs v. Bernard (1703) 2 Ld. Raym. 909.

possibly a hint that the fact that the goods had been stolen might be a good defence to the bailee;¹ and the law was so stated in 1355.² In 1339 counsel said in argument that the fact that the goods bailed were burned together with the house in which they were stored would be a good defence to the bailor's action.³ In 1432 Cotesmore, J., ruled that, "If I grant goods to a man to keep to my use, if the goods by his default are stolen he is accountable to me for the goods; but if he is robbed of the goods he is excusable by law."⁴ Perhaps in these cases the judges were trying to apply to the liability of the bailee the view that a man, though liable for his own acts which wrongfully cause damage to another, is not liable for the acts of others or acts beyond his control.⁵ But these attempts thus to modify the liability of the bailee never materialised. Though, as we shall see, the recognition of the bailor's dominium led to the development of his rights against third persons who had taken the goods,⁶ no substantial diminution was made in the extent of the bailee's liability. The reason for this is to be found in the elaboration of the new theory as to the ground of that liability which had emerged in the time of Bracton.

We have seen that Bracton distinguished the "custodia" of the bailee from the "dominium" of the bailor, and put forward the accountability of the bailee to the bailor as an explanation of the bailee's right of action.⁷ We have seen also that this same explanation was given by Beaumanoir.⁸ That it found speedy acceptance is clear from the fact that it was hinted at in a plea in the court of the Honour of Broughton in 1258.⁹ It involved a departure from the older conceptions but not a very serious departure. According to this view the right of the bailee to sue as if he were owner is taken for granted—the old rules of law which gave him that position were too strongly rooted to be overthrown. But these old rules were rationalized by assigning his liability over to the bailor as the reason for his right to sue. Maitland's dictum that between the rules that the

¹ Y.B. 8 Ed. II. 275; Fitz., Ab. *Detinue* pl. 59; see Holmes, *Common Law* 176; Beale, *Carrier's Liability*, Essays, A.A.L.H. iii 157; Bordwell, H.L.R. xxix 736-737; if Fitzherbert's account of the matter is correct and issue was taken on the theft, it would seem that theft was a good defence to an action of detinue against the bailee; the Y.B. says that the plea being that the goods were delivered in a locked chest, and the replication being that they were delivered out of the chest, issue was taken on that; it is not unlikely, as Mr. Bordwell says, that the Y.B. represents a tentative pleading (below 635, 637), and that we have in Fitzherbert's account the issue really taken. (See *Addenda* p. xlviii).

² 29 Ass. 163 pl. 28; Beale, op. cit. Essays A.A.L.H. iii 152 n. 2.

³ Y.B. 12, 13 Ed. III. (R.S.) 246.

⁴ Below 378, 380.

⁵ Above 340-341.

⁶ Select Pleas in Manorial Courts (S.S.) 65-66.

⁷ Y.B. 10 Hy. VI. Mich. pl. 69.

⁸ Below 348-349.

⁹ Above 341.

bailee could sue third parties because he was liable to his bailor, and that he was liable to his bailor because he could sue third parties, there was no logical priority,¹ exactly represents the view which was beginning to prevail in Bracton's day. In a sense too it represented older law; but, while in the older law the greater stress was laid on the bailee's possession, in the newer scheme the greater stress was laid on his liability over. In the older law his right to sue third parties by virtue of his possession was the premise, and his liability was the conclusion. From the days of Bracton onwards the situation tends to be reversed. His liability over tends to become the premise from which his right to sue third parties is deduced as the conclusion.

The bailee's liability over is very clearly put forward as the reason for his right to sue in an action of replevin heard in the Eyre of Kent of 1313-1314.² It is the generally accepted theory in the Year Books of the fourteenth,³ fifteenth,⁴ and early sixteenth⁵ centuries; and it appears in Croke's report of *Southcote v. Bennet*⁶ in 1601 as one of the reasons for the decision of the court. "It is not any plea in a detinue," say Gawdy and Clench, JJ., "to say that he was robbed . . . ; for he hath his remedy over by trespass or appeal to have them again." Having been thus adopted into the modern common law, this view of the reason for the bailee's right to sue has been repeated by many lawyers of the seventeenth, eighteenth, and nineteenth centuries.⁷ The consequences of this theory were also accepted. It followed that if the bailee was not able to sue he was not liable to his bailor. Thus if the goods were damaged by the king's enemies⁸ or by the act of God,⁹ he clearly had no

¹ "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action," P. and M. ii 170.

² "*Passley*.—By your writ you asserted that the property of the beasts was in yourself, and now, by your counting, you say that the beasts are not yours, but one N.'s. Judgment whether you can now avow property in another's beasts. *Stonore*.—The beasts are in our custody, so that we should be liable if they were lost and they do not deny that they took them. Judgment, etc. *Ashby*.—You first affirmed that the property was in yourself, and now you affirm that it is in someone else. . . . He was told to say something else."

³ Last note.

⁴ Y.B.B. 11 Hy. IV. Mich. pl. 46 (p. 24) *per* Hankford, Hill and Culpeper; Holmes, Common Law 170 n. 2.

⁵ Y.B. 21 Hy. VII. Hil. pl. 23.

⁶ Cro. Eliza. 815; see also the MS. report of this case printed in H.L.R. xlii 43; at p. 44 the fact that the defendants had a remedy over is alleged as a reason for allowing the plaintiff to sue.

⁷ Vol. vii 451.

⁸ Y.B. 33 Hy. VI. Hil. pl. 3; for a full account of this case, which is discussed in most of the subsequent cases on this point, see Holmes, Common Law 176-177.

⁹ Thus in Y.B. 33 Hy. VI. Hil. pl. 3 it seems to have been admitted that an accidental fire or a sudden tempest would have been an excuse—such damage was

remedy over; and therefore it was held that he was not liable to the bailor for damage due to these causes. The same result followed if it was through the action of the bailor that the goods were not returned or damaged.¹ Conversely, if by reason of a special contract with his bailor or for any other reason he was not liable over, it seems to have been the opinion of Brian and Littleton that he could not sue a person who had taken the goods from his possession.²

Thus a more or less logical theory was evolved which accounted both for the bailee's right to sue as if he were owner, and his absolute or almost absolute responsibility to his bailor. As that absolute responsibility was thus accounted for, the attempts to limit it which we see in the earlier law cease in the fifteenth century. And the law as thus settled was authoritatively laid down by Coke in *Southcote's Case* in 1601. "If A delivers goods to B generally to be kept by him, and B accepts them without having anything for it, if the goods are stolen from him, yet he shall be charged in *detinue*: for to be kept and kept safe are all one."³

The question now arises, what is the historical truth as to the basis of the bailee's rights to sue and as to his liability over? Is it true to say that the bailee could sue as if he were owner merely because he is liable over? Or is it true to say that he is liable

not the act of the defendant, therefore not attributable to him; cp. Holmes, Common Law 200, 201-202—as Holmes says, this principle was not peculiar to bailees; it is, as we shall see, a consequence of the mediæval principle of liability for tort, below 380.

¹Y.B. 11 Hy. IV. Mich. pl. 46 (p. 24) *per* Hankford, Hill and Culpeper; cp. H.L.R. xxix 738.

²Fitz., Ab. *Barre* pl. 130—"Detinu. Le defendant monstre coment le bailment fuit fait a gard al jeopardy le plaintiff, et monstre coment un tiel aver pris les biens de luy. Brian bon ple, pur ceo que le bayle ne puit aver accion pur recoverer damages quar il ne recoverait damages mes pour le charge que il ad ouster al baylour, et il n'est charge ouster icy, mes auter est de general baylle;" this is Y.B. 3 Hy. VII. Trin. pl. 16; in the Y.B. Brian's words are not quite so definite as Fitzherbert makes them; but that this was the idea held by both Brian and Littleton appears clearly enough in Y.B. 9 Ed. IV. Mich. pl. 9, of which a good account is given H.L.R. xxix 741-742; it was a question of "colour" (see below 639)—would a bailment to the predecessor of a prior support an action by the successor? Brian said no—"si jeo baille certain biens a un home pur garder, si soient emportes, puis il avera bref de Trespass pur le possession, car il est chargeable ouster a moy. Mes si biens bailles a un Prior soient emportes, le successor n'avera action, car il n'est chargeable, issint a nul mischief," and Littleton said practically the same thing.

³4 Co. Rep. 85b; it should be noted that Dodderidge, counsel for the defendant, argued that it was only when a bailee took goods at his peril that he was bound if they were stolen; on the other hand, Pynde, counsel for the plaintiff, argued that, this being a bailment to keep safely, was equivalent to taking the goods at the peril of the bailee, and it was only if a bailee took goods to keep as his own goods that he would be excused, H.L.R. xiii 43, 44; clearly Coke adopted and even went further than Pynde's argument when he ruled that "to be kept and kept safe are all one;" that Coke was right in treating the words "kept safe" as merely the common form of alleging the bailee's duty is shown by *Ross v. Hill* (1846) 2 C.B. 877; cp. Street, *Foundations of Legal Liability* ii 264 n. 5.

over because, being in possession, he has, like any other possessor, the rights of an owner as against all save his bailor? In other words, is the basis of his rights to sue his liability over, or his possession? This problem was to a large extent academic in the Middle Ages. We have seen that practically the only cases in which the bailee was not liable over were cases in which he could sue no one. If the goods were damaged by the king's enemies or by the act of God clearly there was no one to sue.¹ It was only when a case arose in which a third person damaged the goods in the bailee's possession, under circumstances which did not make the bailee liable to the bailor, that the question of the basis of his liability could arise in a practical form. If in such a case, we base his right to sue on his liability over, he clearly has no right of action against the wrongdoer. On the other hand, if we base his rights of action on his possession he has a right of action. The possibility of such a case arising could not easily occur till after the decision of Holt, C.J., in *Coggs v. Bernard* in 1703;² and we shall see that it was not for nearly two hundred years after that decision that the problem was authoritatively settled in favour of the view that the bailee's right to sue is based, not on his liability over, but on his possession.³

The question, however, whether this was an historically correct decision is essentially a problem of mediæval legal history; and opinions have and probably will continue to differ upon it.

In favour of the view that the bailee's right to sue should be based on his liability over the following considerations have been and can be urged: we have very little evidence that the rule that the bailor was confined to his rights against the bailee was ever the law of England. On the contrary, early in the thirteenth century, the bailor's rights of property are distinctly recognized, and the bailee's rights are based on his liability over. We cannot pray in aid those old conceptions of Germanic law because, like many other primitive ideas, they went down before the new common law which was being created in the thirteenth century. Hence, as soon as we get definite information as to the bailee's position, we find that the bailor's rights of property are recognized, and that the bailee's rights are based on his liability over. This tradition has been continuous right down to the nineteenth century;⁴ and we have seen that Brian and Littleton drew the logical consequence, and held that if he were not liable over, he

¹ Above 343-344.

² 2 Ld. Raym. 909.

³ The Winkfield [1902] P. 42.

⁴ These considerations are ably set out by Bordwell, *Property in Chattels H.L.R.* ix 501 seqq.; 731 seqq.

could not sue anyone who interfered with his possession of the goods.¹

But, notwithstanding these reasons, I think that the evidence goes to show that the bailee's right to sue was based on his possession. It is, I think, reasonably clear from Glanvil's book that English law did start from the old conceptions of Germanic law which gave the bailee as possessor the rights and powers of the owner.² It is no doubt true that these old conceptions were modified as the result of the legal renaissance of the thirteenth century. But they were not wholly got rid of. Here, as in many other cases, they were transplanted and developed in a modified form. There was a modification of legal doctrine, but no absolute breach of continuity. No doubt the Roman conceptions of ownership and possession exercised a disturbing influence both in the law as to hereditaments and as to chattels. But neither in respect to hereditaments nor in respect to chattels did they succeed in ousting the old idea that seisin or possession is ownership as against all the world save as against the man with the better right. Hence it followed that the bailee, being a possessor, had the rights of a possessor and could sue by virtue of those rights. There is support for this view in the Year Books. In the case of 1409³ already referred to, in which a villein brought trespass, one of the counsel argued that the fact that the goods were in his custody at the time of the taking entitled him to bring the action. This argument was not upheld because, I think, of the personal incapacity of the plaintiff; for in the same case Thirning, C.J., ruled that as against a stranger the bailee had property.⁴ In the case of 1469, which has also been referred to, Choke and Nedham upheld, as against Brian and Littleton, the right of the bailee to sue by virtue of his possession;⁵ and it is noteworthy that in Coke's report of *Southcote's Case*⁶ he did not, as in *Heydon and Smith's Case*,⁷ base the bailee's liability to his

¹ Above 344 n. 2.

² Above 388-389.

³ Y.B. 11 Hy. IV. Mich. pl. 2; above 337 n. 3; note that Rolle, Ab. *Trespass* M. 6 conjectures that this ruling was due to the fact that he was not chargeable over; but there is no hint of this in the report.

⁴ Y.B. 11 Hy. IV. Mich. pl. 39.

⁵ Y.B. 9 Ed. IV. Mich. pl. 9; above 344 n. 2; H.L.R. xxix 741-742; in that case Choke said, "Cest possession est sufficient, pour ce qu'il poit per cause del possession aver maintenir breve de Trespass ou appell de Robberie s'ils eussent estres emportes;" and Nedham said, "Et, Sir, quand il aver possession de les biens, par celle possession il purra maintenir action, s'il fuissent pris hors de son possession, vers chescun forsque vers cestui que droit aver;" but, later, though he granted the bailee's right to recover on the possession, he at once added the reason that he was chargeable over; but it is clear from the whole gist of his argument that he regarded the possession as the foundation of the right to sue; it may be noted that in Y.B. 21 Hy. VII. Hil. pl. 23 Fineux, C.J., though he assigns as a reason for the bailee's right to sue that he is chargeable over, yet lays stress on the principle that he "ad properte encontre chescun estranger."

⁶ (1601) 4 Co. Rep. 83b.

⁷ (1611) 13 Co. Rep. at p. 69.

bailor upon his right to sue a third person who had taken the goods. On the contrary, he bases his liability on "his acceptance upon such delivery,"¹ i.e. upon his possession. It is true, as we shall see, that the bailor's ownership was recognized when he was allowed to bring trespass against persons who had taken the chattels from the bailee.² But it is significant that these extensions of the rights of the bailor were not accompanied by any relaxation of the bailee's liability. No doubt we can explain this fact by saying there was no need to relax his liability because these extensions of the bailor's rights were not made at the expense of the bailee's rights—while in possession, he still had all the rights of the owner. But this explanation clearly puts the stress on the possessory aspect of the bailee's rights.

In fact, the view that the bailee can sue by virtue of his possession is in harmony with the root principles of the common law as to the position of a possessor—whether finder, wrongdoer, or bailee; while the view that the bailee can sue only by virtue of liability over can only be harmonized with those root principles by treating a bailee differently from any other possessor. It is true that a continuous chain of authority can be cited for the view that the bailee's rights rest upon his liability over; but this is largely discounted by the fact that these statements were made in cases in which it was immaterial which view of his position was adopted. They are to a large extent dicta, and cannot therefore weigh against the generally accepted principles of the common law as to the legal rights of a possessor.

Therefore I regard the view which bases the bailee's rights to sue upon his liability over as the product of the disturbing influence exercised by Roman law in the thirteenth century. And in support of this view it is possible to point to the analogy of the land law. Just as ideas drawn from the Roman conceptions of *dominium* and *possessio* gave rise to the unfortunate distinction between the seisin of the freeholder and the possession of the termor,³ so these same conceptions, coupled with Roman conceptions of liability, obscured the fact that the rights of the bailee depended on his possession. In spite, therefore, of the reasons which have been alleged to the contrary, I must subscribe to Holmes' argument that the bailee's position depends, not on his liability over, but on his possession. We shall see in a later volume⁴ that, with the help of Holmes' argument, this, the true historical view, has prevailed.

But we must return to the Middle Ages. Though the new ideas of the thirteenth century did not in any way diminish the

¹ 4 Co. Rep. at f. 83b; cp. also *Arnold v. Jefferson* (1697) 1 Ld. Raym. at p. 276.

² Below 348.

³ Above 213.

⁴ Vol. vii 454-455.

powers of the bailee as possessor, they did help to add to the rights of the bailor as owner. We have seen that Bracton allowed him to bring the appeals of robbery or larceny;¹ and it is by no means unlikely, as Mr. Bordwell has suggested, that the rules thus laid down with respect to the criminal appeals helped to induce the judges in the fourteenth century to allow him rights of action against other persons besides his bailee.² It is certainly significant that the action which was the first to be extended to the bailor was that semi-criminal action of trespass which was taking the place of the criminal appeals;³ and that this extension was at once accepted.⁴ Probably this extension took place in the first half of the fourteenth century. In Edward II.'s reign the older rule that, in case of a bailment, only the bailee could sue seems to be upheld.⁵ But in 1344⁶ Huse, *arguendo*, said, "A writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the property is taken, because both master and servant will have an appeal in respect of the same felony;" and he was not contradicted. In 1374 it was admitted that either the bailor or the bailee could bring trespass against one who had wrongfully taken possession of the goods.⁷ It is true that in later law it was laid down that the bailor could not bring trespass if the goods had been bailed for a fixed term or pledged.⁸ But it is doubtful if the law was so laid down in this period. There is some ground for thinking that trespass was then regarded as a general action which was capable of remedying wrongs to personal rights, wrongs to the possessory rights of bailees, and wrongs to the proprietary rights of bailors; and that it was not till the following period that it came to be regarded as an exclusively possessory remedy.⁹

More difficulty was felt in allowing a bailor to bring detinue against persons other than his bailee in cases where there had been a bailment. The actions of debt and detinue were, so to speak, twin actions.¹⁰ They are placed together in the register;¹¹

¹ Above 339, and n. 8.

² H.L.R. xxix 509; above 340 n. 2.

³ Vol. ii 360, 364-365.

⁴ H.L.R. xxix 573.

⁵ Y.B. 16 Ed. II. f. 490; above 324 n. 3.

⁶ Y.B. 18, 19 Ed. III. (R.S.) 508. It may be noted that this extension was made in Germany in the thirteenth century, Schulte, *Histoire du droit de l'Allemagne* (Tr. Fournier) 471.

⁷ Y.B. 48 Ed. III. Mich. pl. 8 (pp. 20, 21); this, of course, does not apply if the bailee gives the goods to another, as in that case there is no trespass, Y.B.B. 2 Ed. IV. Pasch. pl. 9; 21 Hy. VII. Mich. pl. 49.

⁸ Vol. vii 422, 430-431.

⁹ H.L.R. xxix 517-519, citing Litt. § 71, and Y.B. 12 Ed. IV. Pasch. pl. 20 *per* Choke; of course during the term the bailor could not sue the bailee, Y.B. 17 Ed. IV. Pasch. pl. 2 *per* Brian, C.J.

¹⁰ P. and M. ii 171, 172; and cp. Y.B.B. 20, 21 Ed. I. (R.S.) 138, 21, 22 Ed. I. (R.S.) 256, with Y.B. 33-35 Ed. I. (R.S.) 454; vol. ii 366.

¹¹ f. 139; for the writs see App. Ib. (1) (2).

and their wording is almost identical. Debt lay where the plaintiff demanded the payment of money: detinue if he asserted his right to a specific chattel. It would not be true to say that either cause of action rested upon a contract. It is true that in the Year Books this expression is sometimes used;¹ and if debt was brought upon an agreement executed on one side, or detinue was brought upon a bailment, the expression was not inappropriate. As a matter of fact, the right to the payment of the money or the conveyance of the chattel really rested either upon a grant of the defendant, or upon some provision of positive law which created such right.² But, though the contractual aspect of debt and detinue was gaining prominence, from the reign of Edward III. onwards, it never entirely prevailed over the older ideas. We have seen that in the case of involuntary loss of possession the owner was allowed to bring detinue based on a *reversion ad manus* or a *trover*.³ It was only natural therefore that the right of the bailor to bring detinue against other persons besides the bailee should be gradually extended. He was first allowed to sue the bailee's executor;⁴ and then any third person who had got possession of the goods and detained them.⁵ By the reign of Edward IV. he was allowed to choose whether he would sue his bailee, or whether he would sue any third person making use of the count in *trover*.⁶ This extension of the bailor's rights, which gave a fuller recognition of his ownership, is as Ames has pointed out, closely analogous to the contemporary process by which the chancellor extended the rights of the cestui que use, and gave him a remedy not only against the feoffee to uses but also against many other persons in possession of the legal estate. In both cases the result was to convert a right which was originally a right *in personam* into a right which was substantially a right *in rem*.⁷

¹ Y.B.B. 20, 21 Ed. I. (R.S.) 202; 17, 18 Ed. III. (R.S.) 622 pl. 42; 37 Hy. VI. Mich. pl. 18 (debt); 18 Hy. VI. Pasch. pl. 7 (p. 9) (detinue).

² See Y.B. 3 Ed. II. (S.S.) 191 for a good statement of this conception; vol. 367, 368; below 356.

³ Above 326-327.

⁴ Y.B. 16 Ed. II. f. 490; cp. Y.B. 9 Hy. VI. Hil. pl. 4. In Y.B. 11 Hy. IV. Hil. 20 *Hankford* said, "Avant ces heures il ad estre en disputacion si home avera action de detinue vers executor sur un bailler d'un fait baillie al testator sans especialty ou nemy."

⁵ Y.B. 11 Hy. IV. Hil. pl. 20 *Thirning* says, "Si jeo baillie un chartre touchant inheritance d'un estranger a un home, et il baillie ouster, j'averay assey bon action vers le possessor sans especialty. *Hankford*.—Jeo grant bien."

⁶ Y.B. 12 Ed. IV. Mich. pl. 2 above 325 n. 1; *Brian* notes that the bailee is always liable; but that a sub-bailee or finder is only liable while in possession—much the same principle as is now applied to the original lessee and the assignee respect of covenants running with the land.

⁷ Ames, *Essays A.A.L.H.* iii 435; for the detailed history of this change in the case of the cestui que use see Bk. iv Pt. I. c. 2.

Thus in the case of voluntary parting with possession, just as in the case of involuntary loss of possession, the rights of the owner came to be recognized. They obtained more complete recognition through a new action, the origins of which we can discern at the close of this period.

(3) *The origins of the action of Trover and Conversion.*

At the end of this period the rights of owners out of possession were beginning to be further protected by an action of trespass on the case. This action on the case developed into the modern action of trover and conversion which, in course of time, almost superseded the action of detinue, and made considerable encroachments on the sphere of trespass.¹ In fact, the career of this action in the law of tort is very similar to the career of assumpsit in the law of contract.² It is true that trover did not supersede these older personal actions which redressed wrongs to the ownership and possession of chattels so completely as assumpsit superseded the older personal actions of debt and covenant; but the history of both trover and assumpsit is similar in that they both, to a large extent, took their place, and both helped thereby to simplify and generalize the law.

The need for this new action originated in the defects of the action of detinue. That action lay if the defendant refused to deliver at the plaintiff's request. As we have seen, it was not the bailment but the detention that was the gist of the action.³ It lay also if the defendant had by his misconduct disabled himself from redelivery, as for instance if wine had been bailed, and the bailee had drunk it up.⁴ But this action did not afford a remedy if the bailee misused the chattels,⁵ or if he restored them in a damaged condition.⁶ To get damages in these cases it was necessary to bring an action of trespass on the case. It was equally necessary to sue by this form of action if it was desired to get damages against a third person who had destroyed the goods.⁷ This being so, it was but a short step to take to allow the owner to sue at once the bailee who had damaged the goods

¹ Vol. vii 402-447; it also superseded replevin, above 285-287.

² For assumpsit see below 429-453; Ames, H.L.R. xi 386.

³ Above 327 n. 2.

⁴ Y.B. 20 Hy. VI. f. 16 pl. 2; Statham, Ab. *Detinue* pl. 9; Fitzherbert, Ab. *Office del Court* pl. 22 (20 Ed. III.); Y.B. 17 Ed. III. f. 45 pl. 1; all these cases are cited by Ames, *Essays A.A.L.H.* lii 433 n. 7.

⁵ Glanvil x 13, above 338 n. 1; Y.B. 2 Ed. IV. Pasch. pl. 9 *Littleton* says, "Jeo pose que jeo baille a vous mon toge et vous le ardez, jeo avera trespass sur le cas vers vous."

⁶ Y.B. 18 Ed. IV. Hil. pl. 5 (*Brian* dissenting); cp. Y.B. 12 Ed. IV. Mich. pl. 9.

⁷ Y.B. 12 Ed. IV. Mich. pl. 9.

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by a form of trespass on the case;¹ and it was settled by the middle of the sixteenth century that this action on the case lay both against a bailee and against a person to whose hands the goods had come by finding or otherwise.²

But, even then, the sphere of this new action on the case based on a trover and a conversion differed from the sphere of the action of detinue. The gist of the action of detinue was the detention after a request to deliver or to redeliver: the gist of the action of trover was the conversion. It was only as the result of later developments that the spheres of the two actions were brought into closer approximation to one another. These developments were the work of the lawyers of the latter half of the sixteenth and of subsequent centuries; and with them I shall deal in a subsequent Book of this History.³ But it is clear that the developments which had already taken place at the close of the mediæval period had resulted in a considerable improvement in the position of the dispossessed owner of chattels. Such an owner, whether he had parted voluntarily or involuntarily with his chattels, had a choice of remedies. If he had parted voluntarily with the chattels he might sue his bailee either in detinue sur bailment, or, if the bailee had damaged the goods, by trespass on the case. If, having parted with them involuntarily, they had got into the hands of third persons, or if, having parted with them voluntarily, a third person detained them from the bailee, he could sue such third person in detinue sur trover, or on a devenerunt ad manus; or he might be able to sue by an action of trespass on the case, alleging a trover and a conversion.⁴

Let us now turn to the effect of those developments in the law of actions upon the mediæval theory of the possession and ownership of chattels.

The Mediæval Theory of the Possession and Ownership of Chattels

The main principles and the historical development of the law relating to possession are the same in the case both of land and chattels; but the law relating to the possession of chattels as come to differ both in form and in detail from the law relating to the seisin of land. The differences arise from two connected causes. (1) Land differs from chattels both in respect

¹ Y.B. 2 Hy. VII. Hil. pl. 9; but this form of action was not allowed against a bailee who merely declined to restore till 1675, H.L.R. xi 385.

² Brooke, Ab. *Action sur Case* pl. 103 (26 Hy. VIII.); pl. 113 (4 Ed. VI.); *Case's Case* (1537) Dyer at p. 22 per FitzJames, C.J.

³ Vol. vii 403-414.

⁴ Y.B. 27 Hy. VIII. Mich. pl. 3; conversion is alleged in Y.B.B. 18 Ed. IV. l. pl. 5, and 20 Hy. VII. Mich. pl. 13.

of its legal importance and in respect of its physical characteristics. The importance of land-holding in a society still, to some extent, organized upon feudal principles is obvious. It is obvious also that any system of land tenure necessitates the existence of two separate sets of interests in the land—the interest of the lord and the interest of the tenant; that the physical characteristics of land make it possible that it shall be enjoyed in succession; and that the large powers given to the landowner of carving estates out of his land, or of charging it in various ways, gives rise to many other simultaneous interests in the same piece of land. No such simultaneous interests were allowed to coexist in the case of a chattel. A chattel is not the subject of tenure, nor can it be carved out into estates.¹ (2) Consequently, the remedies given by law for the protection of land differ entirely from the remedies given by law for the protection of chattels. We have seen that the various interests which might coexist in land were protected each by its appropriate real action, and that the rights of the person dispossessed of a chattel were protected only by personal actions. Though, as we shall now see, the evolution of these personal actions has produced a law as to possession fundamentally similar to the law as to seisin,² the form in which these bodies of law have come to be expressed is so different that this fundamental similarity may easily be overlooked.

That the common law has, throughout its history, applied to the possession of chattels the same general principles as it applied to the seisin of freehold interests in land, will be clear if we look at the following facts and rules of law: (1) the words "seisin" and "possession" were used convertibly till quite the end of this period;³ and the lawyers frequently illustrate the principles of the law as to possession from the law as to seisin.⁴ (2) We have seen that the rule that two persons cannot possess the same thing at the same time was as applicable to chattels as it was to land.⁵ (3) The person in possession is the person who has all the rights of an owner, "the convertor of a chattel, like the disseisor of land had the power of present enjoyment and the power of alienation. If dispossessed by a stranger he might proceed against him by trespass, replevin, detinue, or trover. He could sell the chattel or bail it. It would go by will to the executor, or be cast by descent upon the administrator. It was forfeited to the crown

¹ See H.L.R. iii 39; for the history of the very limited extent to which future interests in chattels could be created at common law see vol. vii 470-478.

² Above 89-95.

³ Vol. ii 581.

⁴ See e.g. Y.B.B. 2 Ed. IV. Mich. pl. 8; 6 Hy. VII. Mich. pl. 4 (p. 9) *per* Brian, and (p. 8) *per* Vavisor.

⁵ Above 96.

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for felony; and was subject to execution."¹ Thus a delivery of chattels by a trespasser had a tortious effect very similar to the effect of a feoffment by a disseisor.² (4) On the other hand, the person out of possession had merely a right to recover the chattel; and that right was a chose in action which was inalienable.³ He might retake it; but, as we have seen, his rights of recaption were very limited.⁴ It is true that quite at the end of this period some of the judges were of opinion that he might release his rights to the trespasser; but this was denied by others;⁵ and even this very limited exception was not established till the following period. If he owed money (unless the creditor was the king) no execution could be levied from chattels which were out of his possession.⁶ If a villein or a wife were dispossessed of their chattels neither the lord nor the husband could assign their rights to the villein's or the wife's chattels, unless and until they had reduced them to possession in the lifetime of the villein or wife.⁷ We shall see that, though it was settled in Edward I.'s reign that the executor or administrator of a deceased person could bring debt or detinue for the property of the deceased,⁸ it was only by virtue of express legislation that he got the right to bring trespass for chattels carried off in the deceased's lifetime.⁹ The chief instance in which the position of a dispossessed owner of a chattel differed from that of a disseised owner of land was in respect of the rights of the crown to the chattels of a dispossessed owner, who had died intestate and without next of kin, or who had been convicted of felony or outlawed. We have seen that in the case of land there was no escheat in such cases;¹⁰ but in the case of chattels the crown took them, in the first case as *bona vacantia*, and in the other two cases as forfeited. They were choses in action, it is true; but the rule that choses in action are not assignable does not apply to the crown.¹¹ (5) A delivery of possession

¹ Ames, Essays A.A.L.H. iii 560; and cp. Y.B. 17, 18 Ed. III. (R.S.) 628, the reply of W. Thorpe to a plea of justification in an action of trespass for carrying off lead.

² Ames, Essays A.A.L.H. iii 550, 551; Pollock and Wright, Possession 169, 170; as is pointed out by Pineux and Tremayle, C.J.J., this rule does not apply where a stranger takes goods from a bailee or from a person wrongfully in possession, Y.B. 21 Hy. VII. Mich. pl. 49 cited below 358 n. 6, as in that case the owner could sue the stranger by action of detinue or trover, above 326-327, 350-351.

³ Y.B. 6 Hy. VII. Mich. pl. 4, "Le lessee poit surrenderer per parol, mes si le lessor luy disseisit, et or il voile surrenderer son droit per parole c'est void, et issint jeo entend tous fois qu'on ne poit surrenderer son droit, ou doner ou releaser per parol soit cel chose personel ou real, car tout est un a tiel entent comme semble."

⁴ Above 279-280.

⁵ Y.B.B. 2 Ed. IV. Mich. pl. 8 *per* Danby, C.J., and Nedham, J., dissentiente Littleton *arg.*; 6 Hy. VII. Mich. pl. 4 (pp. 8, 9) *per* Vavisor, J., dissentiente Brian C.J.; cp. Ames, Essays A.A.L.H. iii 555.

⁶ Y.B. 22 Ed. IV. Pasch. pl. 29.

⁷ Below 584.

⁸ Ibid.

⁹ Ames, Essays A.A.L.H. iii 558-559.

¹⁰ Above 92.

¹¹ Ames, Essays A.A.L.H. iii 558; for the history of choses in action see vol. vii 515-544.

was in the thirteenth century in all cases as necessary for the valid transfer of a chattel as a livery of seisin was for the valid transfer of a freehold interest in land.¹ But of this last rule, and of two important exceptions to it which emerged during this period, it is necessary to speak a little more in detail.

The rule that a delivery of possession is necessary for the valid transfer of a chattel is the law of England to-day. It was laid down in 1890 in the case of *Cochrane v. Moore*² that "according to the old law no gift or grant of a chattel was effectual to pass it, whether by parol or deed, and whether with or without consideration, unless accompanied by delivery." Thus was settled in strict accordance with historical truth a longstanding doubt whether or not the property in chattels could pass by parol gift without delivery. But it was not till the following period that this doubt emerged, and therefore I shall deal with the history of this episode in the following Book of this History.³ It is true that it was recognized in Edward IV.'s reign, if not earlier, that no delivery was needed if the goods were already in the possession of the transferee.⁴ To use Roman terms, a *traditio brevi manu* was an effectual *traditio*. But this is no real exception. The case of *Cochrane v. Moore* did, however, recognize that there were two real exceptions to the general rule: "On that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery."⁵ Of the history of these two exceptions I must speak at this point because they emerged during this period.

According to the law of the thirteenth century no property passed upon a bargain and sale until delivery had been made or

¹ Glanvil x 14; P. and M. ii 179, 208, citing Bracton f. 62 and Fleta p. 127; references cited in *Cochrane v. Moore* (1890) 25 Q.B.D. at pp. 66-67; vol. ii 277; H.L.R. vi 393 and n. 5; Madox, *Form. Angl.* no. 167—a deed, dated 15 Ed. II., which after reciting a sale of "*blada prata et pasturæ*," and the gift of earnest, goes on to provide that the vendee shall not remove the goods till the whole price is paid. This looks as if the vendee would have been entitled to carry off the goods on such a *bargain and sale*; but it implies that, till carried off, they remained the property of the vendor; a fortiori no property could pass on a mere *agreement to sell* specific goods.

² 25 Q.B.D. at pp. 72-73.

³ Vol. vii 505-509.

⁴ "En detinue des chateaux il est bon plee a dire que le pleintif puis le bailment ad done eux al defendant, etuncore il poit avoir son ley, *quod fuit concessum*," Y.B. 21 Ed. IV. Mich. pl. 27 *per* Brian, C.J.; cp. *Cochrane v. Moore* (1890) 25 Q.B.D. at pp. 69, 70; *Stoneham v. Stoneham* [1919] 1 Ch. at pp. 154-155 *per* P.O. Laurence, J.

⁵ 25 Q.B.D. at p. 73; Lord Esher, M.R., *ibid* at pp. 74, 75, laid it down that this exception applied to a contract both of sale and exchange; and generally the same principles apply to both contracts, though, as Chalmers points out, "the question has been by no means fully worked out," *Sale of Goods Act* (2nd ed.) 4; however, the history of the origin of this exception, below 355-357, would seem to indicate that Lord Esher was right in thinking that a contract either of exchange or of sale would pass the property.

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taken.¹ The vendor could, on delivery, sue for the price by action of debt. The purchaser on payment could not sue for the goods by action of detinue. His remedy was to sue by writ of debt in the detinet. He could not sue by writ of detinue because he could not allege that the things were his.² Probably if the contract were merely executory neither could sue the other.³ The same rule was applied as was applied in later law to contracts other than the contract of sale.⁴ In Henry VI.'s reign, however, it was said that upon an agreement to sell a specific chattel the vendor could sue in debt and the purchaser in detinue.⁵ The right to get the chattel gave a right to sue in detinue; and this applied both to the case of the purchaser in an agreement to sell, and to a third person to whom goods were to be handed by a bailee of the owner.⁶ It is clear that this is a departure from the old law and an extension of the actions of debt and detinue. It seems to me that in these extensions we can see the origin of the doctrine that a contract of sale of specific goods passes the property in the goods.

We have seen that the action of detinue had come to be generally used by owners out of possession to assert their right to possession.⁷ No doubt its proper sphere was the recovery of a possession which had formerly belonged to the plaintiff. But if it could be generally used to assert a right to possession, why limit it to the case where the person having such right had formerly been in possession? It was, however, inevitable that this extension of the scope of the action of detinue should react on the action of debt. At this period the theory had been developed that the receipt of any substantial benefit—*quid pro quo*—would support an action of debt against the recipient by the person who conferred that benefit. As a general rule it is only performance by the plaintiff which will amount to a sufficient *quid*

¹ Above 354 n. 1.

² Y.B. 50 Ed. III. Trin. pl. 8, debt for four quarters of corn due as rent—"bref de detinue ne puis jeo aver en le cas, pur ceo que jeo n'ava unques propertie en mesmes les biens devant, et puis le bref fuit agard bon;" cp. Y.B.B. 3, 4 Ed. II. (S.S.) 26; 7 Hy. IV. Pasch. pl. 10.

³ Y.B. 21 Ed. III. Hil. pl. 2.

⁴ Y.B.B. 37 Hy. VI. Mich. pl. 18 (p. 9) *per* Moile; 12 Ed. IV. Pasch. pl. 22 (*per* Brian).

⁵ Y.B. 20 Hy. VI. Trin. pl. 4, *Fortescue* (*arguendo*) says, "Sir, jeo veux prouver que si jeo achete un cheval de vous, maintenant le propertie del cheval est a moy, et pur ceo vous aurez breve de Deute pour les deniers, et j'aurai Detinue pour le cheval sur cest bargain;" cp. Y.B.B. 37 Hy. VI. Mich. pl. 18; 17 Ed. IV. Pasch. pl. 2; 49 Hy. VI. Mich. pl. 23.

⁶ "Mes quant a ce que *Laicon* ad dit que si jeo baille certains biens ou chattels a bailler a un J. que le property est or en J. et nemy en moy, et que J. aura action de ce, et nemy moy; ce n'est pas issint: car il est chargeable a nous ambideux; car s'il ne livre les biens a J. jeo puisse avoir action et J. puit avoir action, mes l'un action sera fin de tout," Y.B. 39 Hy. VI. Hil. pl. 7, *per* Prisot, C.J.

⁷ Above 351.

pro quo; but it is clear that a right to sue in detinue is almost as substantial a benefit as performance; and therefore a contract to sell which conferred such a right would be a *quid pro quo* for the right to sue in debt.¹ It is equally clear that this reasoning will not apply to contracts in general, but only to a contract of sale. If I agreed with a carpenter to build me a house for £20, no right of action accrued to me during this period by the mere fact of the agreement.² There was therefore no *quid pro quo* for my promise to pay till the house was built. Inasmuch as there was no right of action recognized by the common law for unliquidated damages for breach of an executory agreement, the making of such a contract could be no *quid pro quo* for an action of debt. As there was a right of action for failure to deliver a specific chattel, based on the right to possession thereby given, the making of such a contract was a sufficient *quid pro quo* for an action of debt.

This being the case, it is not difficult to see how the idea arose that the property passes upon an agreement to sell a specific chattel. If A agrees to sell B his horse for £10, A can bring debt for the money, because he has a right to it by virtue of B's grant. B can bring detinue for the horse because he has a right to the possession by virtue of A's grant. As we have seen, this right to possession is very often called "property" in the Year Books.³ When improved remedies made this right to possession more easily enforceable it took upon itself more of the characteristics of ownership. It was natural to think of the rights of any one who had a right to possess enforceable by the action of detinue as property. If, therefore, a contract of sale were made which gave the purchaser the right to bring detinue for the thing sold, it was easy to say that he had the property as the result of the sale.⁴ It is clear that this reasoning will not apply to sales of

¹ H.L.R. xi 259, "The right of the buyer to maintain detinue and the corresponding right of the seller to sue in debt were not conceived of by the mediæval lawyers as resulting from mutual promises, but as resulting from reciprocal grants—each party's grant of a right being the *quid pro quo* for the corresponding duty of the other;" Y.B. 49 Hy. VI. Mich. pl. 23 *per* Choke; and cp. Plowden, Comm. at p. 11, where it is said that, "An action of debt for the duty . . . is taken to be of the same effect as a satisfaction indeed and shall countervail a satisfaction;" see below 421-423 for *quid pro quo*.

² Y.B. 37 Hy. VI. Mich. pl. 18 *Prisot*, C.J., says, "On poet avoir action de Dehte sur retention ove un home estre de son conseil, et que j'aurai xls. per an; uncore j'aurai bon accion sur cest contract; mes en cest cas covient a moy declarer en mon count que jeo suis ove luy, ou autrement voile luy consaillier, s'il le voile avoir demande." We may note, too, that to succeed in debt the price must have been fixed, Y.B. 12 Ed. IV. Pasch. pl. 22 (p. 9) *per* Brian, C.J.; below 423.

³ Above 331.

⁴ Cp. Blackstone's words (Comm. ii 448), "As soon as the bargain is struck the property of the goods is transferred to the vendee, and that of the price to the vendor;" as Sir F. Pollock says, L.Q.R. ix 283, 284, this is only intelligible if we interpret property to mean the right to get possession which can be enforced by the appropriate action; it should be noted however that no property would pass by the

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chattels which are not specific, as detinue would not lie in such a case.¹ Therefore although an "executed contract of sale" will pass the property in the goods, an "executory contract of sale" will not. It is clear too that this reasoning does not apply to the case of a sale of land. Till livery of seisin has been made no real right to the land passes.² The intenser ownership of land protected by the real actions made the line between the personal right against a vendor to get seisin of the land, and the actual obtaining of seisin, far more clear than it could be in the case of a chattel. In the case of a chattel a contract of sale gave a right to possession which was asserted by the same form of action as the right of an owner out of possession to get possession was asserted. In the case of land the personal action which lay against a vendor, and the real actions which lay against a disseisor, were wholly different.

It is probable that the second exception—the gift by deed—was introduced in the course of the fifteenth century. In 1468 the reporter notes, as if it were new law, the fact that Choke and the other judges had held that such a gift could be made by deed without delivery, and that it could only be avoided if the donee disclaimed it in a court of record.³ It is possible that causes similar to those which gave rise to the first exception gave rise also to this. It is well known that if A promises B by deed a sum of money B can sue by the action of debt.⁴ There seems to be no reason why B should not sue A by action of detinue if A promised him by deed a specific chattel.⁵ If this is the case, the

agreement if payment and delivery were to be simultaneous, Y.B. 17 Ed. IV. Pasch. pl. 2 (p. 2) *per* Littleton, and even if the property passed, no delivery need be made till payment, *ibid.*, *per* Brian, C.J.

¹ "A man bought twenty quarters of barley to be delivered at a certain place on a certain day; the vendor did not perform his contract, by which the vendee was driven to buy barley for his business, being a brewer, at a much greater price; the vendee upon this matter was permitted to bring an action upon the case, and adjudged maintainable: and so he might well have had an action of debt for barley, but not detinue, for the property of the barley could not be known, for one quarter cannot be known from another quarter," *Core's Case* (1537) Dyer at f. 22b.

² In Y.B. 20 Hy. VI. Trin. pl. 4; 22 Hy. VI. Hil. pl. 29; 37 Hy. VI. Mich. pl. 18, *Prisot* and *Newton*, C.J.J., held that though no right to the possession of the land passed, yet debt lay for the price; as Ames says, *Lectures on Legal History* 140 n. 3, this was "an idiosyncrasy of these three judges. . . . There was no *quid pro quo* to create a debt;" and so the law is laid down, Y.B. 12 Hy. IV. Hil. pl. 13; as we shall see (below 438) the view taken by these judges can be explained by the history of the development of the action of assumpsit.

³ Y.B. 7 Ed. IV. Mich. pl. 21; *cp.* L.Q.R. VI. 448.

⁴ Bl. Comm. ii 442, "Where A contracts with B to pay him £100 and thereby transfers property in such sum to B, etc.;" *cp.* L.Q.R. ix 283.

⁵ In Y.B. 22 Hy. VI. Hil. pl. 33 (p. 46), it is said that if A bails goods by deed to B, to be rebailed to him, A, detinue lies; in Y.B. 39 Hy. VI. Mich. pl. 46, *Prisot*, C.J. says, "Si jeo baille biens per fait indente et puis porte bref de detinue pour ceux jeo ne count sur le fait indente pur ce que n'est que chose testmoinant le baillement . . . *ad quod omnes justitiiarii concesserunt*;" I have found no distinct

same reasoning which applies to the case of sale will apply to a deed promising to give. *Dockeray's Case* (1536) would seem to show that this reasoning was so applied. It was said in argument in that case, and not contradicted, that a "covenant relating to a personal thing can alter the possession of that thing. As if I covenant with you that if you pay me £20 you shall have all my cattle within the manor of Dale, if you pay the £20 on such a day, then you can take all my cattle within the said manor, and on payment there is a perfect contract. . . . And the law is the same if I bargain with you for money."¹ But, as a matter of fact, as this case recognizes, a deed has a double aspect. It may operate either as a contract or a conveyance; and this double aspect has always been one of its characteristics.² In the Middle Ages it is something between a conveyance and a contract. It is the grant of a liability to pay or do conclusively evidenced by the sealed writing—just as the receipt of money or chattels from another was evidence of a grant by the recipient that he was liable to pay a certain sum which could be recovered by action of debt.³ At the end of the period both the contractual and the conveying powers of the deed became more clearly distinct. The deed became the only mode of making an executory contract.⁴ On the other hand, it was being recognized that a deed could both convey a chattel and create or transfer an incorporeal hereditament.⁵ No doubt the rule that a promise under seal to convey goods passed the property was helped by this double aspect, which from the first had been characteristic of the writing under seal.

The recognition of these two exceptional cases, in which property could be conveyed without delivery, no doubt helped to develop the idea that ownership is a right which can be distinguished from the fact of physical control.⁶ But there is no

authority for the proposition in the text, but it seems logically to follow from the law laid down in the case of sale, and from the law laid down in the case of a bailment to rebail to a third person, Y.B. 39 Hy. VI. Hil. pl. 7 *per* Prisot, above 355 n. 6.

¹ Y.B. 27 Hy. VIII. Trin. pl. 6 (p. 16) *per* Deinsbil, *arg.*; Brooke, Ab. *Propertie* pl. 2.

² P. and M. ii 215, 216.

³ Y.B. 39 Hy. VI. Mich. pl. 46.

⁴ Below 420.

⁵ Vol. ii 580; above 98-99.

⁶ Perhaps this is illustrated by a dictum of Fineux and Tremayle, C.J., who said, Y.B. 21 Hy. VII. Mich. pl. 49, "Si jeo baille les biens a un home, et il eux don a un estranger ou vend: si l'estranger eux prend sans livre, il est trespassor, et jeo aurai bref de trespass vers luy: car per le don ou vend le properte ne fuit change mes (per) le prisel: mes s'il fait delivere d'eux al vendee ou donee, donque jeo n'aurai bref de trespass;" these two judges could hardly have been ignorant of the fact that a sale passes the property, nor could they have intended to hold that if I (the owner) by word give goods to X, I can sue X if he takes in pursuance of my gift, provided that the gift stands unrevoked; clearly they intended to hold that a mere sale by a non-owner cannot pass the property, though a delivery by a non-owner passes the possession. Thus the dictum shows that, in one case at least, this rule did emphasize the distinction between ownership and possession.

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doubt that the strongest influence making for this recognition must be looked for, not in these two exceptional rules, but in those modifications of the personal actions which gave increased powers to dispossessed owners.¹ And here again we can see a similarity between the law as to chattels and the land law; for just as the right of a disseised owner to get seisin was developed by modifications in the real actions,² so the position of the dispossessed owner was improved by gradual modifications in some of the personal actions. Thus, as I said at the outset, the historical development of the law relating to the possession of chattels is parallel to the historical development of the law relating to the seisin of land. Possession is *prima facie* evidence of ownership. The possessor has, as against third persons, all the rights of an owner; but the right of the true owner to possession is better protected. The man with the better right to possession has "the property." This better right to possession is the only form of "property" either of lands or chattels recognized by the common law.

Everywhere we can trace the leading doctrines and the fundamental distinctions of the common law to differences between the classes of actions and to epochs in the history of some one class of actions. The differences between the classes of actions mark out the main divisions of the law. The epochs in the history of each class leave their traces in substantive rules which may be justified but hardly explained upon strictly analytical principles. They can usually be justified because, owing to the manner in which the forms of action were moulded under the pressure of the constantly shifting demands of human society, there either is or has been some obvious need behind them which they have been formed to satisfy. They cannot be explained unless we watch the mode in which these ever-shifting social, business, and political demands of successive generations instruct the lawyers to make and improve, and again to improve and remake, the technical machinery which will satisfy them. The history of this process shows us how the lawyers of past ages have made laws fit to rule a changing society, and how those laws have sometimes reacted upon the society, the needs of which have been the primary cause of the shape which the lawyers have given to them. In the following period we shall see that the same processes centering round the actions of *trover* and *ejectment*, instead of round these mediæval personal and real actions, have built up our modern law of ownership and possession.

¹ Above 327, 348-351.

² Above 92-93.

The offence of treason was not yet, as I have said, clearly distinguished from felony. In later law it will always be a felony—and something more. At this period it seems to be regarded simply as an aggravated kind of felony. We have seen that the term “felony” was applied abroad to offences which involved a breach of the vassal’s obligation. A breach of the obligation of allegiance to the king will in later law be the essence of treason. Under the influence of Roman law, forgery of the king’s money and his seal was included. But the attempts on the part of the king to extend the law of treason, the distinctions drawn between treason and simple felony, and the settlement of the boundaries of treason by statute, belong to the following century.¹

Though there is nothing as yet answering to the misdemeanour of our modern law, we can see some of the causes which will lead to its growth. We have seen that the procedure by way of indictment was growing, while that by way of appeal was decaying.² The technical nicety required in pleading,³ the possibility of trial by battle,⁴ the hostility of judges to a form of procedure which was often used simply from hatred and malice, were the causes of this decay.⁵ The chances of success were doubtful; and if the appellee were found to be innocent there was the certainty of amercement and imprisonment.⁶ But a system of criminal law must rest to some extent upon the natural desire of mankind to avenge a wrong. If justice is to be done the law must, as we have seen, provide some procedure which will enable the injured person to come forward and obtain a remedy for himself.⁷ Up to this period the old appeals had supplied this need. But at the end of the thirteenth century the action of trespass provided a new and efficient substitute for them. The procedure by way of appeal was therefore attacked, so to speak, on two sides—by the indictment on the one side and by the action of trespass on the other. It is not surprising to find that

¹ Below 449-450; vol. iii 287-293.

² Above 256-257.

³ See e.g. R.P. i. 122, the appellees get judgment because, “Certa sunt verba in Curia Domini Regis statuta per quæ fieri debent appella, et per quæ appellator prosequi debet et narrare in appello suo; et prædicta Agnes (the appellor) nihil narrat versus eos.” Cp. Eyre of Kent (S.S.) 101-102.

⁴ Britton i 123.

⁵ Above 256-257; and they took the same view in the fifteenth century, see Plumptre Corr. (C.S.) 35.

⁶ 13 Edward I. st. 1 c. 12.

⁷ Above 257; it was still the common practice, if the appeal were quashed, to arraign the appellee at the king’s suit, *ibid*; R.P. i. 122; Y.B.B. 30, 31 Ed. I. (R.S.) 520; 18, 19 Ed. III. (R.S.) 50; Eyre of Kent (S.S.) i 111, 118; the same thing happened if the appellor abandoned his suit, Y.B.B. 20, 21 Ed. I. (R.S.) 396; 30, 31 Ed. I. (R.S.) 496; Eyre of Kent (S.S.) i 106. The need to encourage the injured person to come forward was also met by the growth of the criminal information to the Council; and this later influenced the criminal procedure of the common law; see Select Cases before the Council (S.S.) xxxvi-xxxvii.

and fifteenth centuries, starting with this definition, interpreted it in such a way that it fitted in both with the theory of possession which I have just described,¹ and with the English division into land and other property which could be recovered in a real action, and property which was not land and could not be recovered in a real action.² To a certain extent also they were influenced by older rules which drew distinctions based upon the idea that the thing stolen must be property of some value, and upon the idea that the gravity of the crime depended on the value of the property stolen. In describing larceny, therefore, we must consider (1) the elements due to the common law theory of possession; (2) the question of the value of the thing stolen; and (3) the things which cannot be the subject of larceny.

(1) *Larceny and the theory of possession.*

Fraudulent dealing—"contrectatio"—is a vague term and covered many things in Roman law.³ In English law it is narrowed down to the case where there has been an actual physical change of possession effected by the act of the thief without the consent of the person entitled to the goods.⁴ This change of possession has from the earliest times been essential to larceny;⁵ so that there can be no larceny where there is no trespass. A wife cannot steal her husband's goods, for a taking by her works no change in the possession; they remain in the husband's possession as before.⁶ In addition there must be an asportation—a carrying away; but from the time of the Year Books a very slight removal sufficed. Thus when a man stayed in another's house, got up early, took the sheets from the bedroom to the hall intending to steal them, went to the stable to get his horse, and was caught by the ostler, he was held to be guilty of larceny.⁷

Bracton, as we have seen, laid stress on the *animus furandi*;⁸ but we have seen that appeals of larceny were often brought against innocent people.⁹ However, when larceny became a felony to be prosecuted by indictment, and when the mental element in felony came to be regarded as its distinguishing characteristic, felonious taking was distinguished from other unlawful taking by reference to the intention of the taker.¹⁰

¹ Above 351-354.

² Vol. ii 261-262.

³ Moyle, *Justinian notes to Instit.* 4. 1. 1.

⁴ Hale, *P.C.* i 504 seqq.; Kenny, *Criminal Law* 182, 183; as to larceny by a finder see the *Eyre of Kent* (S.S.) i 81, 146.

⁵ Britton i 115.

⁶ Fitz., *Ab. Corone* pl. 455; below 526-527.

⁷ 27 Ass. pl. 39.

⁸ Vol. ii 359.

⁹ Above 320; cp. *Y.B.* 21, 22 Ed. I. (R.S.) 106.

¹⁰ *Y.B.* 13 Ed. IV. Pasch. pl. 5 *per* Hussey, the King's Attorney, "Felony is to claim feloniously the property without cause, to the intent to defraud him in

Definite rules as to various circumstances under which this intent may be held to exist have been and still are being worked out as concrete cases arise for decision. It was settled during this period that the intent must be to deprive the person out of whose possession the things are taken of the benefit of that possession. We have seen that possession and property are not accurately distinguished in earlier law. The possessor is *prima facie* the owner, and is treated as such till another can prove a better right to possession.¹ Hence, a bailee, from whose possession goods had been taken feloniously, could prosecute any one, even the bailor,² unless probably the bailment was determinable at the bailor's will.³ Seeing that the essence of the offence is the taking, English law does not require that the thief should have intended to profit by the things stolen. Bracton omits this element from the Roman definition; and it has probably never been part of English law.⁴

It follows from these principles that the scope of larceny in English Law was far too narrow to be an adequate protection to owners of chattels. (i) Seeing that a trespassory taking was required, the offence could not be committed by any one who came to the possession of the goods with the consent of the owner,⁵ or with the consent of the bailee if they were bailed.⁶ It is only by statute that appropriation by a bailee is larceny.⁷ (ii) For the same reason, if the owner really consented to part with his entire property in the thing, no offence was committed, even though that consent had been obtained by fraud.⁸ It was only if the fraud was carried out by means injurious to the public generally that the misdemeanour of cheating was committed.⁹ Hence the necessity for creating the offence of obtaining goods

whom the property is, *animo furandi*." *The Chancellor*, "Felony is according to the intent." *Molineux*, "A matter lawfully done may be called felony or trespass according to the intent." The translation is from Pollock and Wright, *Possession* 134, 135.

¹ Above 352-353.

² Y.B. 7 Hy. VI. Trin. pl. 18, "Et fuit dit que si jeo vous baille certains biens a gard et puis jeo eux reprend felonisement, jeo serai pendu, et uncore le proprietie en moy. Et Norton dixit que il fuit ley;" cp. Y.B. 13 Ed. IV. Pasch. pl. 5 *per* Nedham, J.

³ Pollock and Wright, *Possession* 165.

⁴ Stephen, H.C.L. iii 132.

⁵ Y.B. 13 Ed. IV. Pasch. pl. 5; cp. Pollock and Wright, *Possession* 131, 132.

⁶ Y.B. 16 Hy. VII. Mich. pl. 7; 21 Hy. VII. Mich. pl. 49. If a third person takes goods from a bailee the bailor can sue in trespass, and, of course, larceny has been committed, see Pollock and Wright, *op. cit.* 169, 170.

⁷ 21 Henry VIII. c. 7 (if the bailee was a servant); 20, 21 Victoria c. 54 § 17 (bailees generally).

⁸ Pollock and Wright, *op. cit.* 218-220; the distinction between this case and the cases where there has really been no consent to pass the entire property (larceny by a trick) is later than this period.

⁹ Stephen, H.C.L. iii 161.

by false pretences.¹ (iii) The person in possession had, as we have seen, the rights of an owner; hence if a thief passed the goods to a third person, that third person, having got the goods by a delivery, even though he knew that they had been stolen, had not committed larceny,² but only a misdemeanour.³ For this reason it was necessary to create the felony of receiving stolen goods knowing them to have been stolen.⁴ Even in this period the inadequacy of larceny, as thus deduced from the principles of the law of possession, must have been apparent. But the lawyers of this period were above all logical; and it was only in two respects that they mitigated the severity of their logic in order to give a more ample protection to property.

(a) It was during this period that the modern distinction between the bailee who has possession and who therefore cannot commit larceny, and the servant who has no possession and who therefore can commit larceny, was growing up. The growth of the distinction was gradual. During the thirteenth and earlier part of the fourteenth century all kinds of dependants brought the appeals of larceny or robbery if chattels were taken from their custody. In 1194 an appeal was brought by the "serviens" of a lord;⁵ Bracton states in one passage that it does not matter whether the stolen thing was the property of the appellor or not, provided that it was taken from his custody;⁶ and in 1344-1345 Huse said,⁷ *arguendo*, "A writ of trespass and a writ of appeal are given to him to whom property belongs, and also to one out of whose possession the goods are taken, because both servant and master will have an appeal in respect of the same felony."

It is clear that the modern distinction was unknown to Bracton; and it is hardly possible that it should have occurred to him. His Roman authorities attributed possession neither to bailees nor to servants; and, as we have seen, he could find in the rules as to who could bring the *actio furti*, which he identified with the appeal of larceny, a sufficient explanation of their

¹ 30 George II. c. 24 § 1; 7, 8 George IV. c. 29 § 53.

² Y.B.B. 21 Ed. IV. Hil. pl. 6; 16 Hy. VII. Mich. pl. 7. It would seem, too, that if A stole X's goods, and B then stole them from A, X, though he might *appeal* B of theft, could not sue him for trespass, Y.B. 21 Ed. IV. Hil. pl. 6; Pollock and Wright 155-157; above 323; though it was otherwise if B stole from X's bailee, above 348, 358 n. 6.

³ Hale, P.C. i 620.

⁴ 5 Anne c. 31; 7, 8 George IV. c. 29 § 54; cp. Stephen, H.C.L. ii 238.

⁵ Rot. Cur. Reg. 53, cited H.L.R. xxix 509 n. 68; it should be noted that the term there used is "serviens" which may denote a servant or a tenant by serjeanty—perhaps at this date this would have been a distinction without a difference, above 46.

⁶ "Et non refert utrum res, quæ ita subtracta fuit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua," f. 151a.

⁷ Y.B. 18, 19 Ed. III. (R.S.) 508.

right to bring their appeals against a thief. Their right to sue depended, he considered, in English as in Roman law, upon the fact that they were accountable to the owner.¹ We have seen that he emphasized this fact, and made their right to sue depend upon it.² It is not, I think, improbable that it is in this condition of accountability, upon which the right to sue is founded, that we can find the germ of the distinction between the servant and the bailee. At any rate it indicates the line upon which the separation gradually proceeded; for it roughly differentiates the mere servant from those whose powers and discretion are greater.³ The principle that the bailee had possession was too firmly rooted in the common law to be got rid of. But it was obviously inconvenient to attribute possession to mere servants who would be very unlikely to be able to indemnify the owner if they abused the large powers which possession conferred. Besides they might well be villeins;⁴ and technical difficulties stood in the way of allowing them to sue as if they were owners.⁵ And so, as Stephen says, "the distinction between a charge and a possession readily suggested itself."⁶ But it took some time to harden into a technical rule. It was hinted at in 1339;⁷ but, as we have seen, it seems to be ignored in 1344-1345.⁸ It was stated clearly enough in 1474, and extended to the case of a person allowed to use a thing by the mere licence of the owner, such as the guest at a tavern;⁹ but in 1488 Brian and the other judges seem to deny it.¹⁰ It was, however, finally established, in 1506;¹¹ and the law as thus established was summed up and passed on into modern law by Coke.¹² In modern law the

¹ Above 340-341.

² Above 340 n. 7.

³ See below 365 n. 6.

⁴ As to the incapacity of villeins see below 491-500.

⁵ Above 337 n. 3.

⁶ H.C.L. iii 151.

⁷ 12 Ass. pl. 32.

⁸ Above 363.

⁹ Y.B.B. 49 Hy. VI. Mich. pl. 9; 13 Ed. IV. Pasch. pl. 5. "If a taverner serve a man with a piece, and he take it away, it is felony, for he had not possession of this piece; for it was put on the table but to serve him to drink: and so it is of my butler or cook in my house; they are but ministers to serve me, and if they carry it away it is felony, for they had not possession, but the possession was all the while in me; but otherwise peradventure if it were bailed to the servants, so that they are in possession of it."

¹⁰ Y.B. 3 Hy. VII. Mich. pl. 9.

¹¹ Y.B. 21 Hy. VII. Hil. pl. 21; translated by Kenny, *Select Cases on Criminal Law* 216.

¹² "Also there is a diversity between a possession and a charge, for when I deliver goods to a man he hath the possession of the goods, and may have an action of trespass or an appeal, if they be taken or stolen out of his possession. But my butler or cook that in my house hath charge of my vessel or plate hath no possession of them, nor shall have an action of trespass or appeal, as the bailee shall; and therefore if they steal the plate or vessel, it is larceny. And so it is of a shepherd. . . . If a taverner set a piece of plate before a man to drink in, and he carry it away, etc., this is larceny; for it is no bailment but a special use to a special purpose." Third Instit. 108.

principle is applied to all licencees. None of them have possession;¹ and therefore all of them can commit larceny of the goods which they are allowed to use.

None of these exceptional cases covered very much ground. The most important is the case of the servant; and, at first, this exception was, as we might expect from the manner in which it originated, very narrowly construed. It was said in the Year Book of 1506 that it only applied if the servant was on his master's premises, or while he was accompanying him.² This was recognized to be law by the framers of the statute of 1529, which was passed to extend this exception. That statute enacted that if a person delivered goods above the value of 40s. to his servant to keep or to carry for him, and the servant took them *animo furandi*, he should be guilty of felony.³ Hence we get the modern rule that a servant can commit larceny of his master's goods entrusted to his custody, not only if he is on his master's premises or accompanying him, but also if the goods have been delivered to him by his master to keep, or even to use, or to carry to a third person, in the course of his employment as servant.⁴

Even as thus extended the exception did not apply if the master transferred the property to the servant for a special purpose,⁵ or presumably if he specifically bailed the possession to him;⁶ and what was perhaps more important, it did not apply if goods were given by a third person to a servant to give to his master.⁷ This latter defect was not remedied till the statutory offence of embezzlement was created.⁸

¹ *Reeves v. Capper* (1838) 6 Bing. N.C. 136.

² "Tantost que il est in ma meason, ou ove moy, ce que j'ay deliver a luy est auge in ma possession; comme mon butler que ad mon plate en gard, si il fuye ove ce, il est felony: meme le Ley si cestuy que gard mon cheval va: et la case est, ils sont tous fois in ma possession: mes si jeo deliver un cheval a mon servant de chevaucher a la marche, et il fuye ove luy, il n'est felony, car il vient loialment a le cheval par delivery. Et issint est, si jeo done a luy une bague de carier a Londres; ou de payer a ascun, ou de emer ascun chose, et il fuye ove ce, il n'est felony; car il est hors de ma possession, et il vient loialment a ce," Y.B. 21 Hy. VII. Hil. pl. 21; cp. Y.B. 49 Hy. VI. Mich. pl. 10 *per* Billing. (See *Addenda* p. xlviii).

³ 21 Henry VIII. c. 7; Coke, Third Instit. 105; Hale, P.C. i 505.

⁴ Pollock and Wright, Possession 138.

⁵ *Ibid.*, and authorities cited in n. 6.

⁶ See Y.B. 13 Ed. IV. Pasch. pl. 5 cited above 364 n. 9; Pollock and Wright, Possession 138-139; it would seem that even in modern law the extent of the authority given to the servant may make his "charge" very like a true possession—"It may be that it will sometimes as against strangers be treated as a possession in cases when the servant's charge is to be executed at a distance from the master and when the manner of the execution is necessarily left to the discretion of the servant," *ibid.* 139-140; so that there was good sense in the line drawn in the Y.B., but the exigency of the statute 21 Henry VIII. c. 7 has caused the line to be drawn at a somewhat different place.

⁷ *Dyer* 5a; Coke, Third Instit. 105; Stephen, H.C.L. iii 152, 153.

⁸ 39 George III. c. 85.

(b) The second exception to strict principle is to be found in the famous case of the carrier who broke bulk.¹ It was decided in that case that "a bailee of a package or bulk might, by taking things out of the package or breaking the bulk, so far alter the thing in point of law that it becomes no longer the same thing—the same package or bulk—which he received, and thereupon his possession was held to become trespassory. If a carrier fraudulently sold the whole tun of wine unbroken he committed no crime; if he drew a pint it was felony; per Choke, J."² That this was a departure from principle is obvious. As Brian put it, "Where he has the possession from the party by a bailing and delivery lawfully it cannot after be called felony nor trespass, for no felony can be but with violence and vi et armis, and what he himself has he cannot take vi et armis nor against the peace; therefore it cannot be felony nor trespass, for he may not have any other action of these goods but action of detinue." The goods in question belonged to a merchant stranger; and the judges, perhaps to please the king, who might otherwise have been involved in diplomatic difficulties,³ "reported to the chancellor in council that the opinion of most of them was that it was felony." The face of the strict doctrine was saved by adopting the distinction suggested by Choke between breaking bulk and taking the whole of the goods without breaking bulk.

(2) *The value of the thing stolen.*

Many systems of law distinguish between the larceny of large things and the larceny of small, and between manifest and non-manifest theft.⁴ "In England both an old English and an old Frankish tradition may have conspired to draw the line between 'grand' and 'petty larceny' at twelve pence."⁵ Grand larceny, as we have seen, became a felony, and therefore punishable with death. Petty larceny, not being a true felony,⁶ was only punishable by whipping or the pillory. The fact that

¹ Y.B. 13 Ed. IV. Pasch. pl. 5; a translation of this case will be found in Pollock and Wright, *Possession* 134-137.

² Ibid 133.

³ Stephen, H.C.L. iii 139, 140.

⁴ As Maitland has shown (P. and M. ii 494 n. 1) the distinction between the thief caught in the act and the thief afterwards discovered was known to English law before and after the Conquest. It is substantially the same distinction as that marked in Roman law by the terms *manifestus* and *ne manifestus*.

⁵ P. and M. ii 494; cp. vol. ii 48; 3 Edward I. c. 15 § 4, those indicted for larceny below the value of twelve pence are bailable; Y.B. 30, 31 Ed. I. (R.S.) 537; in Y.B. 30, 31 Ed. I. (R.S.) 533 previous larcenies were allowed to be proved to make up the amount, and this view is taken in the Eyre of Kent (S.S.) i 82; but these decisions were not followed, Y.B. 11, 12 Ed. III. (R.S.) 532.

⁶ As Hale points out, P.C. i 530, the offence had some of the marks of felony; the indictment ran *felonice*, and on conviction the offender lost his goods.

grand larceny came to be a felony and therefore punishable with death is probably the reason why the distinction between manifest and non-manifest theft disappeared. Both were punished in the same way. The only difference was the mode of trial. The manifest thief was, as we have seen, put to death in summary fashion,¹ the non-manifest thief after a regular trial before the royal judges. Grand and petty larceny therefore remained as the only division between larcenies in the common law till 1827.²

The question what was the value of the goods stolen was a matter of fact for the jury. Already in Edward III.'s reign juries were beginning to use their power to save petty thieves from the gallows by depreciating the value of the stolen property. "One was arraigned for that he had stolen two sheep value twenty pence, and the jury found him guilty but they said that the sheep were only worth ten pence; wherefore he was remanded to prison as a punishment, and he will be liberated at the next session."³

This distinction between grand and petty larceny may show us that the law has always required that the things taken shall have some value. This in fact is a necessary requirement. "Otherwise it would be a crime to dip your pen in another man's inkstand, or to pick up a stone in his garden to throw at a bird."⁴ Thus this consideration of value has not only caused the division of larceny into two species, it has also had some bearing on the question as to the things which can and the things which cannot be the subject of larceny.

(3) *Things not the subject of larceny.*

We find in the books a heterogeneous list of things which cannot be stolen;⁵ and the comprehensiveness of the list has necessitated the passing of many statutes in order to fill up the many lacunæ thus appearing in the criminal law. Three main principles have been at work in the formation of this list. The first is based upon the idea of larceny as consisting of taking and carrying away. The second is based upon the idea that there can be no larceny of things which are not property because of no value. The third is based upon the idea that the stolen thing must have an owner. By virtue of the first principle, land and things annexed to land were not the subject of larceny. A man who cut and took away

¹ Above 319-320; below 608; P. and M. ii 495. ² 7, 8 George IV. c. 29 § 2.

³ Fitz., Ab. *Corone* pl. 451 (1368); see also 18 Ass. pl. 14.

⁴ Macaulay, Indian Penal Code n. N, cited Kenny, Criminal Law 200.

⁵ See Pollock and Wright 230-236; Stephen, H.C.L. iii 142-144; Hale, P.C. i 510-512.

trees did not commit larceny; though it would be otherwise if he had carried off trees already cut.¹ By virtue of the second principle it was held that such things as animals *feræ naturæ* could not be stolen if they were useful neither for food nor domestic purposes.² By virtue of the third principle animals *feræ naturæ*, unless confined, were again excluded;³ and also such things as waif, wreck, or treasure trove.⁴ But these principles were extended, not always very logically, owing perhaps to a feeling against capital punishment. They were not easy to keep apart; and it was possible to exclude the same thing on several grounds. Thus title deeds to land might be excluded, either because they were annexed to land, or because, being merely evidences of a right of entry or action, they were choses in action of no value. That they were excluded was settled at the end of this period;⁵ and this exclusion was the foundation for the exclusion of all other choses in action⁶—a decision which involved, as Stephen points out, the absurd conclusion that a banknote cannot be stolen.⁷

Robbery.

Robbery is larceny aggravated by violence. It has been a felony certainly since the reign of Henry II.⁸ Hale⁹ defines it as "the felonious and violent taking away of any money or goods from the person of another, putting him in fear." Thus where two took hold of a man and made him swear on pain of death to bring them £1,000, it was adjudged to be robbery.¹⁰ That the value of the property taken was immaterial was decided as early as Edward III.'s reign.¹¹

¹ Y.B. 11, 12 Ed. III. (R.S.) 640.

² Y.B. 12 Hy. VIII. Trin. pl. 3, *Eliot* argued that things that are only useful for pleasure cannot be stolen, "Car une Dame qui ad un petit chien ne veut vendre ceo pur grand somme d'argent, et si un prend ceo, il n'est raison que elle aura action vers luy pur le plaisir que elle avoit en luy;" this view was pushed to an extreme by Hales, J., in Edward VI.'s reign, who ruled that it was no felony to take a precious stone, Stephen, H.C.L. iii 143.

³ Y.B. 12 Hy. VIII. Trin. pl. 3, *Brudnel* said, "Pur ceo que tiels choses sont *feræ naturæ* et bestes sauvages jeo n'aurai appel de felony, pur ceo que jeo n'ay ascun propriete in eux, car nul poit dire *feras suas*;" 22 Ass. pl. 95 it was admitted that the law was otherwise if they were kept in confinement; for a modern application of this principle see *R. v. Townley* (1870) 1 C.C.R. 315.

⁴ 22 Ass. pl. 99.

⁵ Y.B. 49 Hy. VI. Mich. pl. 9, *Choke*, "Il semble que il n'est felony pour deux causes, l'un ils sont issint reals que il ne puit estre felony. . . . Auter cause est pour ce que ils ne poient estre values."

⁶ "Un obligation n'est valuable mes un chose in action," *Dyer* 5b (1533).

⁷ Stephen, H.C.L. iii 144; *Cayle's Case* (1584) 8 Co. Rep. 32a. For the statutory modifications of these rules see Stephen, *op. cit.* 147-149—as he points out, a statute was passed as early as 1429 (8 Henry VI. c. 12 § 3) to make the stealing of records felony.

⁸ P. and M. ii 492, 493.

⁹ P.C. i 532.

¹⁰ Y.B. 44 Ed. III. Pasch. pl. 32.

¹¹ Y.B. 13, 14 Ed. III. (R.S.) 352 = Fitz., Ab. *Corone* pl. 115.

Burglary.

It is probable that the nature of the crime which the common law knows as burglary was not completely determined in this period. According to Coke, "A burglar is a felon that in the night breaketh and entreth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not."¹ The Anglo-Saxons knew the crime of *hamsoken* or breaking into a house;² and Britton³ tells us that those who feloniously break churches, houses, or the walls and gates of cities are burglars. But neither in Britton's definition, nor in the cases cited in Fitzherbert's Abridgment,⁴ is the time of the commission of the crime an element in it. There was no doubt a disposition in some cases to regard certain crimes committed at night as more serious than if they were committed by day; and, as Maitland remarks, Bracton speaks of the crime of *hamsoken* in close connection with the *fur nocturnus*.⁵ But probably the rule that burglary can only be committed at night is not much older than the sixteenth century. For the appearance of the word "*noctanter*" in the indictment Coke can cite no earlier authority than a case of Edward VI.'s reign;⁶ and Staunford cites no authority at all—merely saying that for all that appears in the older authorities the crime might as well be committed by day as by night, but that the law is not so now.⁷ As a matter of fact, certain cases of breaking into or robbing in dwelling-houses, whether by day or night, had been made felonies by statutes of Henry VIII., Edward VI., Mary, and Elizabeth's reigns;⁸ and this may have led to the restriction of the common law felony. The result was that housebreaking in the daytime, unless it fell within some one of these statutes, sank to the level of a misdemeanour.

That the intent of the breaking and entering must be to commit a felony was settled as early as Henry IV.'s reign.⁹ The questions what can be said to be a house and what will amount to breaking and entering have been elaborated by later decisions.

¹ Third Instit. 63.

² P. and M. ii 491, 492.

³ Britton i 42.

⁴ Fitz., Ab. *Corone* pl. 185 = 22 Ass. pl. 95; 264.

⁵ P. and M. ii 492 n. 2.

⁶ Third Instit. 63, citing Bro., Ab. *Corone* pl. 180 (2 Ed. VI.), and 185 (4 Ed. VI.); the latter entry runs, "Burglarie ne sera adjudge nisi ou le infriendre del meason est per noctem."; (see *Addenda* p. xlviii).

⁷ P.C. i 24, "Et nota que pur aucun chose contenue en ceux livres [the Y.B.B.] burglary peut estre fait auxi bien au jour come au nuit, etc. Mes le ley n'est issint prise, quar tous lenditementes de burglarye sont *quod noctanter fregit*."

⁸ For these statutes see Hale, P.C. i 548.

⁹ Y.B. 13 Hy. IV. Mich. pl. 20 *per* Hankford; Fitz., Ab. *Corone* pl. 229.

Arson.

Arson, like burglary, is a crime against the sanctity of the homestead. It is described by Coke as "a felony at the common law committed by any that maliciously and voluntarily in the day or night burneth the house of another."¹ "House" in this definition is taken more largely than in the definition of burglary. "For the indictment of burglary must say *domum mansionalem*, but so need not the indictment of burning, but *domum*, viz. a barn, malt-house or the like."² From the Anglo-Saxon times arson was regarded as the worst of crimes;³ and as late as John's reign the punishment was death by burning.⁴ But the law on this point changed, and its punishment became the same as that of the other felonies—certainly as early as Edward II.'s reign.⁵ From the first the element of malice was required—Bracton remarks that a fire caused merely negligently gives rise only to a civil action.⁶ The common law crime of arson did not cover much ground. Some part of the building must have been burnt; and the building burnt must belong to, i.e. be occupied by, another, so that if a tenant burnt his house he did not commit arson.⁷ As in other cases the crime has been largely extended by statute.⁸

The narrowness of the crime of arson at common law is the more remarkable when we remember that it was "the only form of injury to property that was recognized by the common law as a crime."⁹ All other kinds of damage to property were treated simply as trespasses. Here, as in the case of offences to the person,¹⁰ the civil aspect of trespass was dwarfing the criminal aspect; and, as I have said before, the wide field which the writs of trespass cover is the best proof of the scantiness of the criminal law. The man who has put a cat into his neighbour's dove-cot,¹¹ or who has extracted wine from his neighbour's casks and filled them with sea water;¹² the man who has removed his neighbour's landmark,¹³ or destroyed his neighbour's sea wall;¹⁴ the man who has laid waste his neighbour's fields,¹⁵ or besieged his house¹⁶—all are sued by an action of trespass. Moreover, the writs of trespass on the case were, as we shall see in the following section, beginning to lay the foundations of our modern law as to civil liability

¹ Third Instit. 66; Hale, P.C. i cap. xlix.

² Third Instit. 67.

³ P. and M. ii 490.

⁴ Gloucester Pleas pl. 216, cited P. and M. ii 490 n. 7; Britton i 41.

⁵ Hale, P.C. i 566, citing H. 7 Ed. II. Coram Rege Rot. 88 Norf.

⁶ Bracton f. 146b; P. and M. ii 491.

⁷ Holmes's Case (1635) Cro. Car. 377.

⁸ The various statutes are now consolidated by 24, 25 Victoria c. 97.

⁹ Kenny, Criminal Law 166.

¹⁰ Above 317-318.

¹¹ Register f. 106.

¹² Ibid f. 95b.

¹³ Ibid f. 107b.

¹⁴ Ibid f. 92b.

¹⁵ Ibid f. 94.

¹⁶ Ibid f. 95.

for wrongdoing, and, as we shall see in the following chapter, our modern law of contract.

§ 8. THE PRINCIPLES OF LIABILITY

In the thirteenth century there are many evidences that the old principles of liability as they existed in the days before the Norman Conquest were still remembered.¹ We have seen that a man who has killed another by misadventure, though he may deserve a pardon, is guilty of a crime; and the same rule applies to one who has killed another in self-defence,² and to one who is a lunatic³ or an infant.⁴ It is only in very exceptional cases that killing is absolutely justified.⁵ A man is still liable for all the harm done by animals while under his control;⁶ and the existence of the deodand testifies to a survival from the time when anything instrumental in doing the wrong was regarded as tainted with guilt.⁷ It is true that a master is not necessarily liable for the wrongful acts of his servants; but we can see traces of the older principles under which he was held to be liable in the rule which made him responsible for the doings of his household or "main-past;"⁸ and in the rule which, as a condition of escaping liability, required him to swear that he had nothing to do with the wrongful act.⁹ Even those who had acted under duress in times of war or rebellion did not escape scot free.¹⁰

All these survivals point to the permanence of the old principles; but the influence of the civil and canon law tended to make them look archaic. Bracton would have liked to rationalize the law by the aid of these more civilized systems.¹¹ But, as we have seen, they ceased to exercise any appreciable influence on the development of English law after the thirteenth century.¹² In working out the principles of liability, as in constructing a law of contract,¹³ English lawyers were thrown back upon themselves, and were obliged to evolve by their own efforts the new principles demanded by an advancing civilization.

I shall deal in this section firstly with criminal, and secondly with civil liability. Though, as I have said, crime and tort are

¹ Vol. ii 50-54.

² Above 312-313.

³ P. and M. ii 478; Fitz., Ab. *Corone* pl. 412 (8 Ed. II.).

⁴ Below 372; cp. Hale, P.C. i 24; the Register f. 309b—a pardon granted to a child under seven.

⁵ Above 310-311, 312.

⁶ Vol. ii 47, 52.

⁷ Ibid 47.

⁸ Below 383; cp. Fitz., Ab. *Corone* pl. 428 (8 Ed. II.).

⁹ Bracton f. 204b; Bracton's Note Book Cases 779, 781; Y.B. 30, 31 Ed. I. (R.S.) 532.

¹⁰ See extracts from the Dictum de Kenilworth, cited Hale, P.C. i 50, 51.

¹¹ Vol. ii 258-259.

¹² Ibid 359, 452.

¹³ Below 413.

not sharply distinguished in this period, the distinction is beginning to emerge; and it is in the different principles of liability which are applicable that it appears most plainly.

Criminal Liability

We have seen that by Edward I.'s reign the tender age of the delinquent was admitted as an excuse.¹ We have seen, too, that necessary self-defence, misadventure, or lunacy were admitted to be good grounds for mitigation of punishment.² These departures from the older principles continued all through this period to take the form simply of mitigations of punishment. But they tended to grow more precise; and their growing precision doubtless helped to develop the view that the proof of some of these facts should negative guilt.³ This will clearly appear from the manner in which they are dealt with in the later law.

As early as Edward III.'s reign it was ruled that offences committed under compulsion in time of war or rebellion were excusable.⁴ We have seen that the meaning of self-defence and misadventure was being more precisely defined.⁵ With regard to crimes committed by children it was settled in later law that a child below the age of seven cannot be guilty of felony, that between seven and fourteen there is a rebuttable presumption to the same effect, and that over fourteen he is fully *doli capax*.⁶ The law is not quite settled in this way in this period; but it is tending to such a settlement.⁷ In Henry VI.'s reign Moile, J., was shocked that even a civil action for trespass to the person should be brought against a child of four.⁸ Similarly madness, if it existed when the crime was committed, was a defence.⁹ In

¹ Vol. ii 358 n. 8.

² Above 312-313, 316.

³ Cp. Y.B. 4 Hy. VII. Hil. pl. 3.

⁴ Hale, P.C. i 49, 50, citing records of Mich. 21 Ed. III. Coram Rege Rot. 101 Linc., and Mich. 7 Hy. V. Coram Rege Rot. 20 Heref.; and cp. record of 14 Ed. II., cited at pp. 56-58.

⁵ Above 313-314.

⁶ Plowden 19 n. f; Hale, P.C. i 24-29; in the Eyre of Kent (S.S.) i 108 it was said that a child of twelve could not be outlawed because he "was not of a tithing nor sworn to the law."

⁷ Y.B.B. 3 Hy. VII. Hil. pl. 4, and Mich. pl. 8; 35 Hy. VI. Mich. pl. 18; so early as Edward II.'s reign the judges were applying the maxim "*malitia supplet etatem*," the Eyre of Kent (S.S.) i 148-149; see also Fitz., Ab. *Corone* pl. 118 = Y.B. 11, 12 Ed. III. (R.S.) 627.

⁸ Y.B. 35 Hy. VI. Mich. pl. 18, "*Moile dit a Wangford, purres vous trouver en vostre conscience a declarer envers ce enfans de ceo tendre age? Jeo croy que il ne scait aucun malice, car il n'est person de grand pouvoir . . . et cum hoc Moile leve sus meme person, supporte l'enfans ove sa main, et luy mit en le Place, et dit a Wangford, icy est le person; et pur ceo advises vous.*"—All counsel could say was that he was instructed that the child had put out his client's eye.

⁹ Under the older law the chattels were forfeited, Fitz., Ab. *Corone* pl. 412 (8 Ed. II.), but it was about this time the law was changing, as in a case of this kind in the

the case of damage done by animals, knowledge on the part of the owner that the animal was fierce was necessary to fix him with criminal, and perhaps even civil, liability.¹ We can see the beginnings of the rules which excused a wife in case of the commission of certain crimes under the coercion of her husband.² Both married women and infants were granted certain procedural privileges, based upon the presumption of their incapacity to understand and obey as a full-grown man.³

These rules make it clear that the law was laying more emphasis upon the ethical element in wrongdoing. It was beginning to be felt that the essence of the more serious crimes lay in the intent with which the act was done; and we even find cases in which the judges took the will for the deed, and punished the intent only, though the act was not accomplished.⁴ This was a dangerous doctrine, but tempting perhaps at a time when there was no legislation directed against attempts to commit crimes. There is no evidence, however, that it was ever generally held in the case of ordinary felonies. It was only in the case of high treason that an intent was made criminal. The completed act was required together with an intent in all other cases.⁵ But the common forms of presentments and indictments strengthened the idea that accompanying the act there should be an element of moral wrongdoing. Accordingly, in the later Year Books the felonies were differentiated from civil wrongs on this basis. "Felony," said Fairfax,⁶ "is of malice prepense, and when an

Eyre of Kent of 6, 7 Ed. II. (i 81) the chattels were not forfeited; the law was settled in this way in Edward III.'s reign, Fitz., Ab. *Corone* pl. 244 (22 Ed. III.); see Hale, P.C. i 35, 36; 26 Ass. f. 123 pl. 27; Y.B. 21 Hy. VII. Mich. pl. 16; above 316.

¹ Fitz., Ab. *Corone* pl. 311 (1330), a presentment was made that a child had been killed by a cow, "et demande fuit si elle fuit accoustome de male faire, et ils disent que oile; et demande fuit si le home fuit en vie que aver la jument, que disent que non; et dit fuit s'il ust estre en vie il ust estre arraigne de mort et amercy vers le roy; mes quatenus il connust sa maner il duist aver luy lie en un sur lieu."

² Hale, P.C. i 45, and the record cited at p. 47; 27 Ass. f. 137 pl. 40; Fitz., Ab. *Corone* pl. 160; Kelyng 31. (See *Addenda* p. xlviii).

³ They are not imprisoned according to the provisions of Stat. West. II. though they vouch a record and fail at the day, 13 Ass. pl. 1, cited Hale, P.C. i 20; an infant is not imprisoned though he fail to attach an offender, Fitz., Ab. *Corone* pl. 395; in Y.B. 12 Rich. II. 21 it is said that neither laches nor folly nor prejudice could be imputed to an infant; but the exact limits of these privileges were not clear, see the Y.B.B. cited by Hale, P.C. i 21, notes *f*, *h*, and *i*.

⁴ Fitz., Ab. *Corone* pl. 383 (15 Ed. II.); Stephen, H.C.L. ii 222; P. and M. ii 474 n. 5. This was a case of homicide; for similar rules in the case of larceny, robbery, etc., cp. Y.B. 25 Ed. III. Pasch. pl. 33; 27 Ass. pl. 38; Y.B. 13 Hy. IV. Mich. pl. 20; Staunford, P.C. i 20; Coke, Third Instit. 5; Ellesmere's judgment in Calvin's Case 2 S.T. at pp. 674-675; Hale, P.C. i 425-426, 532. Maitland thinks that the adoption of this maxim, *Voluntas reputabitur pro facto*, "was but a momentary aberration;" but Staunford, Coke, Ellesmere, and Hale treat it as seriously held in Edward III.'s reign. (See *Addenda* p. xlviii).

⁵ Above 315; Plowden 259; Coke, Third Instit. 5.

⁶ Y.B. 6 Ed. IV. Mich. pl. 18; cp. 13 Ed. IV. Pasch. pl. 5 *per* Hussey, the Chancellor, and Molineux, above 361 n. 10. (See *Addenda* p. xlviii).

act is done against a man's will there is no felonious intent." It may be that in civil cases the law will deem that the intent of a man is not triable;¹ but in criminal cases, as Rede, J., said, the intent shall be tried;² "for instance, if a man is shooting at the butts, and kills another, it is not felony, and it shall be accounted as if he had had no intent to kill him; and so in the case of a tiler on a house who with a stone kills a man unwittingly, it is not felony." In one of the cases of high treason, as we have seen, the intent itself—the compassing or imagining of the king's death—constituted the offence;³ and it is just the presence or absence of this element of wrongful intention which differentiates felony from trespass. It is taken as one of the tests—perhaps the chief test—which distinguishes criminal from civil liability. It would not, of course, be true to say that it is or can be the only test. At all times the state may find it expedient to suppress acts which it deems to be dangerous by saying that those who do them are guilty of a crime, whether or not they had any intention to do the act in question.⁴ Or, again, the state may find it convenient to presume a guilty intent from a course of conduct which appears to be dangerous.⁵ In such cases as these a man may be held to be guilty of crime though he had no guilty intent at all, or no intent to commit the crime which the law imputes to him. But these are really exceptional cases. The general rule of the common law is that crime cannot be imputed to a man without *mens rea*.⁶ It is, of course, quite another question how the existence of that *mens rea* is to be established. The thought of man is not triable by direct evidence; but if the law grounds liability upon intent it must endeavour to try it by circumstantial evidence. Much of that circumstantial evidence will be directed to show that a man of ordinary ability, situated as the accused was situated, and having his means of knowledge, could not have acted as he acted without having that *mens rea* which it is sought to impute to him. In other words, we must adopt an external standard in adjudicating upon the weight of the evidence adduced to prove or disprove *mens rea*. That, of

¹ Per Brian Y.B. 17 Ed. IV. Pasch. pl. 2; and cp. Y.B.B. 33-35 Ed. I (R.S.) 326; 17, 18 Ed. III. (R.S.) 464; 20 Ed. III. (R.S.) ii 396.

² Y.B. 21 Hy. VII. Trin. pl. 5, "Coment que l'entente del defendant icy suit bon; uncore intant que l'entente ne puit estre construi: mes in felony il sera."

³ Above 292.

⁴ For a modern instance see *Parker v. Alder* [1899] 1 Q.B. 20; on this matter generally see Kenny, *Criminal Law* 46-47; *R. v. Prince* (1875) L.R. 2 C.C.R. 154; *R. v. Tolson* (1889) 23 Q.B.D. 168.

⁵ See Stephen's *Digest of Criminal Law*, Art. 223, for the various states of mind which may constitute the "malice aforethought" which will make homicide murder.

⁶ *Williamson v. Norris* [1899] 1 Q.B. at p. 14 Lord Russell, C.J., said, "The general rule of English law is that no crime can be committed unless there is *mens rea*."

course, does not mean that the law bases criminal liability upon non-compliance with an external standard. So to argue is to confuse the evidence for a proposition with the proposition proved by that evidence.¹

Civil Liability

The mitigations existing at this period of the old strict principles of criminal liability are not found in the case of civil liability. The reason is well explained by Hale. He points out that such incapacities as infancy, madness, compulsion, or necessity do not excuse the person suffering from them from a liability to a civil action for damages for the wrong done, "because such a recompense is not by way of penalty, but a satisfaction of damage done to the party; but in cases of crimes and misdemeanours, where the proceedings against them are *ad pœnam*, the law in some cases . . . takes notice of these defects, and . . . relaxeth . . . the severity of their punishments."² Thus throughout this period the old ideas still dominated the principles of the law as to civil liability. The general rule is that a man is liable for the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. In adjudicating upon questions of civil liability the law makes no attempt to try the intent of a man,³ and the conception of negligence has as yet hardly arisen. A man acts at his peril.

It is not difficult to illustrate these conceptions from decided cases. In the Year Book of 6 Edward IV,⁴ a case is reported, the facts of which are as follows: The plaintiff brought trespass against the defendant for breaking his close and trampling down his grass. The defendant pleaded that he was cutting thorns upon his own land, that some of the thorns fell, *ipso invito*, on the plaintiff's land, that he came at once on to the plaintiff's land and collected them, and that this was the trespass complained of. The court held that this plea disclosed no defence; and the reasoning of Brian and Littleton shows clearly that the old ideas still held their ground. Brian said, "When a man does a thing he is bound to do it in such a way that by his acts he causes no damage to others. If, for instance, I am building a house, and

¹ See *Angus v. Clifford* [1891] 2 Ch. at p. 471 *per* Bowen, L.J.

² Hale, P.C. i 15, 16. There were some few cases in which laches would not prejudice an infant in other than criminal proceedings (see Litt. §§ 402, 403 and Coke's comment); but these cases relate chiefly to real actions, and have little bearing on criminal or delictual liability.

³ Above 374 n. 1.

⁴ Y.B. 6 Ed. IV. Mich. pl. 18; Holmes, Common Law 85-87.

in the arsenal of the parliamentary lawyers of the seventeenth century were deductions from them; and the victory of the Parliament, by establishing the supremacy of the common law, gave these principles a great place in English public law. Thus the rules explained by Kingsmill, J.,¹ as to the circumstances under which an interference with another's property was justifiable were the bases of Holborne's argument in the *Case of Ship Money*;² and at the present day they are the basis upon which the powers of the crown and its subjects and servants to deal with riot or rebellion or invasion—sometimes miscalled martial law—rest.³ Similarly, it is these mediæval rules as to the liability of masters and servants for wrongful acts which are the basis of the present law which determines the liability of the servants of the crown to the public for their wrongful acts. The king is a master who is in a peculiar position because he cannot be sued.⁴ But this peculiar position, the lawyers of the fifteenth century held, limited his powers to act because, if the law was otherwise the subject would be deprived of all remedy for his unlawful acts.⁵ He must act through a servant, and all servants of the crown are liable if they do or command others to do illegal acts. But, however exalted their position, they are but servants; and, since it has been held to be impossible to extend the modern principle of employer's liability to their employer, the crown, their liability still depends upon the principles of the mediæval common law⁶—a result which sometimes makes for serious injustice in these days of constantly increasing state activity.⁷

§ 9. LINES OF FUTURE DEVELOPMENT

From the earliest times the royal judges had assumed jurisdiction to enforce the public duties of citizens, and the regular performance of the various functions both of the communities of the land, and of subordinate courts and officials.

The law made it the duty of every citizen to disclose any treason or felony of which he had knowledge, and a person who

¹ Above 377.

² (1637) 3 S.T. at 975.

³ Vol. i 578.

⁴ For this rule and the later deduction from it that the king can do no wrong, see below 465-466.

⁵ Y.B. 1 Hen. VII. Mich. pl. 5, "*Hussey*, Chief Justice, disoit que *Sir John Markham* disoit au Roy Ed. le 4 qu'il ne poit arrester un home sur suspeccon de treason ou felon, sicome aucuns de ses lieges onissent, parce que s'il face tort, le party ne poit aver accion." (See *Addenda* p. xlviii).

⁶ *Lane v. Cotton* (1701) 1 Ld. Raym. 646; *Mersey Docks Trustees v. Gibbs* (1866) L.R. 1 H. of L. 93, 124 per Lord Wensleydale; *Raleigh v. Goschen* [1898] 1 Ch. 73; *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178.

⁷ For the modern history of this branch of the law see vol. ix 43-45.

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did not fulfil this duty was guilty of a "misprision" of treason or felony.¹ It was likewise the duty of every citizen, if called upon, to help to arrest a felon² or to serve on a jury; and criminal proceedings could be taken against those who neglected these duties, or against those who performed them badly.³ There was a curious case in 1330 in which Edward III. took proceedings against the Bishop of Winchester for neglecting his duty by departing from the Parliament before it was ended.⁴ It would seem that the king regarded such a neglect of duty as a species of contempt. And he sometimes used this procedure to enforce not only public duties, but also his private rights; for, as little distinction was drawn at this period between the king's capacities,⁵ little distinction could be drawn between his various powers and rights. Thus in 1371 he took proceedings against the abbot of St. Oswald for disobedience to his command to assign a corrody to a certain person, which he asserted and the abbot denied was in his gift.⁶

In the thirteenth century the control of the courts over the misdeeds of subordinate courts and officials was strict. We have seen that a large part of the business of the Eyre consisted of an examination of the mode in which they had fulfilled their duties.⁷ But the general Eyre ceased to be held, the local government of the country gradually passed for the most part into the hands of the justices of the peace,⁸ and the law came to rely rather upon the action of the injured individual than upon the action of the central government.⁹ In fact, as the old communal organization of the local government decayed, the direct control of the courts grew weaker. The offences for which these old communities of the land and their officials were punishable tended to become obsolete with the changes in the form of government involved in

¹ Staunford, P.C. i c. 39; Coke, Third Instit. 139. In earlier days, when the offence of treason was ill-defined, above 289-291, it would seem that the concealment of treason ranked as treason, Bracton f. 118b; Coke, Third Instit. 36, Hale, P.C. i 372; no doubt the definition of treason effected by Edward III.'s statute helped to differentiate treason from misprision of treason, though it was not clearly differentiated till later, vol. viii 322-324; and in Coke's day an element of confusion had arisen in that the term "misprision" had got an extended meaning; to use Coke's words, it was not merely a *crimen omissionis*, consisting in the concealment of treason or felony, it was also *crimen commissionis*, "as in committing some heinous offence under the degree of felony;" in this latter sense it was a vague offence which covered many various contempts.

² Fitz., Ab. *Corone* pl. 395 (8 Ed. II.); the Eyre of Kent (S.S.) i 152-153; but persons under age and "not sworn to the law" were excused, the Eyre of Kent *loc. cit.*

³ Fitz., Ab. *Corone* pl. 207—a juror arraigned for discovering the king's counsel; cp. *ibid* pl. 272.

⁴ *Ibid* pl. 161=Y.B. 3 Ed. III. Pasch. pl. 32.

⁵ Below 463-468.

⁶ Y.B. 44 Ed. III. Trin. pl. 33.

⁷ *Ibid* 285-292.

⁸ Vol. i 269-271.

⁹ Above 317-318.

the rise of the justices of the peace. The courts were hampered with much old learning relating to the older system. Not having as yet realized the new conditions, they had not yet established that firm control over the new authorities which the justices in eyre had been accustomed to exercise over the old authorities. Consequently the control of the common law over the local government of the country was never weaker than it was at the close of this period. It was not till the strong government of the Tudors had again accustomed the country to an active executive that the common law, either in alliance or in competition with the council, regained this control. The old learning was then made to supply precedents for the exercise of that control whenever the central government was strong or active enough to set the law in motion. The lawyers remembered some of these old precedents when they wished to amplify their jurisdiction in order to compete with rival courts. Thus Coke used the two cases of Adam de Ravensworth and John de Northampton to prove that libel was a common law offence.¹ The case of Adam de Ravensworth was probably a case of *scandalum magnatum*,² which, as we shall see, was specially provided for by statute.³ John de Northampton was an attorney of the King's Bench who had written a letter which libelled the judges and clerks of the court;⁴ and he was probably dealt with by the court by virtue of its power to punish contempts committed by its officers.⁵ The cases obviously do not bear out the broad proposition for which they were cited. But Coke wished to show that the King's Bench had as wide a jurisdiction in cases of libel as the court of Star Chamber; and they were the only likely cases which he could find.⁶

One subject upon which the criminal law of this period was full and ample was the subject of offences against the machinery of justice. These fall under three main heads: Firstly, offences which are in the nature of a contempt of the court and its process; secondly, offences which aim at the perversion of the machinery of justice; and thirdly, offences which

¹ Third Instit. 174.

² "Adam de Ravensworth was indicted in the King's Bench for the making of a libel in writing, in the French tongue, against Richard of Snowshall, calling him therein Roy de Ravenors, etc.," *ibid.*

³ Below 409.

⁴ He wrote to John Ferrers, one of the king's Council, "that neither Sir William Scot, Chief Justice, nor his fellows the king's justices, nor their clerks, any great thing would do by the commandment of our Lord the King, nor of Queen Philip, in that place, more than of any other of the realm," Third Instit. 174.

⁵ Below 392.

⁶ "The mention as notable of these two cases which seem in no other way notable, looks as if they were the only cases of libel which Coke had met with in his study of the records," Stephen, H.C.L. ii 302.

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originally fell under the last-mentioned head, but which were later generalized, and, as so generalized, added important chapters to the law of crime and tort. This classification is beginning to emerge in the sixteenth century. It is hardly apparent in the Middle Ages. But, if we look at some of the very miscellaneous and somewhat amorphous mediæval rules upon these topics, we can see the germs of the later classification. I shall therefore deal with these rules under these three heads; and under each head, I shall indicate the manner in which they developed in later law. We shall thus be able to perceive the origins of certain bodies of law, the development of which will be related in the succeeding Book of this History.

(1) *Offences which are in the nature of a contempt of the court and its process.*¹

Disobedience to the king's writ was a contempt of the king; and from an early period the offender could be attached summarily.² When in prison he would be allowed after an interval to purge his contempt by making fine with the king. The fine thus settled between the judges and the offender was a "bilateral transaction—a bargain. It is not 'imposed,' it is 'made'."³ This process of making fine with the king was being extensively used by the judges in Henry III.'s reign;⁴ and it naturally superseded the older amercements imposed by the courts for many sundry irregularities committed by officers of the courts and others, which were affected by the suitors of the court.⁵

This power to imprison and fine those guilty of contempt seems to have been originally used, firstly, to punish direct disobedience to the process of the court, and secondly, to punish all kinds of irregularities and misfeasances of officials of the court. That direct disobedience to the process of the court could be punished by attachment has never been doubted.⁶ It would seem, for instance, that disobedience to a writ of

¹ The best historical account of this matter, on which my summary is mainly based, is to be found in two articles by Mr. C. J. Fox on "The King v. Almon," L.Q.R. xxiv 184, 266; and two articles by the same author on "Summary Process to Punish Contempt," L.Q.R. xxv 238, 354.

² L.Q.R. xxv 238; xxiv 194-195; it is pointed out, L.Q.R. xxv 252 n. a, that in the Prohibition upon the articles of the clergy, printed among the statutes of uncertain date, Statutes (R.C.) i 209, attachments vi laica are said to pertain to the crown; attachment was not granted as a civil process till the end of the seventeenth century, L.Q.R. xxv 252-253 n. a.

³ P. and M. ii 516.

⁴ Ibid.

⁵ L.Q.R. xxv 240-242; see Y.B. 7 Hy. VI. Mich. pl. 17 *per* Cottesmore; Griesley's Case (1588) 8 Co. Rep. at f. 38b.

⁶ Above n. 2.

prohibition was from the first punished by attachment;¹ and the power thus to attach those who disobeyed the king's commands was extended by statute—it was, for instance, given to sheriffs by a clause of the Statute of Westminster II.² Probably also the court had power from an early date to deal thus with its officers who were guilty of irregularities or contempts.³ It is clear that this jurisdiction was well established in the fourteenth and fifteenth centuries. Thus, jurors were frequently fined for eating and drinking before giving their verdict. An undersheriff was attached because his servant allowed the jury to go at large. A juror who failed to appear could be amerced. An attorney guilty of sharp practice or other misconduct could be imprisoned.⁴ Probably John of Northampton—an attorney of the King's Bench who, as we have seen,⁵ was punished for writing a letter which was adjudged to be in scandalum Justiciæ et Curie—was thus dealt with because he was an officer of the court. And this power of dealing summarily with attornies and of striking them off the rolls was enlarged by a statute of 1403.⁶

In these two classes of cases, then, the courts could attach and summarily punish an offender by imprisoning him, and subsequently releasing him on payment of a fine. It would seem too, that, as early as Edward III.'s reign, they had power thus to deal with contempts committed by other persons in their actual presence;⁷ and this, as Littleton and Selden explained in 1627,⁸ could be justified by the theory that "the offence being done in the face of the court, the very view of the court is a conviction in law." But all through the mediæval period, and long afterwards, the courts, though they might attach persons who were guilty of contempts of court, could not punish them summarily. Unless they confessed their guilt, they must be regularly indicted and convicted. Mr. Fox has given a list of forty cases of various contempts—

¹ Bracton ff. 410, 411; cp. Y.B. 22 Ed. IV. Mich. pl. 9—attachment against the Ordinary of St. Albans for disobedience to a writ ordering him to absolve an excommunicate.

² 13 Edward I. st. 1 c. 39 § 23; Gilbert, C.J., in his history of the Common Pleas suggested that this statute was the origin of the power to commit, but this view was not taken by Wilmot, J., in *The King v. Almon*, nor by Blackstone, L.Q.R. xxiv 192-193.

³ See Y.B. 3, 4 Ed. II. (S.S.) 195 where Stanton, J., thus addressed an attorney: "Because you to delay the woman from her dower have vouched and have not sued a writ to summon your warrantor, this Court awards that you go to prison."

⁴ See the authorities cited by Mr. Fox, L.Q.R. xxv 245.

⁵ Above 390.

⁶ 4 Henry IV. c. 18.

⁷ Y.B. 17 Ed. III. (R.S.) 276, cited L.Q.R. xxv 253 n.f.

⁸ Stroud's Case (1629) 3 S.T. at p. 267.

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insults to the judges, an assault on the attorney general, beating jurors, striking a witness, trampling on a writ of prohibition—in all of which the offender was tried by the ordinary course of law.¹ That this was the correct course to pursue was stated by Anderson, C.J., in 1599;² and in the famous case of the convicted prisoner who, at the Salisbury assizes in 1631, "Ject un brickbat a le dit justice que narrowly mist," an indictment was immediately drawn by Noy, and his hand was cut off and fixed to the gibbet on which he was immediately after hanged.³

Two connected developments mark the later history of this branch of the law. (i) The Council and later the Star Chamber had long possessed a jurisdiction over contempts committed against any court;⁴ and the common law courts had from an early period sometimes referred such cases to them.⁵ After the abolition of the Star Chamber and the jurisdiction of the Council in England in 1641 the King's Bench assumed this jurisdiction.⁶ It was then able the more easily to do so because it could be represented as a supplement to and a corollary of its powers to correct "misdemeanours extra-judicial"⁷ committed by or occurring in all inferior courts; and as a consequence of the fact that it had inherited from the Star Chamber the position of *custos morum*⁸ of all the subjects of the realm. And these are the bases on which this jurisdiction is now rested.⁹ (ii) Simultaneously with this development we can see the gradual enlargement of the powers of the court to convict and punish summarily without having recourse to an indictment and the verdict of a jury. This development was partly due to statutes which gave the courts in certain cases power to inflict punishment after examination without a trial by jury,¹⁰ and partly—perhaps mainly—to the example of the Council and later of the Star Chamber. The Council and Star Chamber proceeded by the examination of

¹ L.Q.R. xxv 242-244.

² "A man may be imprisoned for a contempt done in court but not for a contempt out of court," *Dean's Case* (1599) Cro. Eliza at p. 690, cited L.Q.R. xxv 246; it may be noted that Hale laid it down, P.C. i 587, that "if an affray be made in the presence of a justice of peace . . . he may arrest him, and detain him *ex officio* till he can make a warrant and send him to gaol."

³ Dyer 188b note.

⁴ L.Q.R. xxiv 272-273; Hudson, *Star Chamber* 117.

⁵ For the earlier cases see L.Q.R. xxv. 354-355; for later cases see L.Q.R. xxiv 272-273.

⁶ L.Q.R. xxiv 273-274.

⁷ Coke, *Fourth Instit.* 71; vol. i 212.

⁸ Hawkins, P.C. Bk. ii. c. 3 § 4.

⁹ *R. v. Davies* [1906] 1 K.B. 32; *R. v. Daily Mail* [1921] 2 K.B. 733.

¹⁰ A long list of these statutes stretching from 5 Henry IV. c. 8 to 3 James I. c. 13 is given by Mr. Fox in L.Q.R. xxv 358-362.

the accused and without a jury. And, as the relations between the common law judges and the Star Chamber were intimate, it is not improbable that the procedure of the latter court had some influence on the evolution of the common law doctrine on these matters.¹ Thus, even at the beginning of the seventeenth century, the judges were taking upon themselves to punish summarily offences which in the Middle Ages would have been remedied by an indictment² or a bill of deceit.³ It is not, however, till after the abolition of the Star Chamber in 1641 that the great expansion of their jurisdiction to deal summarily with all manner of contempts takes place. In the middle of the seventeenth century they were exercising this jurisdiction in the case of contempts committed out of court.⁴ Occasionally indeed earlier sixteenth and seventeenth precedents were followed, and a procedure by way of information and trial by jury was used;⁵ but informations were often abused in many ways, and they were unpopular; "and so the summary process slipped in and the supposed delinquents were deprived of the privilege of having their cases tried by the verdict of even one jury."⁶ This jurisdiction reached its furthest limit when it was laid down in Wilmot, J.'s, undelivered judgment in *The King v. Almon* (1765) that a libel on the court, or a judge in his judicial capacity, could be punished summarily by attachment—a decision for which there was little if any authority.⁷ But in spite of this fact, it was accepted as correct, and it forms the basis of the modern law on this subject.⁸

(2) *Offences which aim at the perversion of the machinery of justice.*

In a relatively primitive society private war is the natural and most congenial remedy of those who are or think they are

¹ As Mr. Fox says, L.Q.R. xxv 356, "When it is remembered that some of the judges were members of this committee (the Star Chamber), it will be seen that there was an intimate connexion between the common law courts and the Star Chamber, and that the procedure of the latter court might be gradually introduced into the practice of the common law courts. It is certain that the old procedure by bill for contempt followed by attachment, whereby the defendant was brought in to have the question tried by a jury, was in course of time transformed into an attachment followed by an examination of the accused by interrogatories, whereby he might be acquitted or convicted by the court."

² In *Bruistone v. Baker* (1616) 1 Rolle 315 Coke, C.J., clearly thought that he had the power (though he refused to exercise it in the case before him) of punishing summarily a person who had treated the process of the court with contempt; see L.Q.R. xxv 249.

³ *Lord v. Thornton* (1614) 2 Bulstr. 67—a person aged sixty-three who pleaded infancy to delay the proceedings was attached.

⁴ L.Q.R. xxv 366, and references to Style's Practical Register there cited; for earlier cases of Charles I.'s reign see *ibid* 369.

⁵ *Ibid* 368.

⁶ *Ibid* 369.

⁷ *Ibid* xxiv 184 seqq.; 266 seqq.; the judgment is reported in Wilmot's Notes 243.

(See *Addenda p. xlviii*).

⁸ See the modern cases cited, L.Q.R. xxv 238-240.

wronged; and, when the strength of the law makes a recourse to this expedient dangerous or impossible, when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred to the conduct of litigation. The courts are besieged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This, as we have seen, is a phenomenon which recurs in many nations at many periods;¹ but it was specially apparent in mediæval England. The victory won by royal justice in the thirteenth century was somewhat premature. The legal and political ideas held by the royal judges were too far in advance of a society which was still permeated by feudal ideas of a retrograde type.² And so, contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery; and, when the royal power weakened, these attempts were so frequently and successfully made that the law was subverted and civil war ensued.³

But naturally the struggle of the courts with these forms of lawlessness produced the growth of a body of law, both enacted and unenacted, which defined and distinguished many various offences. Both the statutes and the Year Books show that, by the end of the mediæval period, it had grown to a large bulk. Such offences as rescous, escape, and prison breach were largely illustrated in the books.⁴ But more interesting than these are certain offences which were more directly designed to pervert the machinery of justice. These are the offences of forgery, perjury, conspiracy, deceit, champerty, maintenance, and embracery. Of the first four of these I shall speak under the following head, as they all became generalized, and developed into offences which had nothing to do with the perversion of the machinery of justice. At this point I must say something of the history of the last three of these offences.

It would seem that the earliest of these offences to become differentiated was champerty.⁵ Neither Glanvil nor Bracton have anything to say of maintenance.⁶ But Bracton mentions what afterwards came to be known as champerty, that is the maintenance or support of a suit in consideration of a share of the proceeds. This it would seem was a criminal offence when Bracton wrote, as it was included among the articles of the

¹ Vol. i 506 and n. 6.

² Vol. ii 415-418.

³ *Ibid.*

⁴ Staunford, P.C. i cc. 25-33; Hale, P.C. i caps. lii, liii, liv.

(See *Addenda* p. xlviii).

⁵ On this subject generally see Winfield, *Hist. of Conspiracy* chap. vi, the substance of which is also printed in L.Q.R. xxxv 50.

⁶ *Hist. of Conspiracy* 140.

Eyre;¹ but it is very doubtful whether at that time mere maintenance of a suit on behalf of another was unlawful. It is true that Coke and subsequent authorities held that it was a common law offence.² But there is no clear evidence for this proposition; and for two reasons it is difficult to suppose that much evidence can be forthcoming on this point. In the first place, whether it was a common law offence or not, it was made an offence by a series of statutes of Edward I.'s reign. In the second place, there is no reason to think that the term maintenance became the technical name for this particular offence till the passing of these statutes.³ Even after this date it was often used in the untechnical sense of supporting or upholding. A litigant will maintain his writ; the king will maintain his jurisdiction.⁴

It was only a few years after Bracton wrote that the legislature discovered that the maintenance of another's action might lead to the perversion of justice, even though there was no agreement that the maintainer should share the profits.⁵ With this discovery begins the history of maintenance as a criminal and a civil offence. Naturally many of the statutes dealt also with champerty; and it is mainly the treatment of these two offences by the legislature, and the litigation to which they gave rise, which have emphasized the fact that they are offences of the same nature, and have given rise to the modern definition of champerty as an aggravated form of maintenance.⁶

The first of these statutes is the Statute of Westminster I.⁷ Chapter 25 made champerty committed by a royal officer a criminal offence.⁸ Chapter 28 *inter alia* made it a criminal offence for clerks of justices or sheriffs to maintain suits depending in the king's courts. Chapter 33 attempted to suppress maintenance in the local courts—an offence which had been facilitated by the

¹ "De excessibus vicecomitum et aliorum ballivorum, si aliquam litem suscitaverint occasione habendi terras vel custodias, vel perquirendi denarios, vel alios profectus, vel per quod justitia et veritas occultetur, vel dilationem capiat," f. 117a.

² Coke, Second Instit. 212; Hawkins, P.C. Bk. i cap. 83 § 35; for other authorities which have taken the same view see Hist. of Conspiracy 139.

³ Ibid 140-141.

⁴ Ibid 134, and references there cited.

⁵ "We have long been told that champerty is a species of maintenance. This is true now, but historically it looks very much like an inversion of genus and species. . . . Before Edward I.'s time, maintenance was used in its purely popular sense of support. Merely to maintain or support the suit of another was probably not a substantive wrong at all. But it was wrongful if the support were for the purpose of sharing the proceeds of the suit," Hist. of Conspiracy 140.

⁶ Thus Coke says, Second Instit. 208, "An action of maintenance did lie at the common law, and if maintenance *in genere* was against the common law, *a fortiori* Champerty, for that of all maintenances is the worst;" and cf. Co. Litt. 368b.

⁷ 3 Edward I.

⁸ The reason why royal officials are specially signalled out is the growing and widespread corruption amongst them, which is well illustrated by the political songs of the period, see vol. ii 294.

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general permission given by the Statute of Merton to appoint attorneys to sue in those courts.¹ The Statute of Westminster II. cap. 49² for the first time mentioned champerty *eo nomine*. It forbade the royal officials from the Chancellor downwards to commit this offence.³ The ordinance against conspirators of 21 Edward I. seems to be directed against those guilty of both maintenance and champerty as well as against those guilty of conspiracy;⁴ and it perhaps applied to all persons guilty of maintenance and champerty, and not only to royal officials.⁵ However that may be, it is clear that in the *Articuli super Cartas* of 1300 there is a general prohibition against champerty,⁶ and anyone was allowed to sue for the penalty on behalf of the king.⁷ But champerty as a term of art was new. It therefore needed definition; and a definition was supplied in the *Statutum de Conspiratoribus*, which defined conspiracy.⁸ The two offences were then intimately allied—indeed, as Dr. Winfield points out, it was at that date hardly possible to distinguish clearly the three offences of champerty, maintenance, and conspiracy.⁹ It should be noted that none of these statutes gave a purely civil remedy; and the absence of any civil remedy is borne out by what authority there is in the Year Books.¹⁰

In Edward III.'s reign the prohibitions of both maintenance and champerty were multiplied. In 1331 a civil as well as a criminal remedy was for the first time given;¹¹ and there is no

¹ Vol. ii 316.

² 13 Edward I. st. 1.

³ "The Chancellor, Treasurer, Justices, nor any of the king's counsel, nor clerk of the Chancery, nor of the Exchequer, nor of any justice or other officer, nor any of the king's house clerk or lay, shall not receive any church nor advowson of a church, land, nor tenement in fee by gift nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us or before any of our officers."

⁴ R.P. i 96 cited below 402 n. 3; Statutes (R.C.) i 216; for the writ authorized by the Statute see below 404 n. 1.

⁵ Its words seem to warrant this construction; but Dr. Winfield points out, *Hist. of Conspiracy* 147 n. 1, that the framers of 28 Edward I. c. 11 thought that they were making the first general statute on the subject; the statute is said to be made "because the king hath heretofore ordained by statute that none of his ministers shall take no plea for champerty, by which statute others besides his ministers are not before this time bound."

⁶ 28 Edward I. st. 3 c. 11.

⁷ See Y.B.B. 4 Ed. II. (S.S.) 141-143; 11, 12 Ed. III. (R.S.) 538-542, 634-637.

⁸ "Campi participes sunt qui per se vel per alios placita movent vel movere faciunt; et ea suis sumptibus prosequuntur, ad campi partem, vel pro parte lucri habenda." 33 Edward I. st. 2; below 403; those who habitually committed these and the like offences were said to be guilty of barratry, see the Case of Barratry (1583) 8 Co. Rep. 36b.

⁹ "Conspirators were roughly speaking those who combined to abuse legal procedure. But what less could be said of champertors and maintainers," *History of Conspiracy* 146; see the Eyre of Kent (S.S.) i 145, for a case of a conspiracy to maintain.

¹⁰ *Hist. of Conspiracy* 150, and see the Y.B.B. of 6 Ed. III. and 14 Ed. II. cited at pp. 148-149.

¹¹ 4 Edward III. c. 11.

doubt that such an action was recognized in the latter part of the mediæval period.¹ In 1347 there is another comprehensive statute;² and Richard II.'s reign opens with another statute of a similar character.³ We have seen that during the remainder of the mediæval period statutes directed against these and cognate offences were multiplied;⁴ but that they were all ineffective to cure the evil by reason of the "want of governance" from which the country was suffering.⁵ But, though they were unable to effect the purpose for which they were passed, they did result in defining with a certain amount of precision the two offences of maintenance and champerty.

Coke defined maintenance as "an unlawful upholding of the demandant or plaintiff, tenant, or defendant in a cause depending in suit, by word, action, writing, countenance, or deed;"⁶ and in Dr. Winfield's opinion this fairly represents the Year Book authority.⁷ Similarly we have seen that Coke defines champerty as being simply an aggravated variety of maintenance; and that, as a result of this mediæval legislation, this is what it had in substance become.⁸ There was a good deal of authority on the question of what was "unlawful" upholding. We have seen that the courts were inclined to define very many kinds of "upholding" as unlawful—the giving of unsolicited testimony⁹ and even standing with a stranger at the bar.¹⁰ But it had been recognized in the *Articuli super Cartas* that a man might have the counsel of his legal advisers or his relations or neighbours;¹¹ and the cases make it clear that blood relationship, or the relation of master and servant, or even charity, made it lawful to maintain.¹²

We shall see that these mediæval rules as to maintenance and champerty are the foundation of our modern law.¹³ But by no means all the mediæval rules have survived till modern times. The multiplicity of the mediæval statutes and cases had given rise to numerous distinctions which are now obsolete. Coke tells us of the distinction between *manutenentia ruralis* and *curialis*,¹⁴

¹ Hist. of Conspiracy 153-154 and the Y.B.B. there cited.

² 20 Edward III. cc. 4, 5, 6. ³ 1 Richard II. c. 4.

⁴ Vol. ii 452; see Hist. of Conspiracy 151-152.

⁵ Vol. ii 414-416; see Hist. of Conspiracy 154-157.

⁶ Second Instit. 212.

⁷ Hist. of Conspiracy 136.

⁸ Above 396 n. 6.

⁹ Y.B. 22 Hy. VI. Mich. pl. 7 (p. 5) *per* Paston, J.; see vol i 334-335.

¹⁰ Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) *per* Newton, J.; cp. Y.B. 21 Hy. VI. Mich. pl. 30 (p. 15) *per* Paston, J.

¹¹ 28 Edward I. st. 3 c. 11; vol. ii 315 n. 1.

¹² Y.B. 21 Hy. VI. Mich. pl. 30 (p. 16).

¹³ Vol. viii 397-402.

¹⁴ Co. Litt. 368b; *manutenentia curialis* is what we understand by maintenance; *manutenentia ruralis* is "to stir up and maintain quarrels, that is complaints, suits, and parts in the country, other than their own, though the same depend not in plea," Second Instit. 213; Hist. of Conspiracy 131-134; as Dr. Winfield points out, it was probably never a distinction of very much importance.

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and the distinction between general and special maintenance.¹ But the latter distinction was chiefly or only a pleading distinction; and it is doubtful if *manutenentia ruralis* still exists.

Coke also classified embracery as a subdivision of *manutenentia curialis*. "When one laboureth the jury if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and is in law called an embraceor, and an action of maintenance lyeth against him."² No doubt the offences of embracery and maintenance are similar in their nature; but they are clearly distinct,³ and are distinguished in certain dicta in the Year Books.⁴ They are not identified by Fitzherbert,⁵ and the statute law relating to them is different. Statutes of 1332⁶ and 1361⁷ had made it a criminal offence in a juror to receive a bribe, and had allowed anyone to sue for the penalty provided for this offence. In 1365⁸ a penalty of ten times the amount taken was imposed both on a juror who took a bribe and on an embraceor who actually took money to labour or procure a jury—a penalty enforced by the writ of *decies tantum*.⁹ But it was clear that a person "who had come to the bar and talked in the cause, or who had stood there to survey the jury or put them in fear,"¹⁰ had done an act very similar to and hardly distinguishable from an act of maintenance. Naturally therefore the courts tended to regard such acts as acts of maintenance;¹¹ and the analogy was strengthened by the fact that relationships which would afford a defence to proceedings for maintenance were also a defence to certain acts which might

¹ As to this see Hist. of Conspiracy 136-138; the most intelligible account of it seems to me to be given by Paston, J., in Y.B. 21 Hy. VI. Mich. pl. 30 (p. 15) where he says that it is a good justification to say that the maintainer is of kin to the person maintained, "*autement (si) ceux que sont lais gens voillent prendre ceo pur un maintenance, issint coarcterait l'autre de monstrier special maintenance;*" by which I understand him to mean that a verdict against the defendant who had pleaded such a plea could only be supported by proof of special facts—just as at the present day a plea of privilege can be rebutted by proving express malice; but as Dr. Winfield points out the cases are conflicting; in Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) Newton, J., seems to regard it as an act which needs to be specially defined in the declaration—like an innuendo in the case of a libel which is not at first sight defamatory.

² Co. Litt. 363a.

³ Hist. of Conspiracy 135-136.

⁴ Y.B.B. 13 Hy. IV. Hil. pl. 12 *per* Hankford, J.; 11 Hy. VI. Mich. pl. 24 *per* Martin, J., cited Hist. of Conspiracy 136 n. 1.

⁵ F.N.B. 171 B. thus defines an Embraceor: "An Embraceor is he who cometh to the bar with the party and talketh in the cause, or standeth there to survey the jury, or to put them in fear; but the lawyers may plead in the cause for their fees, but they cannot labour the jury, and if they take money so to do they are embraceors."

⁶ Edward III. c. 10.

⁷ 34 Edward III. c. 8.

⁸ 38 Edward III. c. 12.

⁹ "*Decies Tantum* lieth against an embraceor if he take money, as well as against a juror, otherwise not," F.N.B. 171 A.

¹⁰ Above n. 5.

¹¹ Y.B. 22 Hy. VI. Mich. pl. 7 (p. 6) *per* Newton, J.

otherwise have amounted to embracery.¹ The legislature also took the view that the two offences were substantially similar when it penalized them in the same way in 1541.² Probably therefore Coke did not materially misrepresent the actual state of the law in his day when he classified embracery as a species of maintenance.³ This was in fact the result of the way in which this branch of the law had been developing during the fifteenth and sixteenth centuries. When this identification had been established it became possible to contend that acts of embracery were, equally with acts of maintenance, offences at common law.⁴ But obviously for this proposition there was even less authority than for the proposition that maintenance was a common law offence.⁵ No doubt from an early period violence to jurors could be punished by indictment as a contempt of court;⁶ but, till the passing of the statutes of 1361 and 1365, and the identification of embracery with maintenance, it is difficult to find any authority for the punishment of those who attempted to influence them unduly.

(3) *The offences designed to pervert the machinery of justice which were generalized in later law.*

Under this head come, as I have said, the offences of forgery, perjury, conspiracy, and deceit. All these offences were originally simply offences against the machinery of justice. The offence of forgery had been known to the common law from an early period; but, apart from forgery of the king's seal or money, which was treason, the only forgery punishable at the common law was "the reliance upon a forged document in a court of law."⁷ In the case of perjury the only form of it punishable by the common law was the perjury of jurors.⁸ Other forms of perjury were matters for the ecclesiastical courts. "A miserable jealousy blunted the edges of those two swords of which men were always speaking; neither power would allow the other to do anything effectual. . . . And so our ancestors perjured themselves with impunity."⁹ Since Edward I.'s reign, if not earlier, the law had known the offence of conspiracy; but the only conspiracy which it punished was a conspiracy to take civil

¹ Y.B. 21 Hy. VI. Mich. pl. 30 (p. 16) *per* Newton and Paston, J.J.; *cp.* Hussey v. Cooke (1621) Hob. 294; Hawkins, P.C. Bk. i c. 85 § 6.

² 32 Henry VIII. c. 9 § 3.

³ Co. Litt. 369a.

⁴ Hawkins, P.C. Bk. i c. 85 § 7.

⁵ Above 395-396.

⁶ Above 393.

⁷ P. and M. ii 539; for a good instance see Y.B. 21, 22 Ed. I. (R.S.) 388. Apparently in the twelfth century it was treated as a felony, *Assize of Northampton* c. 1; and *cp.* Y.B. 18, 19 Ed. III. (R.S.) 76, 78; 1 Henry V. c. 3 gave a civil remedy.

⁸ Vol. i 337-338, 339-340.

⁹ P. and M. ii 541.

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or criminal proceedings maliciously.¹ Similarly the law possessed a writ of deceit, but originally it lay only for some deceit committed in the course of legal proceedings.² In the future the law will be developed by generalizing all these offences. In all these cases this development will be assisted and in some cases initiated by the practice of the Council and the Star Chamber;³ and in the case of forgery and perjury it will be assisted by the legislature.⁴

But, though this development is mainly the work of the sixteenth and early seventeenth centuries, it was already beginning in the mediæval period in the cases of conspiracy and deceit. Of the origins and mediæval development of these two offences, therefore, it will be necessary to speak at this point.

Conspiracy.

Both Bracton⁵ and Britton⁶ mention conspiracies or confederacies among the pleas of the crown which should be presented by the jury of presentment. Bracton would seem to equate those who conspired to commit crimes with accessories to crimes.⁷ Britton would seem to confine the term to conspiracies to hinder justice;⁸ and in 1279 Edward I. had issued letters close to the justices in Eyre ordering them to enquire into such conspiracies—a step which led to the inclusion in the Articles of the Eyre of the Article “de mutuis sacramentis.”⁹ But it is not till certain statutes of Edward I.’s reign gave a writ of conspiracy that the offence definitely emerged. Though some writers have thought that such a writ existed at common law,¹⁰ Dr. Winfield’s examination of the MSS. Registers of writs would seem to make it very much more probable that it owes its origin to these statutes.¹¹ In fact, it may well be that the need for more stringent

¹ Below 402-404.

² Bk. iv Pt. I. c. 4.

³ f. 128.

⁴ “Ubi principale non consistit, nec ea quae sequuntur locum habere debent, sicut dici poterit de precepto, conspiratione, et consimilibus quamvis huiusmodi esse possunt etiam sine facto, et quandoque puniuntur si factum subsequatur, sed sine facto non, juxta illud: quid enim obfuit conatus, cum injuria nullum habuit effectum. Nec enim obesse debent preceptum, conspiratio, preceptum et consilium, nisi factum subsequatur,” f. 128.

⁵ “Let it also be enquired concerning confederacies between the jurors and any of our officers, or between one neighbour and another, to the hindrance of justice; and what persons of the county procure themselves to be put upon inquests and juries, and who are ready to perjure themselves for hire, or through fear of anyone: and let such persons be ransomed at our pleasure, and their oath never after be admissible,” i 95.

⁶ H. E. Cam, Vinogradoff, *Oxford Studies* vi, xi 58-59.

⁷ Staunford, *Pleas of the Crown* 172a; Coke, *Second Instit.* 562; Y.B. 11 Hy. VII. Trin. pl. 7 *per* Fairfax, J.; Smith v. Cranshaw (1625) W. Jones 93.

⁸ Hist. of Conspiracy 29-37.

⁹ Vol. ii 366; below 407.

¹⁰ Ibid c. 2.

¹¹ i 95.

measures was, as Miss Cam suggests, caused by the attempts of guilty persons to evade the enquiries made by the government in the general Eyre and otherwise.¹ We must therefore regard these statutes and the writ given by them as the starting point of the modern law on this subject. But, as with many another of these old writs, so with the writ of conspiracy, there was a tendency in the fourteenth and fifteenth centuries to supplement, and almost to supersede it by an analogous action on the case. The rise and spread of this action introduced a new element into the offence of conspiracy, which has had a large influence on the common law on this subject, and has modified both directly and indirectly the law which has grown up round the writ of conspiracy. Therefore in dealing with the common law on this subject I shall deal firstly with Edward I.'s statutes; secondly, with the writ of conspiracy and its development; and thirdly, with the action on the case in the nature of a conspiracy.

(i) Edward I.'s Statutes.

There are three of these statutes.² The first is the so-called Statute of Conspirators, which probably comes from the year 1293.³ It enacted that a writ "should be provided for those who wished to complain of conspirators, and of those guilty of maintenance or champerty; and that those found guilty of these offences should be punished by imprisonment and ransom. The second of these statutes is a clause in the *Articuli super Cartas* of 1300. It provided that, "in respect of conspirators, false informers, and evil procurers of dozens, assizes, inquests, and juries, the king has ordained a remedy by writ of the Chancery;" and it gave power to the judges of either bench and judges of assize to try by a jury, without writ, complaints made of such offences.⁴ These statutes had spoken of conspirators without giving any

¹ H. E. Cam, Vinogradoff, *Oxford Studies* vi, xi 59.

² For the statute of 13 Edward I. st. 1 c. 12 for the punishment of those who brought or abetted false appeals, and the subsequent application of the writ of conspiracy to this case see *Hist. of Conspiracy* 39-51. The statute does not make this offence conspiracy, though the two offences were closely allied.

³ R.P. i 96, "De illis qui conqueri voluerint de Conspiratoribus, in patria placita malitiose moveri procurantibus, ut contumelie braciatoribus placita illa et contumelias ut campi partem vel aliquod aliud commodum inde habeant malitiose manutinentibus et sustinentibus, veniant de cetero coram justitiariis ad placita Domini Regis assignatis, et ibi inveniant securitatem de querela sua proseguenda. Et mandetur Vicecomiti per breve capitalis justitii et sub sigillo suo, quod attachientur quod sint coram Rege ad certum diem: et fiat ibi celeris justitia. Et illi qui de hoc convicti fuerint puniantur graviter, juxta discretionem Justiciariorum predicatorum, per prisonam et redemptionem: Aut expectent tales querentes iter justiciariorum in partibus suis si voluerint, et ibidem sequantur etc.;" for what is perhaps another version, see *Statutes of Uncertain Date, Statutes (R.C.)* i 216.

⁴ For a discussion as to whether this writ was original or judicial see *Hist. of Conspiracy* 37-39.

⁵ 28 Edward I. st. 3 c. 10.

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definition of the term; and as can be seen from some of the writs in the MSS. Registers,¹ the offence of conspiracy badly wanted definition. At all times this offence has been apt to shade off into the particular wrong which the conspirators have combined to commit. It is therefore not surprising to find that, in the thirteenth century, plaintiffs purchased writs of conspiracy when their cause of action was rather deceit or some other specific wrong.² As Dr. Winfield has pointed out, many writs were very "fluid" before "the phrases in them had crystallized as terms of art."³ It was with a view of helping litigants to ascertain whether their cause of action was properly redressible by a writ of conspiracy⁴ that in 1304 the legislature passed the third of these statutes on the subject.⁵ It runs as follows:—
 "Conspirators be they that do confeder or bind themselves by oath covenant or other alliance that every of them shall aid and support the enterprise of each other falsely and maliciously to indict, or cause to be indicted, or falsely to acquit people, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries and fees for to maintain their malicious enterprises and to suppress the truth; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seignory office or power undertake to bear or maintain quarrels, pleas, or debates for other matters than such as touch the estate of their lords or themselves." The definition thus covered a wide ground; but most of the cases brought under the writ of conspiracy were cases of conspiracy to indict or appeal others for criminal offences. There are a few cases of conspiracy to take civil proceedings; but there are none of the other cases mentioned in the statute.⁶ We

¹ Hist. of Conspiracy 31-33; as Dr. Winfield says, "The absence of any definition of conspiracy before 33 Edward I. would justify experiments with the writ."

² Ibid 32; thus in Y.B. 3 Ed. II. (S.S.) 196 Scrope argued that in that case the proper remedy was deceit; and this argument, as Dr. Winfield points out, prevailed at a later date, Hist. of Conspiracy 32.

³ Ibid 33.

⁴ "The Statute of Westminster II. gives a writ in a general way for a plea of conspiracy, etc. But the king being advised that this Statute was too general ordained another which names other cases of conspiracy," Y.B. 3 Ed. II. (S.S.) 194 *per* Bereford, C.J.

⁵ 33 Edward I. st. 2.

⁶ Hist. of Conspiracy 51-52; Dr. Winfield points out that the Y.B., and Fitzherbert's and Brooke's Abridgments give fifty-two cases; of these thirty-five were cases of conspiracy to indict or appeal of criminal offences, eight were cases of abuse of civil procedure, one was not a case of abuse of procedure, and there are eight in which the nature of the conspiracy is not stated; in the Register of Writs "eight out of the nine writs are against those who have procured false appeals or indictments."

shall now see that these limitations on the use made by litigants of the writ of conspiracy had a considerable effect upon its development.

(ii) The writ of Conspiracy and its development.

The writ given by the statute of 1293¹ contemplates one defendant only, and summons him to answer for the plaintiff's plea of conspiracy and trespass. Later forms of the writ set out the conspiracy alleged, and always suppose at least two defendants.² In fact the forms of the writ grew more precise with the growing precision in the definition of the offence remedied by the writ. It is the development of this definition of the offence which I must here briefly trace.

The writ of conspiracy resembles many other writs of the thirteenth century in that it is by no means clear whether the remedy contemplated by it was criminal or civil.³ In fact, like the writ of trespass, the remedy given by it was both of a criminal and civil nature;⁴ and so in later law a plaintiff could either indict the defendants,⁵ or sue them for damages.⁶ Just as the writ of trespass is the parent both of the misdemeanour and of the tort, so the writ of conspiracy could, at the option of the injured party, be used as either a criminal or a civil remedy.

But the cases in which this remedy was available came gradually to be limited in the following ways:—

Firstly, the writ came to lie exclusively for a conspiracy to indict or appeal a man of felony. It is pretty clear from the definition given in the statute of 1304,⁷ and from a case of the year 1310⁸ that its scope had once been very much wider. In that case the court held that it lay for a conspiracy to procure an infant to make a statute merchant, in order to use it to get his

¹ "Rex Vicicomiti Salutem. Precipimus tibi quod si A. de B. fecerit te securum de clamore suo prosequendo, tunc pone per vadia et salvos pledgios G. de C. quod sit coram nobis a die Sancti Trinitatis in XV dies, ubicumque tunc fuerimus in Anglia ad respondendum prefato A de placito conspirationis et transgressionis secundum ordinacionem nostram nuper inde provisam, sicut idem rationabiliter monstrare poterit quod ei inde respondere debeat. Et habeas ibi nomina pledgiorum et hoc breve. Teste G. de Thornton," Statutes (R.C.) i 216.

² See the writ from Reg. Brev. f. 134, cited Hist. of Conspiracy 37-38.

³ Vol. ii 365, 460.

⁴ Ibid 365.

⁵ Y.B. 11 Hy. VII. Trin. pl. 7 *per* Fairfax; cp. Skinner v. Gunton (1669) Wms. Saunders at p. 230; the judgment if this course was pursued was the same as that on a writ of attain (see vol. i. 341), 27 Ass. pl. 59; 43 Ass. pl. 11; we may perhaps see it in germ in Britton i 95.

⁶ Y.B.B. 24 Ed. III Mich. pl. 35; 43 Ed. III Mich. pl. 41; 8 Henry VI. c. 10 § 4 gave in certain cases both the criminal and the civil remedy, see Y.B. 11 Hy. VII. Trin. pl. 7.

⁷ Above 403.

⁸ Y.B. 3 Ed. II. (S.S.) 193-198.

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land by fraud when he came of age.¹ In Edward III.'s² and Henry IV.'s³ reigns it was held that it lay for a conspiracy to indict for trespass; and there is a precedent of a writ for a conspiracy of this kind in the Register.⁴ But, towards the end of the fifteenth century, the judges were coming to the conclusion that it lay only for a conspiracy to indict or appeal for felony.⁵ It was not till the seventeenth century that the question arose whether a conspiracy to indict a man for treason was actionable; and then it arose in relation, not to the writ of conspiracy, but to the action on the case for a conspiracy.⁶ Secondly, the conditions under which a person indicted or appealed for felony could bring the writ were precisely defined. Thus, "nothing else than a technical acquittal by verdict would support the action. If the plaintiff had gone free by reason of a defective indictment, a charter of pardon, or benefit of clergy, he had no standing in court;"⁷ and the law as to the circumstances under which a person appealed for felony could sue were very intricate.⁸ Thirdly, although the plaintiff could either indict the defendant for conspiracy or sue him for damages, the gist of the proceedings was not the damage which he had suffered, but the act of conspiring. It followed therefore that the proceedings could not be taken against one defendant.⁹

Since the writ of conspiracy had been thus fenced about with limitations which seriously diminished its efficiency, it is not surprising that here, as in other cases, it was necessary to give a wider remedy by means of an action on the case in the nature of conspiracy.

(iii) The action on the case in the nature of conspiracy.

It is clear that the statutes of Edward I.'s reign contemplated a very much wider remedy than that given by the writ of conspiracy

¹ Y.B. 3 Ed. II. (S.S.) 193-194 Ruston argued that the writ only lay in two cases "namely where a man sues a plea to have champerty of the land, and where there is imprisonment on a false indictment;" but Bereford, C.J., did not give much encouragement to his argument.

² "Un Bill de Conspiracy fuit maintenu en Bank le Roy par agarde pur celuy que fuit endite de common trespass et acquitte, non obstant que ce ne fuit mis felonie," 3 Ass. pl. 13.

³ Y.B. 7 Hy. IV. Mich. pl. 15.

⁴ f. 134; and this, says Dr. Winfield, is paralleled in several MSS. Registers, Hist. of Conspiracy 54.

⁵ Y.B. 31 Hy. VI. Trin. pl. 6 *per* Prisot, C.J.; F.N.B. 116 A-H; the remark cited from 3 Ass. pl. 13 above n. 2 would seem to show that even in Edward III.'s reign opinion was tending in this direction.

⁶ Hist. of Conspiracy 58-59; see Vol. viii 386-387.

⁷ J. W. Bryan, the Development of the English Law of Conspiracy (Johns Hopkins University Studies) 23; cp. F.N.B. 115 E-G; Y.B. 42 Ed. III. Pasch. pl. 27 *per* Kinton *arg.*

⁸ Hist. of Conspiracy 39-51.

⁹ Y.B. 24 Ed. III. Mich. pl. 34; F.N.B. 114 D, 116 L; see Winfield, Hist. of Conspiracy 59 seqq.; Present Law of Abuse of Legal Procedure 158-159.

as defined and limited by the law of the fifteenth century. Under these circumstances it was not difficult to apply the action on the case to conspiracies which did not fall under the statutory writ. From Edward III.'s reign onwards there are a large number of these actions.¹ Possibly, at a time when the limitations on the writ of conspiracy were not yet precisely ascertained, some of them may have been considered to fall under the statutory writ.² But Fitzherbert, writing at a time when these limitations had been ascertained, has no difficulty in classing them as actions on the case. It is clear that here as in other branches of the law this action was exerting a liberalizing influence. As in the earlier period before the offence had been rigidly defined,³ there is at least one case in which the conspiracy alleged has apparently nothing to do with the taking of legal proceedings against the plaintiff.⁴ But generally the cause of action alleged a conspiracy to defraud the plaintiff by the fraudulent use of the machinery of the courts. No doubt in allowing these actions the judges were influenced not only by the wide definitions of the earlier statutes,⁵ but also by their willingness to suppress those abuses of legal process which were the most crying evil of the time.⁶ In one case indeed of Richard II.'s reign⁷ they held (contrary to Bracton's opinion,⁸ and contrary to the prevailing theory of liability at common law)⁹ that an action would lie, though nothing had been done in furtherance of the conspiracy.¹⁰

Thus it is quite clear that the scope of the offence was being very much extended by the application to it of the action on the case. And not only was its scope being thus extended by the action on the case, but its nature was becoming somewhat altered by reason of a difference in the character of the conditions needed to support such an action. The gist of all actions on the case was the damage suffered by the plaintiff. Hence the cause of action was not, as in the proceedings under the writ of conspiracy, the act of conspiring,¹¹ but the resulting damage. It followed that

¹ F.N.B. 116 A-H; Hist. of Conspiracy 55-58.

² Above 404-405; see Y.B.B. 8 Ed. III. Hil. pl. 50; 42 Ed. III. Pasch. pl. 27.

³ Above 403.

⁴ Y.B. 40 Ed. III. Pasch. pl. 10 cited Hist. of Conspiracy 57; for another case see a writ cited from a MS. Register of the fourteenth century, *ibid* 37; for other cases from the Parliament Rolls and other sources see *ibid* 110-112. (See *Ad-denda* p. xlviii).

⁵ Thus in Y.B. 11 Hy. VII. Trin. pl. 7 Fairfax seems to think that while at common law "on n'aura Conspiracy forsque sur Enditement de felony," under the Statutes "il aura in trespass."

⁶ Vol. ii 457-459; above 395.

⁷ Bellewe f. 80.

⁸ Above 401 n. 7.

⁹ Above 373, 375; cp. preamble to 3 Henry VII. c. 14.

¹⁰ This case reported by Bellewe should probably be connected with the view held by some of the judges at this period that the intent without the act was punishable, above 373 n. 4.

¹¹ Above 405.

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an action on the case differed from proceedings taken under the writ of conspiracy in that it was possible to sue one conspirator alone without joining the others.¹

It is possible that if the offence of conspiracy had been developed by the common law alone, the old writ of conspiracy would have become obsolete, and the offence would have become a tort pure and simple redressible by an action for damages. As I have already pointed out, there was a tendency during the latter part of the mediæval period for the miscellaneous wrongs redressible by the writ of trespass to drop their criminal character, and become torts.² But we shall see that in the sixteenth century the court of Star Chamber took a hand in the development of this offence; and that its action introduced a very different order of ideas as to its nature,³ which tended to specialise the character of the offence redressible by the common law writs.⁴

Deceit.

We have seen that the writ of deceit originally lay only for some fraud committed in the course of legal proceedings;⁵ and the intricacies of process afforded abundant opportunities for the commission of these frauds;⁶ the following are some typical examples: A protection was given to a knight who was serving with the king in Scotland. Another knight of the same name deceived the court by its means; and the injured party was told by all the judges that it was a proper case for a writ of deceit.⁷ Judgment was entered against a defendant by default, and then it was found that by the fraud of the plaintiff he had had no notice whatever of the proceedings.⁸ A person counterfeited a statute merchant, which he put forward in lieu of a statute which had been satisfied and cancelled.⁹

It was in connection with the contract of sale that the earliest extension of the writ of deceit is to be found. In 1367¹⁰ it appeared that the plaintiff had bought cattle from the defendant and paid the price; but that the defendant was not entitled to the cattle. It seems to have been agreed that he could recover damages for this fraud by a writ of deceit on the case. In Henry VI.'s reign there was a considerable development of the writ of deceit on the case along these lines; and we shall see that these writs covered much the same ground as that covered

¹ Y.B. 11 Hy. VII. Trin. pl. 7 *per* Hussey; F.N.B. 114 D; *Coxe v. Wirrall* (1607) Cro. Jac. 193.

² Above 318.

³ Ibid vol. viii 385-391.

⁴ Below 623-626.

⁵ Y.B. 33-35 Ed. I. (R.S.) 192; cp. a similar case in Y.B. 1, 2 Ed. II. (S.S.) 19.

⁶ Y.B. 15 Ed. III. (R.S.) 314.

⁷ Vol. v 203-205.

⁸ Vol. ii 366.

⁹ Y.B. 32, 33 Ed. I. (R.S.) 468.

¹⁰ 42 Ass. pl. 8.

by some of the writs of trespass on the case.¹ The man who had sold bad meat, or who had warranted the soundness of an unsound article, might be said to be liable either for a form of deceit, or, looking at the damage thereby caused to the plaintiff, for a form of trespass. But even at the end of this period we are only at the beginning of this development in the law. The writ of deceit was being extended; but there is no attempt as yet to analyse the nature of deceit. The law is inclined to look rather at the acts of the parties and the resulting damage than at their intentions;² and this tendency was emphasized by the fact that these deceits in the performance of a contract of sale could equally well be regarded as breaches of warranty. Owing to the fact that the writ had been extended in this way it was not till the following period that the action of deceit based on a false warranty was distinguished from an action for a false representation of fact,³ and it was not till much later that actions of deceit for a false representation of fact became common.⁴ It is not till our own days that it has been finally established that the plaintiff in such an action must prove an intention to defraud.⁵

As I said at the beginning of this chapter, we can see, in the tendency of the judges to extend the scope of trespass on the case, a prospect of many new developments. We have seen that in consequence it is possible to discern the germs of some of our modern principles of civil liability.⁶ Bracton, when speaking of the action for a nuisance, made some attempt to distinguish between *damnum* and *injuria*; and we can see in this, as Maitland points out, "an incipient attempt to analyse the actionable wrong."⁷ In fact the extensions of the actions of trespass and deceit and the consequent extensions of the sphere of liability,⁸ made the problem of drawing the line between the *damnum* which was and the *damnum* which was not an *injuria* a very pressing problem at the end of this period.⁹ Perhaps the best proof that the judges were disposed to extend the area of the

¹ Below 429 n. 3; see Bellewe 139-140. "Trespas sur cas eo quod le defendant vend a luy un chival et luy garrant d'estre bon et sane de touty maladies, lou le defendant sach le dit chival d'estre plein de maladies en le oyels et legges. *Pinchon*. Cest bref suppose faux et fraudulent vend, quel sound in disceit, jugement, *Et non allocatur*, 7 R. 2."

² When deceit on the case was brought for breach of warranty there was often an allegation that the defendant knew it to be false, Y.B. 9 Hy. VI. Mich. pl. 37; but it would seem that this allegation was not necessary, Y.B. 11 Ed. IV. Trin. pl. 10; a counsel said *arg.* in Y.B. 17 Ed. IV. Trin. pl. 2, "home n'avera action de chose que depend solement sur l'entent d'ascun person;" and this idea was not far from the minds of many lawyers at this period.

³ Vol. viii 68-70, 426. (See *Addenda* p. xlviii).

⁴ *Ibid.*

⁵ *Derry v Peek* (1889) 14 A.C. 347.

⁶ Above 381-382.

⁷ P. and M. ii 532, 533.

⁸ Vol. ii 455, 456-457.

⁹ Y.B. 6 Ed. IV. Mich. pl. 18; 17 Ed. IV. Trin. pl. 2 the phrase is used to distinguish the case where an action lies from the case where it does not; see below 420 n. 8.

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actionable wrong is to be found in one or two cases which show that they were beginning at the very end of this period to discuss actions on the case for defamation. But in order to understand the view which the law took of defamation at the end of this period I must say a few words of its earlier history.

In the reign of Edward I. the law had made provision for punishing defamatory rumours affecting the reputation of magnates. The first statute dealing with the offence of *Scandalum Magnatum* was passed in 1275.¹ It was re-enacted in 1379, and the classes of persons who could be reckoned magnates were defined.² In 1389 it was enacted that the disseminators of such tales should be punished if the originator could not be found.³ These statutes were passed, not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom. This is obvious from the words of the statute of 1275;⁴ and the same idea can be traced in the other two statutes.⁵ The legislature fears that the good government of the country will suffer if tales are told "whereby discord may arise between the king and his people or the great men of this realm." This was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury. Such events as the rebellion of the Percys in Henry IV.'s reign will show us that the throne might be endangered by "the growth of a slander between the king and the great men of his realm." But it is probable that these statutes were not very effective. Coke can only cite two mediæval cases from the records known to him.⁶ There is another case of Richard II.'s reign in the *Rolls of Parliament*, in which proceedings were taken against one John Cavendish, a fishmonger, who had accused the chancellor, Michael de la Pole, of bribery;⁷ and from the sixteenth century onwards there is a thin stream of these cases.⁸ Though it had

¹ 3 Edward I. c. 34; and see on this subject Jusserand, *English Wayfaring Life* 272.

² 2 Richard II. st. 1 c. 5.

³ 12 Richard II. c. 11.

⁴ "From henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm;" it was for this reason that these actions were *qui tam* actions, *Cromwell's Case* (1578) 4 Co. Rep. at f. 13a; but its civil tendency to become more prominent than its criminal aspect.

⁵ Thus in 2 Richard II. st. 1 c. 5 it is recited that, in consequence of such slanders "Debates and slanders might arise betwixt the said lords, or between the lords and the commons . . . and whereof great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm."

⁶ Third Instit. 174—the cases of Adam de Ravensworth and John de Northampton; as we have seen above 392, the latter was probably not a case of *scandalum magnatum*. This may be due to the competition of the Constable and Marshal's Court, vol. i 580.

⁷ R. P. iii 168-170 (7 Rich. II. nos. 11-15).

⁸ *Beauchamp v. Croft* (1569) Dyer 285a; *Earl of Lincoln v. Roughton* (1607) Cro. Jac. 196; *Viscount Ley v. Stephens* (1629) Cro. Car. 135; all the former cases were fully considered in *Lord Townsend v. Hughes* (1677) 2 Mod. 105; cf. Comyn, *Dig. Action on the Case for Defamation*, B. 1-3.

long been obsolete, the offence of scandalum magnatum was not formally abolished till 1888.¹

Unless the case fell within the provisions of these statutes the courts of common law declined to give any action for defamatory words. We have seen that this wrong had been recognized by the Anglo-Saxon laws;² and Bracton had, under the influence of Roman law, classed it with the wrong of trespass to the person.³ But we have seen that the principle that no such action lay at common law had been solemnly laid down by Parliament in Edward I.'s reign.⁴ It was only if the defamatory words were accompanied by some overt act, such as beating or destruction of property, that the court gave a remedy. Probably in such cases the words aggravated the damages.⁵ At any rate plaintiffs in actions of trespass usually allege insults "*inter alia enormia*." For defamation pure and simple the plaintiff was obliged to resort either to the local courts, which, as we have seen, freely entertained such cases,⁶ or to the ecclesiastical courts. The jurisdiction of the ecclesiastical courts was recognized both by the legislature⁷ and the judges.⁸ But it was soon seen that an unlimited jurisdiction over cases of defamation might be used, like an unlimited jurisdiction over breaches of faith was used, to get indirectly control over cases which ought to have gone to the king's court. Thus persons indicted and acquitted had a habit of suing the indictors for defamation in the ecclesiastical courts. It was enacted that in such cases a prohibition should lie.⁹ In Edward IV.'s reign¹⁰ we get an odd tale of a similar perversion of the action for defamation told of no less a person than the abbot of St. Albans. He had sent

¹ 50, 51 Victoria c. 59, which repealed the statutes creating it.

² Vol. ii 382 n. 11.

³ f. 155. "*Fit autem injuria non solum cum quis pugno percussus fuerit, verberatus, vulneratus, vel fustibus cæsus, verum cum ei convitium dictum fuerit, vel de eo factum carmen famosum et hujusmodi.*"

⁴ Vol. ii 366.

⁵ P. and M. ii 536.

⁶ Vol. ii 382-383.

⁷ 13 Edward I. st. 4 c. 1 § 8; 9 Edward II. st. 1 c. 4.

⁸ Y.B. 12 Hy. VII. Trin. pl. 2 (p. 24), "*Le cas de diffamation est tout spirituel offence,*" *per* Fineux, C.J.; 17 Ed. IV. Trin. pl. 2, "*Et sont divers cases en nostre ley lou home avera dampnum sine injuria, come le defamacion en appellant un home laron ou traytor, cest damage en nostre ley, mes nul tort,*" *per* Nedham and Billing.

⁹ 1 Edward III. st. 1 c. 11. We may note that in the MS. Register, described vol. ii App. V8 (p. 619 n. 5), there are at ff. 28, 28b two writs of prohibition to meet the case where proceedings in the king's courts were made the basis of an action for defamation in the ecclesiastical courts; for an actual case see Y.B. 18 Ed. IV. Pasch. pl. 32—action for defamation founded on proceedings in the King's Bench for trespass *de bonis asportatis*.

¹⁰ Y.B. 22 Ed. IV. Trin. pl. 47 and Mich. pl. 9; for Cardinal Morton's letter to the Abbot of St. Albans as to the illegal and immoral practices of himself and the monks see Gairdner, Lollardy and the Reformation i 269-273.

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for a certain married woman, detained her in his chamber, and solicited her chastity without success. Her husband then sued the abbot for the imprisonment of his wife. The abbot thereupon sued him for defamation in the ecclesiastical court. In such a case the court found no difficulty in awarding a prohibition to the ecclesiastical court and declining to grant a writ of consultation. In self-defence, then, the courts of common law would prohibit certain actions for defamation. But, in spite of one doubtful case to the contrary,¹ it is clear that all through this period they declined to entertain actions merely for defamation. It is not till Henry VIII.'s reign, in the very last of the Year Books,² that we have any hint that the courts are beginning to think of claiming some share in this jurisdiction. Here, as in other branches of the law of crime and tort, the decline of the ecclesiastical courts and the competition of the court of Star Chamber led to important developments in the common law.³

¹ 30 Ass. pl. 19—an action by bill by Sir Th. Seton, "justice of our lord the king," against Lucy, the wife of one C., for that she in the presence of the treasurer and the barons of the Exchequer called him traitor, felon, and robber; the defendant aggravated her offence by pleading that the plaintiff had been excommunicated by a papal bull, see vol. ii 252 n. 1; this case probably forms no exception to the general rule, as it might be considered to be either a case of Scandalum Magnatum, or more probably a species of contempt, above 393; L.Q.R. xxv 242-244.

² Y.B. 27 Hy. VIII. Mich. pl. 4—action on the case for calling a man a "heretic and one of the new learning;" "Il est cler que cest action ne gist icy; car il est merement spirituel. Et si le defendant justifieroit que le pleintif est Heretique . . . nous ne pouvons discuter s'il soit heresie ou non; mes s'il fuit un chose ou pouvons determiner le principal, come *Thief* ou *Traitor* ou tiels, pro eux un action gist icy. . . . Ascuns choses sont mixez et punissable en ambideux Leys, come si un dit que auter tient *Bawdry* . . . et pro ceux on peut estire ou il veut porter son cas."

³ For these developments see vol. v 205-212; vol. viii 333-378.