HISTORICAL FOUNDATIONS OF THE COMMON LAW

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INTRODUCTION

I

The aim of this book is to give a single picture of the development of the common law, to draw the main outlines of the subject. But which are the main outlines depends upon the viewpoint of the observer. Legal history means different things to different people. To historians it is usually a branch either of administrative or of social history; and legal thinking is not considered for its own sake. Lawyers are interested in legal thinking. But to them the subject usually appears as law read backwards, the inevitable unfolding of things as they came to be; and the thinking is seen as a fumbling for the result eventually reached. In this gulf between the disciplines there is lost the interest of a story and perhaps the measure of an achievement.

Societies largely invent their constitutions, their political and administrative systems, even in these days their economies; but their private law is nearly always taken from others. Twice only have the customs of European peoples been worked up into intellectual systems. The Roman system has served two separate civilisations. The common law, governing daily relationships in very various modern societies, has developed without a break from its beginnings in a society utterly different from any of them. What was it that made its practitioners think on so unusual a scale? What made the product of their thinking so versatile and so durable? It is from the stand-point of such questions that this book will seek to trace its history.

II

The first problem is what starts a legal system off, what causes customs to turn into reasoned law. One condition is no doubt the rise of a profession, or at least of a cohesive group of people whose business it is to think about the law and its administration. Another seems to be the rise of rational modes of trial. Early law-suits admit only a blank denial, and put the unanalysed dispute to supernatural decision. The blank result settles the dispute, but can make no law. Legal thinking begins with a legal process which brings out the facts and compels their analysis. In England the start was the introduction of jury processes. But the jury was first seen as a new ordeal, and gave an equally blank result. Only slowly and deviously could single facts be brought out for legal consideration; and then the aim was not to exploit a body which could ascertain the facts, but to avert the danger that they would misunderstand them. Even slower and more devious was the process by which law-suits were turned round, so that all the facts came out before their legal effect was decided. Not until that happened, not until a court was sat down to a problem like an examination candidate today, did we have a fully substantive system of law.

It is with these matters and their corollaries that the first section of this book deals. For a comprehensive account of the growth of the legal system, the reader is referred to the current edition of Radcliffe and Cross, *The English Legal System*, to the appropriate chapters of Plucknett, *Concise History of the Common Law*, or to Holdsworth, *History of English Law*, especially the first two volumes. The four chapters of "The Institutional Background" below aim only to give such a picture of the changing framework of litigation as will enable the development of the law itself to be understood.

III

The remainder of the book is concerned with the development of the law, and with the second great problem that it raises: how

has it been so versatile and so durable? How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world? It has not been the ordered development of the jurist or the legislator, of men thinking about law for its own sake. It has been the rough free enterprise in argument of practitioners thinking about nothing beyond the immediate interest of each client; and the strength of the system has been in the doggedness, always insensitive and often unscrupulous, with which ideas have been used as weapons.

But however disrespectfully one is prepared to use them, legal ideas have their own strength, and it shows itself in many ways. It shows itself first in the difficulty of change. Apart from the tiny extent to which, at any period of our history, the courts have felt themselves able to reverse an accepted rule, direct change can be made only by legislative act; and that too was rare until Bentham's work was done. Change has for the most part been indirect. All that the practitioner can do for one hit by a rule, whether yesterday's taxing statute or some entrenched result of circumstances long dead, is to look for a way round it. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be exploited and broadened by others, the result in the real world may be reversed, but the rule remains. Even when it is formally abolished or finally forgotten, its shape will be seen in the twisting route by which it was circumvented. And the ideas involved in the circumvention will prove their own strength. The first resort to them may have been artificial; but their natural properties will assert themselves, and consequences may follow as far-reaching as the ecological disturbances produced by alien animals or plants.

The life of the common law has been in the unceasing abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look odd to one brought up on categories of Roman origin; but it will work. If

the rules of one tort, say deceit, give what now seems an unjust answer, try another, try negligence. And so the legal world goes round.

But it goes round slowly, too slowly for the violence with which the conceptual economy is transformed to be felt, too slowly, in periods of rapid social change, for the law to keep pace with life. In the sixteenth century the gap grew so wide that the system itself was perhaps in peril. In the twentieth we make use of legislation; and our familiarity with deliberate change makes it easy for us to misread history. How could our ancestors be so perverse in doing deviously what could be done directly? How could they be so clever in using mere tricks to reach desirable results? Certainly if we view the common law on the eve of reform as a piece of social engineering, we see the spirit of Heath Robinson at his most extravagant. But the viewpoint is anachronistic and the questions unreal. It is a real question why nobody before Bentham was provoked, and a part of the answer is that nobody before Blackstone described the system as a whole. Lawyers have always been preoccupied with today's details, and have worked with their eyes down. The historian, if he is lucky, can see why a rule came into existence, what social or economic change left it working injustice, how it came to be evaded, how the evasion produced a new rule, and sometimes how that new rule in its turn came to be overtaken by change. But he misunderstands it all if he endows the lawyers who took part with vision on any comparable scale, or attributes to them any intention beyond the winning of today's case.

IV

If change is largely brought about by re-classification, by transferring a matter from, say, contract to tort, it follows that the legal historian can avoid anachronism only by writing about a short period at a time. In the hope of giving a single picture of the growth of the common law, however flawed, I have committed the fundamental anachronism of a single classification to

cover its whole life: Property; Obligations; and Crime. This has two merits: in a general way it can be applied to any developed system of law; and in detail it has never been applicable in England. The pervasive anachronism is thus at least obvious. But the reader must always remember that these labels are a modern expository device, which tell him nothing about what was in the minds of the lawyers he is thinking about. If there was a "true" starting-point it was probably a simple division into rights and wrongs. Our concept of crime separated from tort for procedural reasons; and for that reason the criminal law and its institutions will be discussed together. Our concept of property appears to have grown from mere factual possession, and the right to get possession may have been indistinguishable from what we should call an obligation: the lender of a chattel started from the same legal position as a lender of money; and the heir's right to his ancestor's fee simple began as an obligation on the lord to admit him as tenant. "We must not", wrote Maitland, "be wise above what is written, or more precise than the lawyers of the age." We shall inevitably do these things: but something will be gained if we are always conscious of the danger.

That the three divisions are of very unequal size reflects the density of the learning generated in each field. Large though the Property section is, it still does not reflect how much of lawyers' lives was devoted to proprietary matters: it has here been kept down by the omission of whole topics, because there seemed no point in a degree of compression which would leave only unconnected assertions of fact. And small though the Crime section is, it still does not reflect how little lawyers thought about crime until modern times: since criminal trials with their blank Not Guilty have never departed from the ancient pattern of litigation, there was little opportunity for legal thought until such things as the direction of a jury could formally be questioned.

V

The attempt to give a single picture has posed a problem more

fundamental than that of arrangement. Legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges: but our dots are not numbered. We have unrivalled sources from a very early period, but they are all business documents, made by and for men who knew the business. They tell us a tremendous amount of detail with certainty and precision. They do not show us the framework into which that detail fitted, the assumptions upon which it rested. It follows that a general outline of legal development, such as this, can be given with far less certainty than a detailed account of a single medieval action. I have tried in the text to indicate confidence or doubt, and in the notes to put readers in the way of finding different views. But it is right to say clearly at the outset that no major proposition in legal history is ever likely to be final, and that any single picture must be a personal one.

I. INSTITUTIONAL BACKGROUND

1 *The Centralisation of Justice*

LOCAL AND CUSTOMARY LAWS

The common law is the by-product of an administrative triumph, the way in which the government of England came to be centralised and specialised during the centuries after the Conquest. Our starting-point will therefore be a sketch of the local and unspecialised institutions from which that process began, and of their own history we shall say nothing; but of course we thereby miss the beginnings. The Conqueror took over a going concern, one to which he claimed lawful title; and he expressly confirmed the laws of his predecessors. Those laws had first come with earlier conquerors, not rulers seeking control of an existing society, but peoples seeking land and livelihood, largely destroying what was there before, and bringing with them their own ways. Those ways, refined and modified by Christian influence, by administrative needs, and by accident, had become the laws by which Englishmen were governed when the Normans came.

They were, however, by no means the same all over England. Laws as well as institutions were local, and the differences between one district and another sometimes reflected not different answers to the same problem but different ways of life; and these in turn may sometimes go back to the piecemeal nature of those earlier conquests and settlements. As recently as 1925, for example, when the rule of intestate succession assigning land to the eldest son was abolished, itself long an anomaly, there was abolished with it an anomalous exception: in Kent the sons shared equally. But

this began as something integral to the social arrangements of a people whose agrarian structure, whose whole civilisation indeed, differed from those obtaining in the central districts of England; and how much of all this they had brought with them from their first home we shall never know. To the north and east there were other ways again, the ways of more recent arrivals; and the Danelaw was to be a reality long after the Conquest, and perhaps to be the source of important institutions in the common law. But the common law, the acceptance for all England of a single rule on any matter, the suppression of contrary customs, leaving as something special those like the Kentish rule of inheritance deep-rooted enough to survive, all this lay in the future, the slow result of institutional centralisation.

The materials of the common law, therefore, were the customs of true communities whose geographical boundaries had in some cases divided peoples and cultures, and not just areas of governmental authority. But within each body of custom, what we think of as the law was not marked off from other aspects of society. Courts were the governing bodies of their communities, dealing with all their public business; and to us they would at first sight look more like public meetings than courts of law. But the way in which they performed their functions, even those which we should class as administrative, was largely judicial. The needs of society were diverse but constant, and they were for the most part supplied by customary obligations resting upon ordinary people. Thieves were caught because it was the duty of everybody to catch them. Bridges were mended, and stretches of highway kept clear, because each was the customary responsibility of a particular landowner or the inhabitants of a particular township. Such duties were enforced *ex post facto* by penalty; but we mean more than that when we say that most of government had a judicial aspect. It largely appeared as the application of pre-existing rules. There were few overt decisions to be made. Custom decided what should be done, and generally who should do it. And even when, as was often the case in the smaller local units, people had to be chosen for particular duties, to mind

hedges, for example, or to check on brewers or bakers, still the duties themselves were fixed. Early law does not have to cater much for choice. In the private sphere we shall find this reflected in the small part played by contract, and the large part played by enduring relationships of a proprietary nature. In public affairs, to use modern terms, there was no separation of powers but a strict and general rule of law.

The kingdom, then, may be pictured as a two-tier structure. It was to courts of this kind that ordinary people looked up and the king looked down; and neither would often look beyond them. To the king what mattered was the effectiveness of his control; and the methods used made the common law. But the courts themselves may in a sense be classified according to the king's relationship with the men actually in charge. Were they merely agents, or were they seen as grantees having some proprietary right in the government of their territory? Our modern terminology imposes a distinction to which many of the facts do not respond: government as well as property could be farmed out; and some kinds of property were not at first heritable, and some kinds of office became so. But it is central to English institutional history, and a necessary condition for the making of the common law, that the proprietary or feudal element in government took second place.

COUNTY COURTS

After the Conquest, as before it, the primary government of England was through counties and hundreds. The beginnings of the county courts raise questions our starting-point enables us to avoid. But if some were administrative creations, some look like the governing bodies of once independent kingdoms. And what mattered for the future was that their control, with partial exceptions in the great palatinates like Chester, remained in the hands of royal ministers. The earl's place may once have been that of under-king; but now he was at most entitled to a share of the profits of justice. Actual power was in the hands of one still called

in Latin the earl's deputy, *vicecomes;* but in English the sheriff was understood as the king's reeve in the shire, and was accountable to the king. The county boundaries long remained important in our law, but it was as the limits of an agent's authority and not an owner's rights. The sheriff, though not always without difficulty, was kept in his place as a servant of the king; and that is what made possible his own decline and that of his court. From presiding over what was, for all ordinary purposes, the most important kind of court in the land, he slowly became the executive addressee of commands from higher central bodies.

That the sheriff was always convener is almost the only general statement we can make about county courts, because the customs peculiar to each included the rules governing their own meetings. In the absence of communications, an invariable routine of times and places was essential. Even an unaccustomed adjournment could appear as a denial of justice; and, though some courts alternated by turns between one town and another, there was an outcry in Surrey when the appointed place was changed from the central Leatherhead to Guildford, which lies at one end of the county. The period was generally monthly, in some counties every six weeks, and in this matter a rule was imposed: the Great Charter prohibited meetings more frequent than from month to month. Attendance was evidently a burden. And although custom seems generally to have provided for a meeting of the great men of the county and representatives of the lesser, the great man would not often want to come, and if he held land in several counties he could not. He might make permanent provision by granting land to a tenant for the feudal service of performing the suit that he owed to the court, or he might each time send a representative, such as his steward. Stewards in particular, the businessmen of the countryside, to whose competence in affairs was added the weight of their masters' authority, seem often to have played a leading part: one writer likens them to bell-wethers of the flock. And similar influence might no doubt be gained by any suitor with the personal qualities to master both the business and his fellows. In some counties, indeed, it seems that there was more

to it than this, and that the suitors were of two classes, the ascendancy of a few being somehow institutionalised. And it is even possible that these few were at one time held specially responsible to the king; but any such responsibility was probably not for judgment in the ancient internal affairs of the community, but for answering questions about royal rights, part of the rise of the jury and of the process by which the king came to govern people directly and not through the agency of local institutions. By the thirteenth century, when this process was already well advanced and when concomitantly our evidence is fuller, the responsibility for judgment clearly rested upon the court, the community as a whole.

HUNDRED AND FRANCHISE COURTS

The geographical sub-divisions of counties, most often known as hundreds and obscure in origin, also had their courts. The hundred court was of the same nature as the county: a meeting, generally at intervals of three weeks, of the more important persons holding land in the area or their representatives, and of representatives of the communities of lesser persons; and it was presided over by a bailiff. But unlike the sheriff, the hundred bailiff often served two masters. By royal grant, by usage and usurpation, or by the continuance of a state of affairs sometimes older than the counties and hundreds themselves, many hundreds —at the accession of Edward I it was more than half of all those in England—were in private hands. The actual meaning of this in practice varied greatly. The lord of the hundred might be entitled merely to a share in the profits of justice, or he might exercise a substantial measure of control. But the bailiff, whether appointed by the sheriff in a royal hundred or by the lord in a private one, was a royal officer and sworn in as such, in many respects the everyday embodiment of government for ordinary people.

Just as a hundred might be in private hands, and yet be part of the king's machinery of government, so all over England there were all kinds of liberties and franchises, in which some or all of the jurisdiction of counties and hundreds, or in later days of the

jurisdiction which had in principle been withdrawn from them into central institutions, was exercised in courts of the feudal pattern. Here to a greater or lesser extent government was indeed in the hands of persons seen as the king's grantees rather than his agents. But many of these, at any rate, went back to a time when this distinction was by no means so clear as it is to us. If order was to be kept, the co-operation of the man with actual local power had to be enlisted. This could best be done by allowing him a financial interest; and if personal arrangements seem to have grown into heritable proprietary rights, the same thing happened with interests in land itself. To the institutional historian anxious to understand and evaluate the ways in which a medieval kingdom could be effectively governed, these franchises are important. But for those who want to understand the framework out of which the common law grew, what matters is that, numerous as they were, each was seen as something special and in some degree precarious. The right and duty to perform some governmental act might rest upon the officials of the liberty; but if they did not do it, the sheriff's men would.

In England, then, proprictary justice and feudal government were in general harnessed by the royal power rather than opposed to it, and we simplify social and political facts but do not distort the pattern of events if we think of law and order as fundamentally residing in the courts of counties and hundreds, and under the control of officials. It follows from what has already been said about the nature of these courts that to begin with they were in principle omnicompetent and had, in our language, jurisdiction over all kinds of legal dispute; and the making of the common law was largely a process of transfer to new central institutions. What happened in county and hundred courts is therefore of the first importance to us; and our means of knowledge are sadly inadequate.

RECORDS OF LOCAL COURTS

Accounts of law-suits may be written for various purposes. There is first the interest of the journalist or chronicler who will

immortalise the exceptional. In the middle ages, when a large proportion of all writing was done in ecclesiastical houses, the interest of the chronicler might merge into that of the diarist, the litigant who wished for his own purposes to record suits in which his house had been involved. Such unilateral accounts are our chief source of information about actual law-suits in the period before the Conquest and for a century and more after it; and what they tell us is mostly about great territorial disputes. The commonplace is only recorded when courts themselves come to keep records, minutes of their proceedings. But the earliest motive for doing this is financial, to ensure that the proper penalties are collected from the wrongdoer, from the unsuccessful litigant who claimed or denied unjustly, from the litigant or the man owing suit of court who did not come, and from all the others to whom the profits of justice were almost an inevitable tax. In the case of the county court, the state of the records reflects the two-tier structure of government. On the rolls of the king's exchequer, kept in the preservative air of officialdom, would be entered the mute totals for which the sheriff had accounted. Such records as were kept of county court proceedings were for his use and remained in his private keeping; and they have perished except for a few fragments from the fourteenth century, and one, probably untypical, from the thirteenth. Some owners of private hundreds, especially religious houses, preserved the rolls of their courts, and of these a few do survive from the later thirteenth century. From this century too there are some accounts of the same nature brought into the records of central courts by appellate processes; but at best they give capricious glimpses of regular institutions. Literature produced by lawyers for their own purposes also fails us. It was centralisation that created the profession, and central institutions with which professional writing came to be concerned. A few formularies gave precedents for use in local courts, but of course their doings were not professionally reported. They were, however, everyday doings; and when, from the late twelfth century, we can see a great deal of what was happening in the king's central institutions, we must remember

that what we have is a spotlight trained on the special. What has sunk into the dark is the business of the principal instruments of government and judicature for a century and more after the Conquest. And for most ordinary men and many ordinary causes, the county court was the highest regular forum for long after that, and therefore a principal source of things that will strike us as novelties when we first see them transacted on the lighted stage of the royal courts.

FEUDAL JURISDICTIONS

For the sake of putting first things first, feudal jurisdiction has so far been spoken of only as modifying what may be described as the national system of government and judicature. Special or franchise jurisdictions have been mentioned, but not the regular jurisdiction incident to lordship; and this constitutes a large exception to the principle that the courts of county and hundred were at the beginning the primary bodies for all kinds of governmental business and all kinds of dispute. What chiefly matters about feudal jurisdiction in England, however, is precisely that its regular scope was limited. This need not have been so. Feudalism was not a system, or even an ideal, having fixed properties. Such definite ideas as the word connotes are the creation of lawyers and historians seeking to systematise certain features which the facts of power might produce in medieval society. Of these facts, the most elementary is the coincidence that effective government was necessarily local, and wealth, since land was the only form of income-bearing capital, was territorial. Lordship and ownership, government and property, were not therefore clearly distinct as they seem to us; and whether we start at the bottom and think of the small man anxious to hold what he had in peace, or at the top and think of the king or great lord anxious to provide for his governmental and economic needs, there was a tendency toward the organisation of society by dependent tenures. From top to bottom one can imagine a series of bargains in which each superior allowed a measure of immediate control to his

inferior, whose holding he undertook to protect in return for a tribute in food or money or services or fighting men. At the top fighting men were commonly demanded. At the bottom agrarian facts tended to produce their own uniformity. The plough drawn by more oxen than most peasants could own, the waste involved in turning so long a team, the need to fallow and to rotate crops, these and many other factors produced co-operative units of one kind or another, notably the nucleated village community with its great open fields in which each peasant had his scattered strips. If we add a lord, with his own demesne land worked by the peasants in return for their holdings, we have the typical manor, the natural unit taken over, as it were, to be the base of the feudal pyramid.

These forces, operating together in a society without structure, could have pushed its entire organisation up into the pyramid, devolution of all aspects of government being by the simplest territorial division and sub-division. In England, many of the phenomena existed before the Normans came. Agrarian facts had produced many manors of the typical pattern, and many other kinds of unit to which the Norman administrators were to give the name of manor. Governmental facts had produced jurisdictional lordships. The desire for security was still producing the free man claiming to be able to betake himself and his land to what lord he chose. But, whatever pattern may have been latent in all this, its development was interrupted by the Conquest, which produced all at once the pyramid. It was, however, a pyramid in the economic dimension and not the governmental. The entrenched order of the counties and hundreds remained as the governmental framework; and when the Conqueror's men produced their great description of England, listing the fees of the tenants-in-chief and the holdings of the king himself, the information was arranged county by county, and had been collected through the county machinery. Domesday is a register of property and proprietors before and after the Norman takeover. But it assumes that the bearings of society are as they were in the time of King Edward the Confessor.

The new proprietors, of course, were mainly Frenchmen, participants in the gains of the adventure, who had either displaced one or more English owners or had been intruded over their heads to become their lords. The tenures of those who held in chief of the king, and some tenures at a lower level, were thus created instantly. More came into being as the king laid on his tenants-in-chief the obligation to furnish fighting men, and as the tenants-in-chief came to meet this obligation by means of the enfeoffed knight, not kept and paid like the household retainer but granted a living in land. The military tenures, ironically shown by modern research to have been of uncertain value as a provision for warfare, brought with them a logic which was to generate anachronisms throughout our history. These will be considered in connection with the development of property law; and what has mattered for the system as a whole is precisely that the feudal forces were so largely confined to the economic sphere. Had lordship regularly carried most of government with it, jurisdiction would have been defended as property against centralisation, customary law would not have been transformed by professional handling, and Roman law would perhaps have no rival in the western world today.

The regular scope of feudal jurisdiction is hard to discover, and clarity will be served by distinguishing between manorial courts and courts at higher levels of tenure. About the latter we know the less, though it is clear that in the century after the Conquest the courts of honours, the greater fees whose tenants might style themselves barons, were doing much important work. Franchise jurisdiction apart, and setting it apart is not always easy, their proper field was the business of the fee as such: the ownership, if that word is appropriate, of the various holdings; the dues proper to each; the dower of widows of dead tenants; and, perhaps most important of all, inheritance, or rather those decisions about whose homage to accept out of which grew together both heritability and the canons of descent. The courts of these communities of tenants, including of course the king's as the highest such court, created the customs of English feudalism, and so

imposed on English property law a logic as indestructible as it soon became irrelevant.

At the lower level, the courts of manors governed communities, not just of tenants of the same lord, but of neighbours whose lives touched each other every day and at every point, and whose subjection to their lord was different in kind from that of the merely feudal compact. The manor was often also a village, and the village was often also an economic unit which needed, like a modern factory, to be managed. Three elements thus merged in the work of these courts. There was the determination of property rights in the land of the manor; and here very ancient customary rules may have been enforced, free at first both of the uniformity and of the peculiar logic inherent in the newer and higher military tenures. Some of this law was to perish, some to live to a sad old age as what came to be called copyhold, and some, most notably the intricate regulation of pasture, to survive as chapters in today's books on real property. But at the time the matter of pasture would perhaps have been classified—if anybody had attempted classification—as part of the function of the manor court in managing an economic unit. That the plough-oxen should live and that the arable should be manured in the appropriate seasons was no less important than that growing crops should be protected; and the punishment of those who defaulted in such arrangements, which was the most ordinary business of manor courts, was the equivalent of our modern managerial function. Then lastly if a peasant injured another, or slandered him, or did not pay for the eggs he had bought, or cheated him over the cloth he had sold, the victim was more likely than not a neighbour. And although the institutional theory, if there was any, is far from clear, it seems that litigation in such matters between tenants of the same manor would generally take place in the manor court rather than in that of the hundred or county.

The wider ambit of manorial courts, reaching into more areas of life than courts at higher feudal levels, would alone have kept them longer in being. But there was another reason for their long survival. The higher feudal courts perished when their proprietary

jurisdiction, their prime business, passed to royal courts; and at the manorial level this never wholly happened. To later eyes there was a clear distinction between free and unfree holdings. The free tenants were protected by the king's law. They could get a royal writ directing the lord to do right to them; and it would be done in a court in which, as at the higher levels, the free tenants themselves were the judges. This kind of court came to be called the court baron; and like the higher feudal courts it ceased to exist when such claims came to be heard directly in royal courts. But royal courts would not help the unfree, and rationalised the matter by saying that in their law unfree land belonged to the lord, at whose will the unfree tenants held. Seen from above, therefore, there were no rights in such land, no courts, and no judges: there was a gathering at which the lord's will was declared and recorded. This came to be known as the court customary; and since there could be no other title to unfree land, it continued to exist although increasingly controlled by royal courts. The matter is one of many in which the king's courts rejected a class of business as not their concern at a time when many things were not their concern; and their exclusive rules posed great difficulties as other jurisdictions decayed. The reality underlying the rejection in this case was the economic position of the peasant as part of a productive unit; but the indicia of free and unfree were never wholly clear, and mattered less in fact than common law theory would suggest. It is unlikely at any period that there were often two separate units in any one manor; and we must not suppose that the customs of a court customary were not law just because the king's courts took no notice of them.

We have then the ancient public courts of shire and hundred, the feudal courts, and the franchises in which feudal courts might exercise a public jurisdiction. In the compass of this book no consideration at all will be given to the courts of cities and boroughs, the urban equivalents of county and hundred and sometimes also of private courts. The courts merchant, which depended upon the concentration of trade in fairs and markets, and where merchants applied their own customs to their own

transactions, will at this point be only briefly mentioned. Their needs and therefore their customs were very different from those of a society in which true contract otherwise played a small part; and here again great difficulties resulted when these matters were forced into the common law courts.

JURISDICTION OF THE CHURCH

Of one other jurisdiction, however, something must be said, namely that of the church. The courts Christian were the earliest in England which would have looked to us like courts of law rather than meetings; and they were part of a European system which was itself highly organised and which administered universal law, based upon the Roman, of great sophistication. This law was not, of course, confined as is modern English ecclesiastical law to questions about doctrine, clergy discipline, pulling down churches and the like. All lawful men were Christian, and important areas of their lives were subject to the law of the church and to no other. There was a jurisdictional frontier guarded on the one side by the writ of prohibition and on the other by a weapon too powerful for common use, the withdrawal of spiritual sanction from the lay power itself. But many difficulties arose. Testamentary jurisdiction was clearly for the church; but was the church's nominee or some other to represent the dead man in the lay courts if he died owing or being owed an enforceable debt? Questions about the fact and validity of marriage were clearly for the church, and therefore questions of legitimacy; but were its determinations to bind the lay courts in deciding upon inheritance? Ordinary contracts were plainly for lay courts, but to break a promise, at least if it had been supported by some form of oath, was also a sin. To speak ill of one's neighbour might at first be matter either for a lay court as an ordinary wrong, or for court Christian as a sin, particularly if the ill spoken was itself an allegation of sin which might lead to a spiritual charge. How could the frontier be defined?

So far as possible, kinds of question were allocated to the one

side or to the other, and formally at least the other accepted the consequences. The lay courts followed the church as to testamentary representation; and if they did not always follow it on legitimacy, they avoided direct contradiction. Sometimes the line had to be drawn arbitrarily as a matter of degree. Questions about tithes, for example, were for ecclesiastical decision; but the right to present a parson to a church was, after a bitter struggle, admitted to be lay property. Since the value of that property depended upon the tithes due to the church, a rule emerged that a sufficiently large dispute over tithes between neighbouring parsons would have to await the result of a lay suit between their patrons. But although lay courts could and did leave some matters wholly to the church, the church could not so easily relinquish cognisance of those sins which happened to be unlawful. A second principle was therefore brought into play: crudely stated it was that only lay courts could impose lay sanctions, for example order the payment of money. But moral issues are not so easily segregated; and the consistory court of Canterbury, at least, enjoyed what was in effect a flourishing contractual jurisdiction, seemingly on the basis that lay restitution could properly be made the condition upon which spiritual penalties would be mitigated or revoked.

As will be seen later, this was the *modus operandi* of the equitable jurisdiction of the court of chancery, only with a prison instead of a penance. And although we have long ago ceased to look for the origin of that jurisdiction in some identification of the chancellor as the king's confessor, we shall also do wrong to assume that the whole truth lies in administrative details. The rise of equity is intelligible only if we remember the medieval familiarity with earthly institutions of conscience, and the medieval belief in an absolute right. Our own age is the first which has felt able to relegate the relationship between law and morals to the class-room.

The incongruous association of probate and divorce in the modern high court, the two fields in which the exclusive jurisdiction of the church survived, is therefore not the only residue of the powerful ideas given expression in its courts. They were also

secularised in the chancery. And they played a part, though we shall never know how large a part, in the formation of the common law itself. It is an important element of the background to the process by which justice came to be centralised that the men who did it, the men who guided the common law in its first and greatest formative period, were largely ecclesiastics having some canonist learning, capable of thinking of the law as an intellectual system, and having some of the details of a mature system in mind.

THE PATTERN OF CENTRALISATION

The pattern of centralisation from local institutions is clear to hindsight. People were at first governed by the courts of county and hundred, those courts by the king. Government in the upper tier was largely a matter of accounting for what had become due to the king from the lower. Certain wrongs, for example, entailed a forfeiture to the king of the wrongdoer's goods; local institutions must therefore produce what was in effect a balance-sheet of wrongs and goods, and would be penalised for any failure. The earliest method of control appears to have been a system of local agents, local justiciars, who were to take part in the determination of any matter involving royal rights. This gave way to a system of periodic audit by commissioners sent out from the centre, the justices in eyre, supplemented by a permanent local accountant, the coroner, whose records provided a check on the accounts given by the local institutions themselves. Seen from another angle, the system of eyres, journeys by the king's commissioners and the king himself, represents a system of governing the kingdom bit by bit, checking on one county after another; and within each county the sheriff would similarly make periodic tours of the hundreds. But there was an inevitable tendency for matters to be withdrawn from the old two-tier structure, for the king to govern people directly and for people to seek justice from the king directly. As this happened in more and more matters, the realm became the important community. Instead of the king

coming to the counties one after another, the counties sent representatives to treat together with the king and to become the house of commons. And as more and more kinds of dispute were brought to royal judges, who administered a common law, visitations at a frequency suitable for the old audit were less and less appropriate. Litigants sought royal justice wherever they could find royal power, which was most often in the exchequer; there a permanent central court was established. Centralisation and specialisation proceeded together.

But the pattern which hindsight can see was not being consciously drawn at the time. Institutions begin in expedients. An immediate problem arises: an immediate solution is found. Nobody can know that the solution will later be seen as the origin of something, or the problem as the effective end of something else. There was never a time at which the county was consciously reduced from its position as the most important court for ordinary people. Indeed, attempts were made to stem or reverse the tide of centralisation and send some matters back there. Nor was there a time at which the new position was consciously accepted, and thought given to the fitness of the county for its new role. But for the historian this has one advantage: even when his evidence comes from a time later than the best days of the institution, he can still reconstruct those days with fair confidence.

THE EYRE SYSTEM

This is true not only of the county but of the eyre system. Its most critical days were in the twelfth century before judical records began; and the only official traces are entries of the proceeds in the pipe rolls, the great central accounts, from which the personnel and the circuits of many commissions can be reconstructed. But from the thirteenth century we have records made for the commissioners themselves, eyre rolls; and for some fourteenth-century eyres these are supplemented by year book reports, made for the technical purposes of lawyers. In all this we can see not judges on circuit but a whole system of government.

The coming of the justices in eyre was the coming of royal power, and before them would appear the fullest assembly of the county. The ordinary governmental authorities stopped working, and they themselves came to judgment. The catastrophic nature of the visitation can be seen in events at the opening of the eyre. For example machinery had to be set up to regulate more minutely than in ordinary times the prices of food, and special arrangements had to be made about accommodation for the crowds who were to come. And the sheriff surrendered to the justices his wand of office and received it back at their hands: they were the king and he was to act at their command and to hold office at their will.

The conduct of business at an eyre epitomised its historical role. The work was divided into two parts, and sometimes at least the commissioners formed themselves into two groups to deal with them. The first part, the pleas of the crown, represents the system of itinerant government, the first stage in institutional centralisation. At its core was a list of questions, the articles of the eyre, about all matters of possible profit to the king. Some of these were about the feudal rights of the crown, wardships and the like, which will later be discussed for their own sake. Some were about such arbitrary oddities as wreck and treasure trove; and the coroner's inquest into treasure trove survives today to remind us that the enforcement of rules, and not the refinement of their content, was the first achievement. The coroner's inquest into unexplained deaths reminds us even more clearly that law and order on the national scale were first expressed in terms of revenue. When in 1221 a Worcestershire hundred jury, answering the articles of the eyre, said that Roger's wife Emma had been drowned in the Avon, it turned out that she had really been killed by Roger. Roger had already been hanged for it, and he had no chattels to be forfeited to the king; but if the untruth had passed unchecked, two other communal imposts would have been saved. Roger had not been in a tithing, one of the groups into which the population of each area was required to be divided, and upon which was cast the responsibility of producing such of their

members as should be called to justice. And upon Emma's death Englishry had not been presented, a requirement dating from the time when the Normans were in the position of an occupying army, protected by a fine levied upon any community in which one of their number, or anyone not proved to be English, was found dead. But of course we misunderstand the eyre if we imagine some distinction between the financial motive and the aims of government; this was how government was conducted. And other articles of the eyre asked questions more obviously governmental in character, for example concerning franchises, the controlled market in cloth and wine, or the misdeeds of sheriffs and other royal officers.

The other part of the eyre's business was the common pleas, ordinary litigation between ordinary people; and it was in this work that the common law as a single system had its beginning. Most of our evidence comes from a time when royal justice had been centralised, the court of common pleas having become the regular tribunal to which ordinary private disputes were consigned by royal writ. In the working of this system, the commissioning of an eyre seems an anomalous disruption. Cases pending in the common pleas from the county affected were transferred to the eyre. And new cases might be begun in the eyre by direct complaint to the justices instead of by writ. But this had once been the regular channel for royal justice. It was to the eyre that cases first went which could not go to the county court, or which the plaintiff did not wish to take to the county court; and it was the common pleas and to some extent the writ system itself that had begun as something exceptional, a means of catering for those who did not wish to wait for the next eyre and who could pay for special treatment.

Of the earliest kinds of case so to be brought before royal justices we know hardly anything. But they must largely have concerned matters which ordinarily would have gone to an ordinary session of the county court; and as the king's judges slowly evolved rules common to all England, but different from those of any individual county, so in law as in procedure what we regard as the

ordinary and exceptional changed places. Some of the cases whose substantive content, together with what has looked like an extraordinary procedure without writ, led some modern scholars to see in the eyre an equitable institution with power at discretion to override the rules of the common law, were probably in their own day extraordinary only in their ordinariness, claims based simply upon the ancient customs of the county. But the largest bulk of early cases for which royal justice was actually required, the largest part of the content of the early common law, was of legislative origin. It was such institutions as the possessory assizes, to be considered in connection with land law, that took up most of the common pleas section of eyre rolls.

The judicial functions of the eyre may be seen as having ultimately been inherited partly by the court of common pleas and partly by itinerant justices commissioned more frequently but with restricted rather than general powers. Both of course were in full operation long before the eyre began to decline from being the regular arm of central government to its last state in the fourteenth century as an occasional means of extortion. Visitations at intervals of seven years or so, which became accepted as the minimum, were appropriate for an auditing function, for checking what local men had done; but for the actual conduct of business, for the dispensation of royal justice when that was in common demand, other machinery had to be found. The two matters in which this first happened both followed from changes made under Henry II. The introduction of the possessory assizes brought great numbers of small disputes about property to be settled by royal inquest. And the introduction of the indictment system, which we see as the beginning of crime as a separate branch of the law, replaced royal supervision by royal action in the case of most serious wrongs. Local communities were now under a duty, not merely to account later for what had happened about wrongs from which profit might come to the king, but to accuse the wrongdoers before royal justices.

For both these purposes frequent local sessions of royal justices were needed. But the business was trivial in comparison with that

of the eyre, and did not require great men for its settlement. The commissioners to whom it was entrusted might therefore be persons of no more than local importance; and in the case of pleas of the crown this feature came to be accepted by the establishment in the fourteenth century of permanent commissioners for each county, the justices of the peace, who were to act at regular intervals without further instruction. But the regular dispatch from the centre of royal officers never ceased, and the name and business of the modern assizes reminds us of a time when their usual commission was to hear possessory assizes and to deliver the jails. To these there came to be added a new class of what we should call civil business, the taking from local juries of verdicts in cases depending before the central courts; and it was partly for this reason that the commissioners sent on circuit nearly always included professional judges from those courts. But when we speak of professional judges, we are speaking of a time at which the law has become distinct from government in general, something to which a man can devote his life; and this was by far the most important result of the rise of the central courts themselves.

RISE OF THE CENTRAL COURTS

The process had its beginnings in itinerant government, which had two centres. There was first the king himself, constantly on the move within this kingdom and in his other possessions, having with him a court in all the institutional senses of that word. From this court *coram rege* there slowly developed the king's bench, a regular court of law separate from the king's person and separate from his council, which was in time to engross much ordinary civil litigation. But it could not be a regular channel for royal justice so long as it was in constant motion, and in the thirteenth century to commence an action there seems to have been one way of harassing an enemy.

The second centre of itinerant government was the exchequer, brought to rest by the weight of its financial apparatus, but playing a much larger part in the kingdom than that of a modern financial

department of state. We have seen that central government took the form of accountancy, and consisted in the enforcement by financial sanctions of the financial rights of the crown. The eyres can be seen as local audits by officers sent out from the centre; and that centre was the exchequer. If the will of government was with the king, this was its mind; and the frequent absences of the king assured it the control of all necessary routines and the services of those who made government their profession. At the head of this machine, the embodiment of all these factors, was the chief justiciar, the regent in the king's absence and the centre around which royal justice first grew.

By a process of specialisation of which the details are now beyond recovery, not one but two regular courts of law grew from this centre. There was the court of exchequer itself, which had for its special business the legal disputes arising out of revenue. This court was later to justify a large concern with purely private causes by colour of a fictitious revenue interest; but in fact it seems never to have quite given up the wide jurisdiction of the old undifferentiated body from which it grew. The other offspring of that body was the common bench or court of common pleas, whose name, happily preserved in many American jurisdictions, was allowed to disappear from the English legal system in 1880. Here the common law was made.

The common bench had to establish an identity distinct not only from the exchequer, but also from the court *coram rege*. A single body of justices served the common and the king's bench, and they merged when the king was out of the country or was an infant. And that is why, although the Great Charter of 1215 was only confirming the practice of many years when it required that possessory assizes should be heard locally at frequent intervals and that other common pleas should be held in some fixed place, the court emerges as a distinct and permanent institution only after the majority of Henry III, who had succeeded John as a child in the year after the Charter was signed.

Ninety years later, when Henry III's son died, the system of civil justice had become fixed in a form which was to last until the

nineteenth century, to be a reality until the sixteenth, and to leave its imprint in every common law jurisdiction today. But the society catered for was that of the thirteenth century, and its outstanding feature was that justice was still seen as a matter for local communities, and the king's law was still something special. In matters of substance the chief results were in the field of what we call contract and tort, where rules adopted on the footing that ordinary cases would go to lesser courts came to have disproportionate effects as that assumption ceased to hold good. In matters of procedure the chief result was to lend to the machinery which determined jurisdiction an importance that was to outlive its reason.

THE WRIT SYSTEM

This machinery revolved around the system of writs, an administrative routine which came to govern the end it had been created to serve. A writ was in principle simply a royal order which authorised a court to hear a case and instructed a sheriff to secure the attendance of the defendant. It played no necessary part in either feudal or local justice, though it came to interfere with both. In feudal justice, the rule emerged in the twelfth century that royal authority was needed to make a man answer for his freehold: the question was still decided in the lord's court, but that court could not act without a royal writ; and this degree of royal control over pleas concerning land at least facilitated the changes which in the thirteenth century brought them directly into the king's courts. In local justice, county courts had always been self-sufficient in jurisdiction and in executive power, and proceedings there were begun by simple plaint. But when in the thirteenth century royal courts began to entertain private disputes as a regular thing, some principle of apportionment between the two jurisdictions had to be found. Two rules emerged: one was a general monetary limit; the other directed special kinds of case to the king's courts because the king had some interest in them. But since the county was now an inferior court with limited juris-

diction, authority was needed if it was to go beyond its limits. This authority was given by writ; and to the old procedure by plaint there was now added a new procedure in which cases were started by viscontiel writ.

More important for the future was the part played by writs in the king's courts themselves. Take first the eyre. Like the county court, the eyre was older than the writ system. The commission under which the judges went out gave them almost unlimited jurisdiction in the county concerned; and as for the other function of writs, that of securing the presence of defendants, the sheriff attended on the judges and was directly under their orders. Direct complaint to the eyre was then a normal routine for seeking royal justice, and it was the later development of the writ system that was to make it look exceptional. Much the same is true of the king's bench. The king's own court needed no warrant to give it jurisdiction, and if it would entertain a dispute at all, it could do so directly at the instance of the plaintiff as well as on a formal reference by writ. But the court in fact came to restrict the cases it would hear by plaint to those arising in the county in which it was sitting; and this is probably because the sheriff of that county was in attendance upon the court, so that there was no difficulty about securing the presence of the defendant. The result was like that reached in the eyre, but reflected the secondary and practical function performed by writs in getting the defendant, rather than a theoretical limit on jurisdiction. In the sixteenth century, as will appear, this procedure by bill in the king's bench, under the name of the Bill of Middlesex since that was the county in which the court then always sat, was used to subvert the jurisdictional order whose establishment is now being described.

That order hinged upon the position of the common bench. This court had come into being to provide royal justice in ordinary disputes between subject and subject, and its emergence had been compelled by a demand for this on a scale beyond the capacity of the eyre system. But the demand was, to begin with, for a luxury. The plaintiff was asking not just for royal rather than

local justice, but also for royal justice at once: his right, if such it can be called, was to have it in the eyre. The most regular institution of the middle ages therefore started, not as a part of the regular routine of government, but a provision for exceptional cases. One could not apply directly to the court for justice, because the court had no inherent power to act. Its nature was that of a committee to which cases were individually referred by writ; and, except for matters involving the court's own staff and practitioners, bills came to play no part in its jurisdiction.

The need for a writ in the common pleas as the court's warrant to act, an accidental result of its earliest business being outside the ordinary course of things, was to have many consequences. It explains a great deal of what looks like captiousness in the early common law: a plaintiff who brought a writ for £20 and claimed £19 was not making the claim the court was authorised to hear. And it explains a great deal of inflexibility in the scope of the law, the kinds of matters with which it could deal at all. However much royal and central justice had started as something exceptional, as it became more and more the regular thing, the court slowly established a monopoly. It was not merely the body to which private disputes could conveniently be sent; they could not normally be sent to any other central court, for example the king's bench. Partly this was the familiar hardening of practice into right, but partly it was a matter of "due process". When the Great Charter required common pleas to be held in some fixed place, it was perhaps mainly concerned with the need of the plaintiff to have access to justice. But there was also the defendant to consider. Litigation in a travelling court could be intolerable; and even when the king's bench came increasingly to rest, great men and great corporations, who retained standing attorneys in the common pleas, could argue that they should not be forced elsewhere. The paradoxical result was that the regular court to which ordinary disputes had to go was a court which could not act without special authority in each case, namely a writ from the chancery.

This jurisdictional accident was to be of growing consequence.

In the middle ages it hampered the expansion of the common law by restricting the kinds of claim that could be brought before the court. If ordinary private disputes had continued to come before a jurisdiction like that of the eyre, to which plaintiffs had direct access, the common law could have reacted directly to changing needs; and in particular it could have continued to admit kinds of claim familiar in local court but at first regarded as inappropriate for royal judges. But plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to. Important areas, some new but many older than the king's courts themselves, were in this way cut off from legal regulation; and they could later be reached only by devious ingenuity in the common law courts, or by resorting to the chancellor's equitable jurisdiction, to which once more the litigant could directly complain.

All this was no more than the constriction of red tape. But so complete did it become that in the eighteenth century it engendered a purely formalistic view of the law and of its development which has lasted until our own day. The common law writs came to be seen as somehow basic, almost like the Ten Commandments or the Twelve Tables, the data from which the law itself was derived. And since the mechanism of change within the common law had been to allow one writ to do the work formally done by another, the whole process came to be seen as an irrational interplay between "the forms of action". It was not. It was the product of men thinking.

2 *The Institutions of the Common Law in its First Formative Period*

The institutions in which the common law grew to maturity between the thirteenth century and the sixteenth revolved around the court of common pleas. And the clearest view of them may be had, not by a chronological account of each, but by considering their functions in relation to an action in that court.

WRITS AND THEIR LEARNING

The first step was the purchase of the writ, and some knowledge of writs was therefore necessary to all concerned. It is no accident that the earliest item in the literature of the common law, the book known by the name of Glanvill, which dates from a time before the common pleas had separated from the exchequer and before central justice was at all the normal thing, should take the form of an exposition of the writs which controlled such cases as were then brought before the court. As central justice became the normal thing, formularies began to appear. These have become compendiously known as the *Register of Writs*; but the definite article, implying that there were many copies of a single book having that as its title, misrepresents the original Latin. A lawyer, or a frequent litigant such as a religious house with great possessions, would have a *registrum*, a collection of forms. In the nature of the case the forms themselves would vary little. But there are also some recurring patterns of arrangement; and if we do wrong to think of "a" book, we do right to think of a body of learning in constant professional use by clerks and lawyers,

admitting of few doubts at any one time, and subject to traditions which may or may not reflect some physical album or file actually kept in the chancery, but probably do reflect, as it were, a juridical alphabet.

Besides the bare forms, the registers contain all sorts of notes and rules; and the need for instruction about writs later produced commentaries giving only those forms in daily use but with a great deal of explanatory matter more or less systematically arranged. Two of these achieved wide circulation, and came to be printed under the names of the old and Fitzherbert's new *Natura Brevium*; and the latter, last reprinted at the end of the eighteenth century, remains an essential tool for those who want to understand the medieval common law. It seems, moreover, that when the common law came in some sense to be taught, and not just learnt, instruction about the writs came to be the special business of those lesser inns which became attached as preparatory schools to the four great inns of court, and that this function is reflected in their name, the inns of chancery.

But before we transfer our attention, as those matriculating lawyers did, from the chancery to the court, we must understand that in the thirteenth century the common law itself underwent a similar change of emphasis. Its first achievement, that of having come into existence at all, was an exploit not of juristic thought but of administration. Most of the important justices in eyre in the twelfth century, the chief justiciars including Henry II's justiciar Glanvill himself, no doubt the shadowy figure who wrote the book we know by Glanvill's name, most of those who figure in thirteenth-century records mainly as judges, the great Bracton—all these were what we should call civil servants. Professional lawyers, in our sense, did not at first exist.

ANCIENT PATTERN OF LAW-SUIT

This implies that what happened actually in court did not call for much specialist expertise, and here the earliest common law followed the customary systems from which it grew. The plaintiff

put his claim in formal terms pre-ordained by custom. The defendant made an equally formal denial, recapitulating and denying the claim point by point. One of them swore to the justice of his cause, and that oath was put to the test of ordeal or the like. Which was to swear, and how the oath was to be tested, were for the decision of the court, but the court saw itself only as declaring the custom. There was no more for the court to do, and no room for substantive learning because no substantive law.

COUNTING

But even in such a law-suit the litigant needed skill, his own or somebody else's, because the formal statement of claim, which might be long and complicated, had to be composed correctly and spoken correctly. Since its terms were exactly followed by the denial, they became the terms of the oath whose testing would determine the action; and the making of the count, in Latin the *narratio*, was the very centre of the legal process. We do not know how it came about that the litigant was allowed to speak through the mouth of another, though it has been suggested that it was not to prevent mistakes being made but to prevent them being fatal. Certainly the litigant could disavow what was said on his behalf; and perhaps it was only "said" by him when he formally adopted it. If this is right, our modern barrister began as one who could harmlessly blunder.

But we are at several removes from the barrister yet. We are envisaging men in each community known among their neighbours to have the necessary precision of mind and tongue, and becoming professionals only when litigation became a sufficiently concentrated business. This may first have happened in, for example, the city of London; but it must surely have been the emergence of the fixed bench, the court of common pleas, which brought into being a cohesive profession of *narratores* or counters. By the end of the thirteenth century, indeed, it had in the court of common pleas become a closed profession. Only those in some way licensed, the serjeant-counters, might practise there; and for

reasons to which we shall return the "counter" became dropped from their title and these men became the serjeants-at-law, the monopolists of all ordinary civil litigation.

Although counting had been the heart of a law-suit long before there were royal courts or royal writs, it has no early literature; and this is because it was not generally the concern of literate men. But in the thirteenth and early fourteenth centuries formularies appear, many of them, like "the" *Register of Writs*, becoming thought of as "a" book eventually printed under the title *Novae Narrationes*. Others, of more restricted scope, became known as *Placita Coronae* and the *Court Baron*. In one respect the most illuminating of these formularies was that which acquired the title *Brevia Placitata*. Dating from soon after the middle of the thirteenth century, it is a conflated formulary giving both writs and counts. But the writs, which in real life were always in Latin, are here translated into French, the language in which counts, at any rate in the king's courts, were actually spoken, the ordinary language of the upper classes. This collection was for the use, or more probably the instruction, of professional men, literate men, but men not at home in the Latin tongue and not interested in the riches to which it gave access.

Almost at the same time as the counters' modest *Brevia Placitata* there was produced another book, the majestic work of Bracton; and it is one of the important facts in the history of western thought that the former was to prove fruitful, the latter sterile. Bracton was an administrator-judge of the tradition which had brought the common law into being. But, just as the writs in *Brevia Placitata* show counters looking upward to learn the administrative and jurisdictional elements, so Bracton's book shows the administrator looking downward at what was happening in court. He did not rely only upon his own experience for this: he had his *Note Book*, a collection of some two thousand records of actual cases copied from the plea rolls of the king's courts. Nor was his intelligence merely informed; it was also trained. Like the best civil servants of a later age, Bracton and his kind had, as it were, read Greats.

When, in the half century after Bracton's death, his kind ceased to play any part in the common law and the bench came to be filled from below by counters, two qualities were lost. One was the administrative habit of seeing problems as a whole and making solutions work: the kind of man who had brought the common law into being would not have let it get into the state which necessitated the growth of equity. The other was a more specific quality. The ecclesiastical background of the clerical judges ensured that they had some experience of canon law; and many of them read what there was to read about Roman law too. This was a part of their world; and, though scholars will argue for ever about the depth of Bracton's Roman learning, it informs the whole of his book. Had the development of the common law remained in such hands, Roman law would surely have had a larger, and possibly a preponderant influence. But it was no part of the counters' world. No reflection of what had seemed so clear so long before in the Mediterranean sunshine disturbed their more primitive vision; and the future was theirs.

PLEADING

The irony is that the dying Bracton had a clearer idea of the future than had the up and coming counters behind *Brevia Placitata*. Let us go back into court. The ancient pattern of lawsuit was already being broken up by the subversive action of common sense, which had gained access to the legal process through the various events usually known as the introduction of jury trial. These will be described in connection with the various kinds of action concerned; but the important result can be stated quite shortly. If the general question of right between the parties is to be settled, not by putting an oath to divine test, but by demanding an answer from rational and fallible human beings, two kinds of problem arise. Because they are fallible, there will be many situations in which it seems unsafe to leave the general question to them. Suppose for example that land is claimed by one whose formal statement of claim is entirely true: his grand-

father held it, his father was his grandfather's heir, and he his father's. God would not be misled: but who could be sure about the neighbours if in fact the plaintiff's father had granted the land to the defendant's, and the defendant can only make the ancient word-for-word denial of that misleadingly truthful count? The court, no longer just presiding over the ritual formulation of a question to be put to an oracle beyond the need of human guidance, but now in some way responsible for the answer, may be inclined to let the defendant depart from the ancient general denial, and in some way to put forward his own facts.

This was a larger change than it sounds. The example just given assumed that the "right" answer would be clear to the court. But, and this is where the rational nature of the new form of trial comes in, consideration of the actual facts requires the expression, for the first time, of rules of law. Suppose in the same example, that all the facts are somehow put to the neighbours: the plaintiff makes his misleadingly truthful count; the defendant tells of the grant to his father; and then it emerges that the plaintiff's father had been mad when he made that grant. What is the effect of a grant made by a lunatic? The question may not have been difficult. What matters is that it was new. Law, like fact, had hitherto been comfortably wrapped in the judgment of God.

The procedural change, the need to let the defendant make answers other than the ancient denial, seems to have been even clearer to Bracton than to the counters behind *Brevia Placitata*. Writing in Latin, he could not avoid technical terms of Roman law which have since seemed inappropriate to Roman lawyers, such as *exceptio*; but whether or not he misunderstood his Roman texts, he was entirely clear-headed about the practice of English courts and his book describes many situations in which departure from the general denial is permitted. What is far more important, however, is that his intellectual background equipped him to deal with the implications of this. He and his kind would not have been dismayed by the emergence of facts

which required legal analysis and legal decision. They were accustomed to think in terms of substantive law. But his was the last English law-book for centuries to be written with such terms in mind.

Those centuries lay unseen between Bracton and the counters who practised before him; and they are a measure of what was lost when his kind were displaced from the bench. There was to be no short cut through history. What was gained was the common law as an entirely independent system. It is not just that the counters, being unfamiliar with the Roman system, could not adopt ready-made Roman rules. They did not see the law as a system of substantive rules at all. They saw that their ancient pattern of unalterable claim and unalterable denial had been disturbed because jurymen were fallible, and that in some circumstances the defendant must be allowed a new kind of answer. Upon the infinite details of this problem they concentrated their great abilities; and they never looked up to consider as a whole the substantive system they did not know they were making.

The change in court is reflected in the literature. The count still has to be made, and formularies are still produced. But early attempts show the impossibility of dealing with the defendant's answer in the same kind of way, listing the answers available against each claim. The variety is too great, development is too rapid, and above all the logic of the thing cuts across the actions. Take for example just one aspect, though a pervasive one, of the fallibility of jurymen. Their knowledge stopped at the county boundary. If an obligation was incurred in one county, and discharged in another, there were endless problems about whether the defendant had to make the ancient general denial, which would go to a jury of the first county, or could specifically plead the discharge and have a jury from the second. And these problems arose in all kinds of actions, and the reasoning of one might or might not apply to another. There was suddenly a flood of such learning; and no literary form could deal with it except the reporter's note book.

THE YEAR BOOKS

And so the year books grew out of such works as *Brevia Placitata.* First short notes of actual cases are written into the formularies, and then the reporting of cases becomes an end in itself. The question which historians have asked most about the year books concerns their authorship. They seem to begin as the common-place books of students. Indeed, we find persons describing themselves as "apprentices" petitioning the king for enlargement of the space reserved for them in the common bench; and these apprentices are clearly learning the serjeants' art by actually watching them at work. But in the course of the fourteenth century it seems that some organisation takes hold: instead of many reports being made of each case there is generally one, and that a more earnest affair less often noting the happy phrase or the anecdote. That organisation may have been a business or an association of practitioners. But there is some reason to think that both the year books and the abridgments of them were somehow creatures of the inns of court: that as apprentice lawyers banded together in their inns, as did university students in their colleges, and evolved an educational routine which included lectures significantly confined to statute law, they also formalised a method of learning about the core of their art. And if the year books, which went on being made after the reign of Henry VIII, seem to have long outlived the interest which first produced them, that too sounds like an educational routine.

A far more important question is what legal process is actually reported in the year books. In the earliest of them the count itself is often set out in whole or in part, and this, until recently the only skill of the counters, still engages a significant part of the learner's attention. But usually it is the next step that interests the reporter, and he gives only such summary of the count as is necessary to understand what happens next, which is argument about the defendant's answer, about the plea. The matter can most easily be understood from an example. Suppose an action for battery.

So long as there is only ordeal or the like, the defendant can only deny liability at large. The natural reaction to the introduction of the rational jury would be to let him plead whatever facts seemed to tell in his favour, for example that he slipped and hurt the plaintiff by accident, or that he was only defending himself from an attack by the plaintiff, or that he did it deliberately because the plaintiff was having a fit and this was the recognised treatment. In fact his freedom was confined by rules which at first sight seem very artificial. But the last of these pleas was open to him, and we will assume that it has been made. It is now the turn of the plaintiff's serjeant, and logically there are two principal courses open to him. He can deny that the facts justified what the defendant did: the plaintiff was not having a fit at all, or the beating was continued after the last devil had been driven out. Or he can challenge the legal assumption on which the plea is based, that it is lawful to beat those suffering from fits. If he takes the latter course, which is called a demurrer, all the facts are taken as admitted, and the year book will show, even more clearly than a modern law report, the decision of a point of substantive law. But if he takes the former course, he is for the purpose of the action accepting that the law is against him, that it is lawful to beat one having a fit. The year book writer will still report the case so far; but he will have no interest whatever in the outcome, and will not try to note it. He is a lawyer and will not care whether a jury says the plaintiff was or was not in truth having a fit. The point of law will not now be expressed in any judgment; it has not been "decided" at all; but the course of the pleading tells a year book reader the professional opinion.

Often, however, the discussion which he reports will not reflect the actual pleading at all. To take the same example a step further, the defendant's serjeant would not make the plea in the first place if he thought there might be a demurrer which would go against him. It therefore often happens that a year book discussion is about a plea which is proposed but not made. In the end the defendant's serjeant betakes himself to the general denial. The verdict and judgment will now be even less interesting

to the reporter. And the plea roll will contain no hint that the point ever came up: it will consist of an entry of the writ, the formal count, the plea of Not Guilty, and verdict and judgment thereon. This might be the common case of a defendant denying that he was the culprit. But the year book reader still has guidance about the validity of the abandoned plea; and the scholar today can translate that guidance into a proposition about the substantive law of the time.

If that was all there was to it, if defendants had been free to plead whatever facts seemed to tell in their favour, and if the only motive for abandoning a plea had been fear that those facts would be held insufficient in law, then the year books would be immediately intelligible to modern minds. They would show us the evolution of a system of substantive rules; and that process might have occupied decades instead of centuries. During the last years of control by the clerical judges, there are signs that such a degree of freedom might have developed. But any such possibility depended upon lawyers to whom the terms of substantive thought were not alien. The year books are the inbred descendants of *Brevia Placitata*, and the serjeants' world was dominated by the ancient pattern of law-suit. For them the ancient denial, now called the general issue, was still paramount; and it must always be made unless there was good reason for departing from it. Consider again the imaginary action for battery. Of the three pleas proposed, only one was discussed, namely that the beating was by way of medical treatment. Here the defendant confesses the fact complained of, and seeks to avoid liability by alleging a further fact in justification of what he did. Such pleas, for example the peace officer justifying his arrest, became common. And though they are probably first allowed because a jury may be misled if an entirely true complaint is merely denied, they are soon seen to serve the further pupose of withdrawing from the jury questions inappropriate for them to answer. Here is an unmistakable question of law, and one that must not be dodged.

A second possible plea to battery was self-defence. The wording

of this plea, admitted unexpectedly late by the king's courts, suggests that it was first seen almost as a special form of denial: any harm that came to the plaintiff came from his own assault. But again it would have been unjust to insist upon a plain Not Guilty. This, however, was apparently what happened with the third of the imaginary pleas, that the harm had been done accidentally. Such a plea was expressly made (in an action for burning the plaintiff's house down rather than for battery) in the year 1290. But nothing like it is found in the whole of the year books, and the reason seems to be that it was pushed back into the ancient denial, Not Guilty.

It follows that year book discussions are not generally about the legal sufficiency of the defendant's facts. They are about the propriety of allowing him to plead them at all, and about the form in which he may do it: is he to add a preamble or rider to the general issue, or to depart from it altogether? To take again the example of a debt incurred in one county and paid in another, the utmost concession normally allowed to a defendant was to add a preamble to the general issue. Instead of "I owe nothing" he could say "I paid, and so I owe nothing". But because this was only a variant of the general issue, it had to go to a jury from the county in which the debt was incurred; and they could have no direct knowledge of the payment. This, however, was thought no hardship to him because he need not have a jury at all. He could have the ancient mode of trial, swearing blankly that he owed nothing and waging his law; and his own knowledge was not confined by the county boundary. There were however a few ways of incurring debts, such as leasing land for a rent, to which wager of law was not applicable; and in such cases the defendant was allowed to depart altogether from the general issue and simply plead "paid in such a county"; and then he got a jury from the county of payment.

The year books, then, and the legal process which they record, lie in the shadow of that ancient unvarying denial. The modern reader can hear real arguments by lawyers who would shine in any court and in any age; but very often he finds the point of the

argument elusive. The difficulty is in his own mind. The terms into which he is trying to translate the argument, the terms of substantive law, were not much in the minds of those arguing. For them the essence of a law-suit was still the formulation of a question to be put to some deciding mechanism, whether wager of law or jury. Practical considerations compelled departures from the old general question. To hindsight, the important result of these departures was the creation of substantive law. But this was not a focus of attention at the time. The year books astonishingly preserve the true infancy of a modern legal system; but they will not often answer legal questions asked in modern terms.

THE TRIAL

To go back once more into court, the pleadings are now over and the question has been formulated. If it is one of pure law, one side or the other having demurred, then it will be answered by the court itself; and, unless the reporter misses it after adjournments, the answer is likely to be in a year book. If there is wager of law, the reporter is not normally interested beyond that point: judgment will follow mechanically. But it will again all take place at Westminster and if there is a problem, for example about how husband and wife should swear, the reporter can find out what happens. In the case of jury trial, however, this is not so. Getting juries to Westminster from all over England was not practicable; and in the late thirteenth and early fourteenth centuries an expedient was perfected which avoided the necessity. When issue had been joined, it was entrusted to a judge on circuit. The order to the sheriff to empanel a jury tells him to send it to Westminster on such a day unless before then (*nisi prius*) a judge has taken its verdict in the country. It is in the country, therefore, that the trial actually takes place; and the reporter, interested only in the pleading, is not there. Some indications of what we are missing may be had from two exceptional groups of year books, namely those reporting eyres, and the curious *Liber Assisarum*, which consists of reports from judges on circuit under

Edward III. There are other reasons why both these should be rich in apparent curiosities; but one reason is that they show us a part of the normal legal process that we never otherwise see.

But it is not just our picture that is affected, and not just details about the rules of evidence—if there were any—that we have lost. Suppose again an action for battery in which the defendant's true case is that the harm was accidental: if the proper plea for him was indeed the general issue, Not Guilty, then it was at the jury stage that his liability was decided. At first the matter was presumably left each time to their unguided discretion: a teacher, speaking of an analogous problem toward the end of the thirteenth century, says that the defendant should take the general issue *e mettre sey en la grace du pays*. And even when rules came to be formulated it was in the arguments of advocates or at best in the directions of a judge; and it happened out of our sight. More important still, it happened outside the area of contemporary legal learning. There are in fact two late year book discussions of liability for accident, both arising indirectly out of pleas of a different nature; and they both stand out as vague and almost childish. Probably they reflect some general understanding about what a jury would do, or ought to do, or perhaps ought to be told to do; but even this last is a very different thing from the disciplined learning generated by special pleas.

This, of course, is only a single example. In every kind of action questions of law were latent within the general issue, and were brought more or less distinctly to the surface as facts which could not be pleaded emerged later at the trial stage. Perhaps argument arose when the party proposed to give them in evidence to the jury; perhaps the jury returned a special verdict or had to be directed on a general verdict; perhaps even a party proposing to wage his law would seek direction lest his oath should imperil his soul. But however deviously such questions came up and however imprecisely and irregularly they were answered, to us they are questions of substantive law. And though the lawyer of the time did not put it in those words, he knew that much of his professional skill was now directed to matters other than pleading.

THE END OF ORAL PLEADING

And this signals the end of the year books and the end of an age. Just as the formulation of the count had at the close of the thirteenth century been relegated from its position as the central skill of lawyers to being a formal preliminary to the pleading, so in the fifteenth century, though less decisively, the pleading became a preliminary to court processes more sophisticated but less coherent. The lawyer who appeared in court was now an advocate. If, as still often happened, the argument was about the admissibility of a plea, it no longer took place before the plea was actually made, or before a demurrer to it was actually entered. The pleadings were closed before anything happened in court, and the legally important decision would now be in the judgment and not, as so often before, in a serjeant's decision to abandon a plea proposed. If the pleadings ended in a specific issue of fact, or in the general issue, then there would be argument about the facts or about the legal effect of the facts at *nisi prius*; and, when the verdict was reported back to the court at Westminster, then there might be argument about the same matters there. But all this is part of a new system of courts which grew up under the old names in the fifteenth and sixteenth centuries; and it will be described in the next chapter.

The proximate cause of the ending of the year books was the ending of the process they had come into being to record. Oral pleading collapsed under its own weight. In a simple case it was absurd, and for the poor man ruinous, to put serjeants through a ritual recitation of count and general issue. In a complex case, it was like setting grand masters to play lightning chess. What mattered was what went down on the plea roll; and by stages not precisely known, but not difficult to imagine, it became possible to make a plea by handing a draft to the clerk. The plea rolls themselves, as one would expect, do not signal this change except perhaps by an increasing tendency for each stage to be separated from the next by an "imparlance", an adjournment for consultation. But they do throughout the fifteenth century show a

growing standardisation of pleas which made the change possible; and in the professional literature this is reflected in the appearance of the books of entries, formularies for the draftsmen. Here pleas are set out in Latin and in indirect speech, just like the clerk's record of something actually spoken in court; and they were indeed mostly taken from real records. But they were for the guidance, not of the clerks of the court, but of the parties' lawyers.

What kind of men drafted these written pleadings, we do not know; but probably it would not often be the serjeants. Their proper occupation had now gone. They had started as counters, having sole licence to perform the central act of the legal process in the court which had sole jurisdiction over ordinary law-suits. The shift of focus from counting to pleading had not undermined the logic of their position: the new art was an elaboration of the old and was dominated by the same pattern. But this further shift left them with the sole right of audience in the common pleas as a monopoly without reason and almost without explanation: though as late as the eighteenth century there was an occasional reminder of their beginnings, when certain antique actions were introduced by the ceremonial mumbling of a count in French.

The serjeants and their vestigial monopoly lasted until the court of common pleas was destroyed by the Judicature Acts in 1875, some four centuries after they had lost their point; and with their disappearance England became the only modern country to have a bar not qualified by the state. Our modern barrister is descended, not from the serjeant with his royal patent, but from the apprentice who aspired to be a serjeant; and his calling to the bar by an inn of court was at first a matter of graduating in a law school. But by the late fourteenth century some of these apprentices had large practices; and an account of what they were doing will serve to introduce the other judicial institutions of the year book period, the institutions which were later to oust the common pleas from its central position.

BUSINESS DONE ON CIRCUIT

One source of practice, and the reason we know so little about it, has been mentioned already. Whatever argument took place at *nisi prius* was no doubt undertaken not by serjeants but by apprentices; and the same is true of other work on circuit. On what we should call the civil side, the largest early source of such work was novel disseisin and the other possessory assizes. These began as summary proceedings, admitting of no pleading because the questions at issue were formulated in the writ: did the defendant disseise the plaintiff within such a time? But on the one side an explanatory plaint came to be required which was almost as formal as a count, and for which precedents found their way into the counters' formularies. And on the other side the preordained question, like the general issue, proved too simple for the facts of daily life; and it was the possessory assizes which first produced great numbers of *exceptiones*, reasons why the simple question must not be put to the men of the countryside. The *Liber Assisarum*, the exceptional series of year book reports of cases heard mainly by other justices than those of the common pleas, and running through the reign of Edward III, may therefore have been made for the professional use of apprentices who were in such practice, or for the instruction of those who aspired to such a practice as at least the first step in their careers.

The *Liber Assisarum* tells us also something about what we should call criminal work on circuit: like the year books reporting eyres, but unlike other year books, it contains a great many pleas of the crown. Something will later be said of the two principal ways in which criminals were brought to trial, the indictment and the archaic appeal. But though the appeal is generally supposed to have been obsolescent in the fourteenth century, the *Liber Assisarum* reports more appeals than indictments. At least one of the reasons for this is that counsel were allowed to take part in appeals, but not in indictments for felony. And indeed in the latter there would have been little to do, since what had in the fourteenth century become the principal art of the lawyer was excluded. The

pattern of a criminal case today, with its invariable plea of Not Guilty, preserves in the twentieth century that general denial which was ancient in the twelfth. And although in all ages most accused have wished to deny only that they were the persons involved, the absence of special pleas must have contributed to the insensitivity, intellectual as well as moral, of this branch of the common law.

THE KING'S BENCH

More important for the future was the practice of the apprentices in central courts other than the common pleas. The exchequer will not be discussed: although not without interest in itself, the doings of that court seem to have had no important influence on the development of the common law, which is the main theme of this book. But it is otherwise with the king's bench. The steps by which this became a regular channel of justice are the steps by which the law and legal institutions of the year book period were transformed. Its original nature appears from the language by which it was identified: it was the court *coram rege*, before the king; and when writs summoned persons before it, they directed them to come "wherever we shall then be in England". When the Great Charter required provision "in some known place" for the disposition of common pleas, it was of course not seeking to limit the powers of the court with the king, but demanding a facility for those who wished to sue. But the grievance of those sued "wherever we shall then be in England" slowly built up a principle, accepted by the justices with the king as well as by the chancery clerks, that ordinary pleas between subjects must be directed to the court provided for them; and so it came about that the lower of the two great royal courts, the one which could not act at all without royal writ, secured a monopoly as against its autonomous superior. This monopoly came to appear as an abuse, to be abusively circumvented; but it first grew from ideas of due process.

By an irony which chronology has repeatedly devised for the

common law, the rule became established only as its reason was fading. Although the court did not become finally fixed at Westminster until the fifteenth century, its movements in the fourteenth were less frequent and more predictable than was once supposed; and a less cumbersome body was serving as the king's travelling court. The king's bench was now doing a considerable volume of judicial work, though mostly in cases which did not, as did so many common pleas, drag on from term to term and year to year and for which any movement would have been disruptive.

Of its criminal jurisdiction nothing needs to be said here, except to observe again that in the thirteenth and fourteenth centuries at any rate crime was not a conceptual entity distinct from what we should call tort. Most wrongs might be visited by two kinds of legal consequence, compensation for the injured party, and a penalty exacted by the authority whose law had been broken. Proceedings for any wrong might be instituted by either; and the appropriate jurisdiction for these proceedings was that of the authority concerned. The seller of bad fish in the city of London might be sued by a deceived buyer, or (in our language) prosecuted by the city authorities; and in either case it was matter for the city courts. The man who beat another might similarly, in our language, be sued or prosecuted; and it might be in the king's courts or some other, depending upon whether or not the battery had broken the king's law, the king's peace. If therefore the victim of such a battery sued for compensation to himself, and if he alleged that it had been in breach of the king's peace, then his success would make the defendant liable for a penalty to the king. Two things followed from this: the action must come before a royal court; and since it is a plea of the crown as much as a common plea, it can come to the king's bench as well as to the common pleas.

This scheme became infected by unreality. First, the plaintiff in a case like battery could choose whether he would allege breach of the king's peace and sue in a royal court, or omit the allegation and go to his county or other local jurisdiction. Then he could

make the allegation for the purpose of coming to a royal court even when there was no sort of violence, and lend colour to his allegation by speaking of swords and bows and arrows. But if these weapons had no existence but on paper, the king's interest in the matter was no more than a formality: so why should not, say, the buyer of bad fish bring his equally wrong-doing seller before a royal court? By the end of the fourteenth century this was in fact happening, and the king's courts were hearing actions for private wrongs although there was no royal interest and no pretence of one.

But which of the king's courts were to hear such cases? The logic which had first brought actions for wrongs in from local jurisdictions would have assigned the last comers to the common pleas. There was no royal interest, and no reason therefore why they should not go with all other private disputes to the fixed tribunal specially provided; and it was probably these considerations that in 1372 prompted a petition to parliament complaining of cases going to the king's bench. But this logic, if nothing else, had been wounded by those paper swords and bows and arrows. Without further argument, so far as is known, the king's bench retained its concurrent jurisdiction over wrongs of all kinds; and it was not for jurisdictional reasons that the conceptual unity of what we should call the law of torts continued until our own day to be marred by a mystical boundary having something to do with the king's peace.

That the king's bench retained such work was of great importance for the future. In the sixteenth century the common law and the judicial system were both to be transformed as claims ceased to be made by writs within the exclusive jurisdiction of the common pleas, and were expressed instead as wrongs which could equally go to the king's bench. But none of this could have been foreseen at the time. Even in the fifteenth century not many sales of bad fish were large enough to bring to a royal court, and the plea rolls of king's bench and common pleas alike show a tiny proportion of such cases.

A warning about such quantitative estimates is, however,

necessary. The rolls of the common pleas faithfully reflect the doings of that court because every action was started by writ, by royal order, and every step taken in pursuance of that order was recorded. Every case which reached the court at all is therefore to be found in the plea rolls; and the entry of the pleadings, verdict, and judgment in a case which actually finished is generally preceded by a long series of shorter and more formal entries. The same is true, and for the same reason, of actions begun by writ in the king's bench. But the king's bench could also hear cases begun by direct complaint, and it regularly did so when the complaint was of a wrong done in the county in which it was sitting. And it is a peculiarity of all proceedings by bill, in eyre as well as in the king's bench, that nothing generally went down on the plea roll until the case was at or near its end. There are no purely formal entries of appearance and the like.

The reason for this peculiarity is no doubt that the court was acting under its own general power and not on a specific reference from above, and so did not need to keep routine progress checks. The result for the modern investigator is that he must reckon with another area, like proceedings in county courts and proceedings before juries, which is largely screened from his vision. For example, any attempt to calculate from their respective plea rolls the relative volumes of business done by the common pleas and king's bench would be hazardous. Throughout the year book period the rolls of the common pleas are physically between four and ten times the size of those of the king's bench; and though the disproportion would remain if formal entries were discounted, it would not be so striking. For those chiefly interested in the history of the law, a more serious doubt concerns the kinds of matter brought to the king's bench. For example a mid-fourteenth century case, that of the *Humber Ferryman*, has given great trouble to historians because it seems out of place. It was first known from the *Liber Assisarum*, that year book volume already mentioned as rich in apparent curiosities; and the reason for that richness is precisely that it reports processes we do not otherwise see, on circuit, before juries, and in the king's bench. That case has also

been found on the plea roll; but what we cannot find are the many cases which were withdrawn or settled before they reached a stage at which they would be entered on the roll.

JURISDICTION IN ERROR

This, then, is what we know and what we do not know about the king's bench jurisdiction over wrongs, its only important civil work at first instance in the year book period. The increase of this work in the middle of the sixteenth century, to be considered in the next chapter, was signalled first by a dramatic swelling of the plea rolls and then by an institutional change which will serve to introduce the other important medieval jurisdiction of the king's bench. It was at the apex of the routine judicial hierarchy, and decisions of the court nominally held before the king himself could be questioned only before the king in parliament, that is to say the house of lords. This became impracticable as the increase in first instance jurisdiction began to turn the court into an alternative forum for common pleas, and in 1585 a special appellate tribunal was set up called the exchequer chamber.

This was the name of a meeting-place rather than of an institution, and it was confusingly the place where two earlier institutions also met. One of these was more meeting than institution. The changes associated with the growth of written pleadings and the concomitant rise of courts outside the course of the common law, were raising legal problems which came to be referred in a more or less formal manner to meetings of all the judges and the serjeants. Such a meeting was without formal power, and could only advise the body which had referred the question to it. But it did something to supply the deficiencies of the appellate mechanisms and much to regulate the anarchy which followed when in the sixteenth century the old division of work between common pleas and king's bench broke down.

The other body which had met in the exchequer chamber brings us to the routine appellate jurisdictions. It was before the king's bench that the decisions of all other royal courts might be

questioned, with the sole exception of the exchequer. This court, perhaps partly because of the specialised nature of its main revenue business and partly with memories of its ancient institutional parity, resisted the claims of the king's bench; and in 1357 a special committee was set up, the earliest known to us as a court of exchequer chamber.

Otherwise judicial review was the business of the king's bench; and in the year book period this probably seemed its most important work. In the thirteenth century, with the growing organisation of government, the king used writs of *certiorari* to demand further information about all sorts of matters from his officials, generally of course because somebody had complained of official action. It was the medieval equivalent of sending for the file. In judicial matters, what would come would be a transcript of the record, those entries on the plea roll dealing with the case. There might be various reasons for thus evoking a case, for example that some royal interest was affected. But if the reason was a complaint of judicial error, then the complainant was required to "assign errors", to point to those places in the record at which he alleged that the court below had gone wrong. This scheme was a product of administrative good sense, and its eventual abandonment in England is one of the many examples of the common law jettisoning an appropriate principle instead of curing its defects in detail.

These defects may be introduced by a comparison with the institutional ancestor of the *certiorari* process, the writ of false judgment. This was the remedy provided for a litigant who thought himself wronged by a decision in a county, hundred, or private court; and it took the only form possible in an age when the whole of government bore a judicial aspect. It was an action against the court for having judged unjustly, or rather against the community which that court governed. The principle was established that this action must be heard in a royal and not a superior local or private court; but the defendant community was a subject like the plaintiff, and so it came to be heard by the common pleas rather than by the king's bench. To the common

pleas the defendant community must send representatives to bear record, to say what had happened in their court. Their account could be accepted by the plaintiff, who would then say, as in the later *certiorari* process, where the court had gone wrong as a matter of law. But another course was open to him: he could deny the truth of the account and take issue on that.

In *certiorari*, considerations of seemliness early excluded the possibility of saying that a royal court's account of its action was untrue. And, though in the thirteenth century royal judges were sometimes asked for supplementary information, administrative convenience came generally to exclude also the possibility of saying that their account was incomplete. But even at that date there was a common situation in which, without any great fault on the part of the clerk, the record might indeed be incomplete. If in a possessory assize the defendant put forward some exception, some reason why the pre-ordained question should not go to the men of the countryside, and if this exception was overruled, the record might well note only the taking of the assize and its result. To enable the validity of the exception in such a case to be re-opened by *certiorari*, statute in 1285 provided the "bill of exceptions": the defendant could at the original hearing make his own private supplement to the record, which the court was required to authenticate by sealing it.

In the second quarter of the fourteenth century *certiorari* writs issued for this reason came to be differentiated by a clause saying that error was alleged; and it was that writ which came to be known as the "writ of error" and which, with the bill of exceptions, remained the appellate mechanism at common law until the nineteenth century. Although a little capricious, it seems to have worked well enough in the year book period; and it continued to do so for questions arising out of the pleadings in an action. To take the most obvious case, if the pleadings ended in a demurrer, so that a point of pure law was left to the decision of the court, the losing party would have no difficulty in challenging that decision by a writ of error. Whether the actual pleadings had been made orally in court or by the exchange of draft entries,

everything relevant would be there on the plea roll. But the change from oral to written pleading and the concomitant standardisation of pleas were both part of a more fundamental change, in which questions that we should identify as questions of law were being raised off the record. To take the most obvious case, the entire proceedings before a jury would be represented by two lines saying that afterwards, *postea*, the jurors came and said that the defendant was or was not guilty. Suppose that the plaintiff had been run down by the defendant on his horse, and that at *nisi prius* the defendant produces a child witness who says that the horse bolted because of a flash of lightning. The plaintiff may make the objection, which we should regard as depending upon the rules of evidence, that a child is not a proper witness. Or he may make what we should regard as a substantive argument, namely that even if true the facts did not exonerate the defendant. But if he is overruled there will be nothing in the *postea* clause of the record to enable either matter to be raised on a writ of error. For the former he came to be allowed to use a bill of exceptions. For the latter, he came much later to be allowed a step which would appear in the *postea* clause itself, namely a demurrer to the evidence. This admitted its truth in fact, and rested the case on the point of substantive law.

But this was a development only beginning in the sixteenth century, and long confined to written evidence; and it is not just to say something about the writ of error that this chapter reaches so far forward from the period with which it is concerned. The demurrer to the evidence is one of the clearest examples of the common law having to go back and deal with a matter once deliberately shut out from consideration. What had been shut out was any legal question latent within the general issue. The process of pleading made the common law: but it was not a happy juristic invention designed to that end. It was an uncomfortable necessity imposed by the jury, whose fallibility had broken up the comfortable old pattern of a general question to be put to an infallible God. But the necessity did not go beyond configurations of fact particularly likely to mislead, so that the

old pattern, now known as the general issue, remained the normal thing; and so long as the general question was asked, even of a jury, lawyers had no occasion to ask all the particular questions of which it was composed. The potential area of legal discussion was divided by an almost arbitrary frontier, formally opened up in later days by the demurrer to the evidence, which carried the language and concepts of pleading into the zone previously shut off.

But this in turn is only an illustration, though a striking one, of the need to consider these institutions of the early common law in their own terms, and not in ours. When it is said, for example, that the writ of error was defective because questions could not be raised about the propriety of evidence given to the jury, we must remember that the excluded questions might be more serious than what we think of as matters of evidence. And when it is said, as it too often is, that the year books were inferior to modern law reports because they often did not give the facts or the judgment, it must be remembered that neither was generally important. The facts and the law are both reflected in the pleadings; and the equivalent of today's lawyer seeking a *ratio decidendi* was a year book reader trying to make out whether a particular plea would or would not be upheld on demurrer, or why it should be in this form rather than in that. There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought.

3 *The Institutions of the Common Law in its Second Formative Period*

THE NATURE OF THE CHANGE

As an instrument of justice the system described in the last chapter suffered from increasing ills. Hindsight can see that these mostly stemmed from centralisation. The administrative achievement had not been matched in dealing with its consequences. Local jurisdictions fell into varying degrees of decay; and alteration of the forty shillings barrier became unthinkable despite changes in the value of money, so that small claims were left without useful remedy. Even claims large enough to be worth pursuing in the central courts had suffered from the transfer, and the heaviest caualties were in the field of contract. However inadequate as a vehicle for legal development, the ancient pattern of law-suit may in local courts often have done as much justice between the parties to individual disputes as anything we know today. The plaintiff himself, the *secta* of neighbours who had in some way to authenticate his claim, the defendant, and those other neighbours who would have to swear that the defendant was a man to whose own oath credit should be given—all these had to live with each other afterwards, and with their parish priest. But in Westminster Hall there was nothing to mitigate the rigour of the game. The neighbours could not be dragged across England: compurgators must have been hired from the streets until the court ushers came to oblige; and the *secta* became a word in the plea roll. From the language used about wager of law in the early year books, it is clear that the unjust potentialities

of all this were seen; and the insistence on a sealed document in certain contractual situations was a recognition that mere agreements could not be matters for central institutions unless questions of proof were effectively excluded.

Centralisation, therefore, had overreached itself, and brought into the system matters that it could not well deal with. But the system itself was a logically coherent structure, based upon a single court to which the civil litigation of the country was in principle committed. Logic and coherence were now to be sacrificed to new needs. There was no Bentham, no Law Commission, to see what was going wrong and suggest direct changes, perhaps no realisation that change was possible. The awareness of the earlier year books is missing from the later. Impersonality has then done its work, and what seems to be reflected has something of a game about it, played by highly skilled devotees whose aim each time is to win for their clients, but whose love is for the game itself.

In the result, the system was transformed without anything much being changed. The serjeants continued to have their monopoly in the court of common pleas. The common pleas continued to have its formal monopoly of the older actions. The institutions all remained, as did the rules of law themselves; and both were largely by-passed by mean and untidy expedients.

It was a process personified in a mean and untidy man, one within whose lifetime almost all the decisive steps were taken. But if the books tell us that Sir Edward Coke distorted his authorities to present new ideas as ancient principles, or if the reader feels he is entitled to despise the shifts employed, it is well to remember that this is how the common law has lived, perhaps how any system of law must live when direct change by legislation is out of the question. A changing world has to be served, and Coke's generation had to deal with a world which had changed very rapidly. It is the intensity rather than the nature of what was done that should strike us as exceptional; and to think in terms of honesty or dishonesty is as little in place, or as much, as with any common law development of our own day.

Nor must we allow ourselves, even when considering great changes made quickly, to think in terms of a legislator, of a single mind addressing itself to a single problem. We look back and see a twisting path circumventing an inconvenient rule; but only the last steps can have been directed to that end. The earlier ones were the individual solutions to different and smaller problems; and those who took them, far from willing the end, would have regarded it as a subversion of their legal order. But since in the nature of the legal process each step is made to seem to follow from the other, it is often difficult to tell at what point the end, desired or not, became a visible possibility. And sometimes, as with the first of the matters now to be considered, it is difficult to tell when it was consciously achieved, when the new path is being deliberately used to circumvent the old inconvenience.

FICTIONS CONCERNING JURISDICTION

The court of exchequer has been arbitrarily excluded from examination, on the ground that its doings had no special influence on legal development. But the device by which it came to justify a general jurisdiction over ordinary civil litigation illustrates too many things to be passed over. The plaintiff was said to be indebted to the king, and to be so much the less able (*quo minus*) to pay because the defendant would not pay him. In the eighteenth century this was a straightforward fiction, and none the less so for being often true. Many plaintiffs were no doubt indebted to the king, but this indebtedness and that cautious phrase about being the less able to pay were both routine surmises, put in for no other purpose than to give the court unquestionable jurisdiction. But only a close examination of the plea rolls will tell us when they became so. Thirteenth-century writers say that it was the business of the court to recover money due to the king's debtors; and when we find cases in which that indebtness was investigated, we are evidently seeing the reality from which the eighteenth-century fiction grew. The problem therefore is partly one which will be met again, namely that of detecting at what

point an assertion is being made simply to keep the record straight. But in the present case the matter is more complicated than that. When in the thirteenth century that assertion was investigated, it was investigated by the court itself and apparently on its own motion. They suspected the plaintiff of trying to make them take a case they did not want. And at that time it is reasonably clear that, had they wanted, they would have taken his case without any such justification. They had never ceased, after the separation of the court of common pleas, to hear ordinary civil cases as the undifferentiated bench in the exchequer had done. There was no mechanical obstacle, because the exchequer issued its own writs. And plaintiffs often desired it, because those writs reached into places whose jurisdictional immunities were proof against chancery writs, and because, even where chancery writs ran, those from the authority to which the sheriff was accountable commanded the most prompt obedience. The king, and indeed the exchequer itself, might object to its attention being diverted from revenue matters. But the defendant who wished to object could not even point to the factual hardship of a moving court; and when he quoted the demand of the Great Charter that common pleas should be held in a fixed place, he was relying on the monopoly of the court of common pleas as an end in itself, something the Charter had certainly not contemplated. How far that monopoly ever was established as against the exchequer is far from clear. Many kinds of case without revenue interest were directed to the exchequer for various reasons, and it is impossible to tell how many went there for no reason. It is therefore possible that the *quo minus* fiction never played much part in diverting jurisdiction from one court to another, but was only an incantation to ward off jurisdictional questions when such questions became fashionable.

The case is otherwise with the court of king's bench and its notorious Bill of Middlesex which did divert jurisdiction; but again we must be careful what intentions we attribute to whom. Courts can stop developments, but the initiative in starting them nearly always comes from litigants' advisers. In this case the

desired result—and just what was desired will be considered later—was achieved by abusing two distinct features of medieval jurisdiction. The first was that the king's bench, like other medieval courts, had undoubted jurisdiction in nearly all matters over its own officials, and over anybody else in its own custody. What is more, since the court had both the jurisdiction and the person of the defendant, there was no need for a chancery writ. If therefore Tom who owed a debt to Dick, happened to be in the king's bench prison at the suit of Harry, Dick could sue for the debt in the king's bench instead of in the common pleas, could do so without a writ, and could be sure that the case would be heard quickly because Tom was immediately available. So attractive did this become to the advisers of sixteenth-century creditors, that they arranged for Dick himself to play Harry's part, and begin a suit against Tom for the only purpose of getting him into the custody of the marshal, the king's bench jailer.

For this they employed another genuine feature of the court's medieval jurisdiction, one already mentioned. Because trespasses, wrongs, first came before royal courts only when the king's rights were affected, the king's bench had jurisdiction in trespass concurrent with that of the common pleas. This jurisdiction they could always have exercised on their own authority without any reference of the matter to them by chancery writ. But chancery writs also set in motion the machinery for getting the defendant; and this was probably why the king's bench would only receive direct complaints of trespass without writ when the deed had been done in the county in which the court was sitting. Since the sheriff of that county was under the immediate orders of the court, it was easy for the court to get the defendant. But of course difficulties might emerge by the defendant fleeing to, or normally living in another county; and when the sheriff of the first county reported failure, the court would then issue judicial orders to the sheriff of the second.

The developed artefact therefore consisted of the following parts: a fictitious complaint of a trespass done in the county in which the court sat, now always Middlesex; a commonly abortive

order to the sheriff of Middlesex to arrest the defendant and a formal report of failure; an effective order to the sheriff of the defendant's actual county; the defendant being held to bail and therefore placed in the nominal custody of the marshal; and lastly the true action. We do not know whether the conjunction of devices was a feat of imagination or, as is more likely, was inspired by a conjunction of genuine claims; nor does it matter. What does matter is the motive for these convolutions. To us and to the two courts the important result is that the true action is diverted from common pleas to king's bench; but this cannot have been very important to the plaintiff. He was, it is true, spared the risk of having to employ a serjeant; but a serjeant would have been needed only for argument before the court of common pleas itself, and most cases nominally in that court would now go through without there being any such argument. If the written pleadings ended with a demurrer, or if after a trial at *nisi prius* some motion was made to the court *in banc*, then a serjeant would be needed; otherwise not. The diversion of jurisdiction was therefore not deliberately aimed at by anybody. The king's bench of course welcomed the end and connived at the means; but the force behind it was the plaintiff's desire for other qualities of the new procedure.

These were that he avoided the expense, delay and inconvenience of an original writ. The expense lay in the fees for its issue. The delay was in process: in a writ of debt, for example, it had been possible since the middle of the fourteenth century to arrest a defendant, but only after protracted attempts to make him come by the ancient processes of summons and attachment. The chief inconvenience arose from the part played by the writ as the court's warrant to act: if in this long interval reflection or new facts suggested to the plaintiff that he was claiming the wrong amount, or charging the defendant as executor when he should be liable in his own person, and if he counted accordingly, the variance from the writ would be fatal; he would be making a claim which the court was not authorised to hear. All this was avoided by the Bill of Middlesex. That is why we find the artificialities used even

in actions of trespass and case, which were within the king's bench jurisdiction any way. It is also why we find attempts to improve the service in the common pleas, by allowing a plaintiff in say debt to bring a fictitious action of trespass and use the swift process of the latter to accelerate his true action. This last is one of the points at which we can properly think in terms of "competition" between the courts. But we must not allow such language to mislead us as to who at any one moment wanted to do what, or to blind us to the public benefit that resulted.

This is illustrated further by developments in the seventeenth century. The Bill of Middlesex was then found to offer opportunities to vexatious litigants, who could do much damage with it at small cost and no risk. This mischief was met after the Restoration by a statute which, in effect, prohibited the holding to bail of defendants except upon process stating the true cause of action. This would have brought the Bill of Middlesex to an end, and the statute has therefore been attributed to machination by the common pleas; and no doubt that court and the clerks in chancery desired a return to the writ system. But success would not have rehabilitated the common pleas monopoly because the actions comprising that monopoly were by now almost out of use. Most litigation at common law was being conducted under forms of action, trespass and case, which were equally within the king's bench proper jurisdiction. If therefore the statute was inspired by the common pleas, it was aimed only at competition on equal terms, with writs being generally necessary in both courts. It was in fact dodged by the *ac etiam* clause: the process continued to allege the fictitious trespass, "and also" the true cause of action—a device of doubtful legality since until the defendant was in the custody of the marshal the court had no jurisdiction without writ over the true cause of action. But the device worked; the common pleas despondently allowed an *ac etiam* in their own fictitious trespass action; and with these last flourishes, the two courts moved into the age of reason.

Reason undertook some pruning. By the eighteenth century the whole business in both courts had become drill which attornies

learnt to go through without worrying what it was all about; and they soon found that the earlier steps could be omitted without harm. Apart from colourful but meaningless phrases about the custody of the marshal and the like, the actual commencement of actions was therefore now sensible. But the losing defendant who brought a writ of error would set the ghosts walking: the plaintiff had then to complete his record by going through all the omitted steps, paying to have them ante-dated, and failing if his attorney had thoughtlessly left insufficient time in which they could have been taken. Such calamities as this attracted critical notice of these procedural matters at a time when it would have been impious to question equally devious parts of the substantive law; and it is not without interest that eighteenth-century critics went to the heart of the trouble, which was not the amelioration by fictions but the system of original writs itself.

THE INCREASE OF BUSINESS

Having followed the procedural story to its end, it is now necessary to go back and consider the jurisdictional effect of the Bill of Middlesex. The increase in king's bench work in the course of the sixteenth century is striking. A typical plea roll at the beginning of the century will have less than a hundred membranes, at the end ten times as many. Another indicator is the statute of 1585, already mentioned, establishing a court of exchequer chamber which, until 1830, was to correct the errors of the king's bench. The house of lords could not be the regular appellate body from a court operating on this scale. The statute speaks of actions "first commenced" in the king's bench (Elizabeth I did not make it queen's bench); and the words "first commenced" were taken to confine the statute to actions by bill, because an action begun by writ was begun in the chancery. The statute also specifies the kinds of action to which it is to apply. They are debt, detinue, covenant, account, action upon the case, *ejectio firmae* and trespass; and the unremarked enumeration of the first four of these, all within the common pleas monopoly, shows

that the jurisdictional diversion produced by the Bill of Middlesex was already established as part of the order of things.

On the face of it, however, the increase in king's bench business does not reflect an actual diminution in the court of common pleas. A typical common pleas roll at the beginning of the sixteenth century will have something of the order of five hundred membranes, at the end something of the order of three thousand. The crude evidence of plea roll bulk therefore suggests a sharply expanding total of business, with the king's bench share increasing dramatically, but not to the point of reducing the absolute volume in the common pleas. But this evidence does not enable us to take the further step of estimating the relative sizes of the two shares at any one time. At the end of the sixteenth century the rolls of the common pleas were still the more bulky. But—as will be remembered—the enrolment of purely formal steps had always caused that court to use more parchment for each case handled; and since it was in cases by writ that formal entries had to be made, the use of the Bill of Middlesex increased the disparity arising from this practice. There is, moreover, a more fundamental reason why plea roll bulk is an unreliable indicator, not only of the distribution of business between the two courts, but also of the increase of business in each one considered separately. Individual enrolments were growing longer. With the single common exception of actions of debt based on conditional bonds, in which a great deal of contractual detail was set out, the complete entry of a medieval action was generally quite short. The facts of cases, to our great loss, were encapsulated within common forms. But this was not so with actions on the case, in which the writ or bill and therefore the whole entry was much more explicit; and in the sixteenth century, in both courts, actions on the case became very common and began to displace the older actions.

REPLACEMENT OF OLD ACTIONS BY NEW

This was the change which enabled the common law to survive to our own time and one of its causes lay appropriately in the

new world. The discovery of the American silver mines still seems to be one of factors which led in the sixteenth century to an unprecedented fall in the value of money and in particular of forty shillings. Although plea roll bulk may exaggerate the increase in the business of the central courts, it was still striking; and it largely represents business diverted from local courts. Cases came in with smaller real values at stake: the tradesman's bill, for example, became tediously familiar in Westminster Hall.

But, as was indicated at the beginning of this chapter, Westminster Hall did not deal at all well with the tradesman's bill. Modes of proof effective in a community setting were abused in metropolitan anonymity; and the requirement of the seal, sensibly used to exclude questions of proof whenever possible, was a cure appropriate only to large transactions. To bring smaller and smaller cases into this system and these rules was to accumulate injustice; and the pressure so built up widened every chink discovered by plaintiffs, until by the end of the sixteenth century contract litigation was flowing in entirely different channels. The rise of *assumpsit* was the leader in a series of changes which left most of the medieval actions disused, so that almost every question at common law came to be determined in actions of trespass or actions on the case; and the details belong to later parts of this book. But it is important at this stage to identify this development as a whole for what it is. It is first and foremost the last great reception of business from other courts into the common law.

If we look only at plea rolls, the process seems simple and uncomplicated. Contractual complaints are recorded in terms recognizably similar to those found in the records of local courts three centuries earlier. But when we turn to year books and reports we find that this shift of jurisdiction involved great conceptual difficulty. In local courts these actions about agreements had been naturally known as covenant; and the difficulty was that the common law had already received covenant and subjected it to the seal. The wise provision of the fourteenth century was in the sixteenth an impediment which disabled not

merely the common law action of covenant but the underlying concept itself. The transactions of daily life could not usefully be reached from the premises which we call contract, and the growth of *assumpsit* is to that extent a fresh start from new and inappropriate premises.

There were, then, two levels to this development. There was the level of legal reasoning, devious and sometimes incoherent; and at this level the difficulty, as with things like the Bill of Middlesex, will be to tell at what point the end of story, the general replacement of the old actions and therefore of the old rules, became a visible possibility. And then there was the level of social reality, at which this development and the Bill of Middlesex come together. More and smaller cases were being forced into the central courts, and just as there was a need for quicker and cheaper justice so there was a need for more fitting results. The common law must now deal with the simple questions and reach the simple answers formerly found in local courts; but they had cut themselves off from the simple approach. Although the intellectual convolutions, both procedural and substantive, visibly affected the balance between king's bench and common pleas, we perpetuate a misunderstanding if we think of them mainly in those terms. What had been upset was the balance between the central courts and the world they had to serve, and what emerged was a new law and a new legal system.

CHANGING PATTERN OF LAW-SUIT

It must not be assumed, however, that this new system came all at once to consist of two major courts whose workings, apart from laborious peculiarities in the actual commencement of actions, were identical. In the conveniently uniform reprint of the *English Reports*, the period of the Civil War is reached in three volumes for the common pleas, and in ten for the king's bench; and although the attribution of reporters to the one court or the other is for this period capricious, it does seem that more of reportable interest was now happening in the king's bench, a

reversal of the year book position. Beside this pointer there may be placed another. Although the total business of the common pleas was still increasing in the sixteenth century, the number of practising serjeants appears for a time to have fallen to a handful. This decline must be a result of the change from oral to written pleadings; and indeed there is some reason to think that this change had begun with cases in which a party could not afford a serjeant: his plea was put on the record without being actually spoken. But it further shows that many cases went through the common pleas without the services of a serjeant being needed at any point.

A question which has to be answered, and not only for its own sake but in order to understand the substantive changes discussed later, is just how discussions might be started *in banc.* It is a question which has been little asked, and the answer to which is unhappily elusive. In both king's bench and common pleas it is clear that many cases were completed without ever coming before the court at Westminster. The written pleadings would lead to an issue of fact, which would be decided at *nisi prius* or by wager of law; and judgment would be entered by the clerks. Only at *nisi prius* did such a case truly come before a judge; and legal argument there would rarely be reported until the eighteenth century, and even in a case from the common pleas would be conducted by apprentices rather than by serjeants.

DEMURRER

The written pleadings might, of course, end in a demurrer. If one party claimed that the facts pleaded by the other, which had to be taken as true, were insufficient in law to sustain that other's case, then there was nothing but the matter of law to discuss; and it would be discussed *in banc* at Westminster. In the sixteenth century, at any rate, most reports from the common pleas and many of those from the king's bench are of arguments on demurrer. For the common pleas a clear picture is to be had from Plowden's reports. The pleadings are set out as though from the

plea roll. Then comes the argument, which is introduced by a short statement of the case made by a serjeant on behalf of the party demurring. This statement is followed, by no means always all in one day, by a series of more or less set speeches by serjeants giving their opinions; and a serjeant seems generally to have given his opinion whether he was retained in the case or not. Then come similar opinions by the individual judges. Lastly Plowden sets out the formal judgment, again as though from the plea roll: this contains no legal reasoning, but simply says that on consideration it seems to the court that the plea demurred to was or was not good. In the king's bench the sequence of events seems to have been the same, except perhaps that it was less common for counsel not retained to argue in a case. The serjeants were and barristers were not as much part of the official machinery of justice as the judges themselves.

Plowden, therefore, enables us to picture the conduct of any case in which we know there was a demurrer. But no other reporter of the sixteenth century was as clear as he, so that often we cannot tell whether a discussion had been raised in this or in some other way; and we cannot even be certain what other ways there were. At the pleading stage, imagination can suggest only one other possibility. The change from oral to written pleadings was part of the more important change by which pleas became standardised, so that there was less and less room for the tentative exploration reflected in the year books at their best. But every demurrer represents a genuine doubt, and it may have been possible for a doubt to be raised, in the old year book fashion, before the pleadings were settled. Many common pleas reports of the sixteenth century begin with some such phrase as "Serjeant So-and-So moved this case"; and what follows has sometimes an almost hypothetical look.

At the beginning of the sixteenth century it looks as though the demurrer, and perhaps the old-style discussion of a case in which the pleadings were not yet finally formulated, were the principal vehicles of legal thought. There also existed the demurrer to the evidence, already mentioned as illustrating how artificial was the

barrier to legal discussion set by the ancient general denial. This was work which would have been done by the demurrer itself had pleading not been distorted by the primacy of the general issue. But the demurrer to the evidence is more significant for the historian than it was to lawyers at the time: it was not common, probably because things rarely arranged themselves so that a party could afford to admit the truth of all the evidence in question.

SPECIAL VERDICT

It was perhaps this limitation that brought about the next development, which proved to be of great consequence for the future of the common law. This was the increased use of the special verdict, a process in which the king's bench seems to have led and the common pleas to have followed. To the extent that the matter was within the control of the parties, this is likely. If a special verdict were taken at *nisi prius* in a king's bench case, the apprentice who had acted at *nisi prius* could argue the matter *in banc*. But in the common pleas, argument *in banc* would need a serjeant. The court could of course consider a special verdict without hearing argument, and in at least one case reported by Plowden it did so. But even in that case he tells us that there were counsel ready to argue; and it seems probable that a special verdict would be more often asked for in king's bench cases. The working was the same in both courts. A detailed statement of facts, which may fill several printed pages, ends with a formula to this effect: "And if it shall seem to the justices that (say) the entry of such a person was lawful, then the jurors say that the defendant is guilty; and if not, they say he is not guilty." Formally, therefore, this was expressed as a general verdict subject to alternative conditions; and in short reports it is often hard to tell whether the discussion concerns a special verdict or the direction to be given for a general verdict.

To consider special verdicts first, their increase represents a reversal of the year book attitude to jury trial. Special verdicts are found in year book cases, and in contemporary plea rolls, but

they are rare; and it had been increasingly felt that the mere existence of a possible question of law was a reason for withdrawing the question from the jury by special pleading. Indeed, the curious history of "colour" is an exploitation of this to allow special pleading when *prima facie* the general issue would be appropriate. The special verdicts of the sixteenth century and later, in contrast, show a use of the general issue when it is known that points of law must arise. They are not the products of laymen bewildered by an unexpected difficulty: they are professionally drafted, and must have been settled between counsel and the trial judge; but no sudden awakening to the juristic advantages of this mode of proceeding must be supposed. The increase of special verdicts came about in actions for trespass in which proprietary questions were raised, and in particular in the action of *ejectio firmae*. This, as will be seen, had been a remedy for the leaseholder; and as part of the sixteenth-century transformation it came to be used by persons claiming freehold title. The claimant would enter into the land for the sole purpose of granting a lease to his accomplice, who would sue when ousted by the defendant, the present possessor of the land. To the defendant these manoeuvres were at first a mere sham, and the general issue was the natural answer. But even if he wished to plead specially he had to begin by pleading Not Guilty to the allegation that he had acted with force and arms. An ancient principle of feudal origin had it that one could not so act within one's fee; and failure to take the general issue at least to that extent might constitute an admission about the point truly in issue, namely the defendant's title. It was therefore the effect of an anachronism upon a trick that first put the legal horse and cart in what we think the right order.

The lasting importance of the special verdict is that it put the facts first. Putting the facts first is the mark of a developed system of law, which is the product of thinking about facts taken as known. Early legal systems are not so presumptuous. Their aim is only to settle disputes, and the general issue in its most ancient form reflects this: the blank answer settles the dispute, and whether the winner has won on the facts or on the law is a

question which itself does not arise. But when the general issue came to lay out factual stories for judicial consideration, it compelled instead of inhibiting legal thought in substantive terms. The legal historian, reading reports of the sixteenth century, is frequently tantalised by cases which consist only of factual stories and legal discussion: there is no indication of the form of action, let alone the course of the pleadings, and often no proof that the report is even of a real case. But whatever their shortcomings as evidence about individual problems, they tell him at least this: in some areas, especially property, lawyers were largely thinking in such terms.

OTHER MECHANISMS OF DISCUSSION *IN BANC*

To the two sixteenth-century transformations already mentioned, one in the system of courts and the other in the forms of action, there must therefore be added a third: the pattern of litigation was inverted, and with it the way in which lawyers thought. The special verdict was only the earliest of a series of mechanisms, all of which tended to postpone serious judicial consideration of a case until after the facts had been established. For convenience of explanation, they can be divided into two kinds. There were first those which, like the special verdict itself, allowed consideration by the court *in banc* of facts which had emerged at the trial. And secondly there were those which allowed consideration, even after the trial, of facts alleged in the pleadings. In the former kind of case, the trial was normally of the general issue, which thus became no more than a preliminary joinder of the dispute. It follows that the questions raised were of the sort which had long been lost in the general denial. But even before the special verdict became common, they could be raised by a demurrer to evidence, to which the special verdict and the other mechanisms of this first kind were all in principle alternative. Similarly the mechanisms of the second kind were all in principle alternative to the demurrer in pleading: the party who succeeded in any of them would equally have succeeded had he

demurred at that stage and so prevented the facts from being tried at all. The essence of the change is therefore the same in both cases. To demur, whether it was the old demurrer in pleading or the newer demurrer to evidence, was to take the legal objection as soon as the fact which raised it was alleged: at that moment the party chose whether to admit the facts and stake all on the legal point, or to let the legal point pass and fight on the facts. But now he may fight on the facts, and still resort to the law if the facts are found against him. It was a simple end, and to us it is an obvious one. But it is obvious only because we think in substantive terms, and we do so only because these mechanisms in fact combined to turn law-suits round. So fundamental a reversal cannot have been aimed at. The immediate causes must have been individual mischiefs having, no doubt, a common factor. The division inherent in the *nisi prius* system inevitably caused inconvenience to lawyers and expense to their clients when more began to happen in the country than the taking of a final answer to a simple question. That the general solution was always of the same nature, namely to act *de bene esse* in the country and allow all kinds of questions to be raised later, was a piece of juristic good fortune. It allowed single questions to be brought together and considered against the background of complete factual pictures, and not just in terms of particular pleas in particular actions.

DISCUSSION OF FACTS COMING OUT AT THE TRIAL

Those mechanisms which allowed consideration of the facts emerging at the trial are the more difficult to follow in the reports. The special verdict seems to have grown in favour rather than the demurrer to evidence because of the admissions compelled by the latter. But the special verdict itself suffered from twin disadvantages familiar to lawyers of all periods: an inherently difficult piece of drafting was followed by the necessity of getting all concerned to agree to the draft. The special verdict was therefore largely replaced by mechanisms which depended upon the general verdict. The judge at *nisi prius* would direct the jury

on the questions of law raised by the facts, and any discussion would be about the propriety of his direction. The greater elasticity of this, however, had its own price. The demurrer to evidence and the special verdict both put the facts formally onto the record, so that the decision *in banc* could be followed by a writ of error and therefore by further consideration of the point of law. But the devices now to be described worked outside the record, so that the decision of the court *in banc* was final. On the other hand the court *in banc* had itself become essentially an appellate tribunal, reconsidering the actions of the trial judge; and it was indeed in this relationship, rather than in error proceedings, that the modern Court of Appeal largely had its origins.

There are three possible ways in which discussion might be raised on a general verdict. The trial judge might consult his fellows about the proper direction before giving it; or, adapting the principle of the special verdict, he might in effect give alternative directions, have the doubtful point discussed afterwards, and then have the appropriate verdict entered accordingly; or lastly, if the judge was sufficiently confident to give a straightforward direction, the losing party might be enabled to upset the resulting verdict on the ground that that direction was wrong. The reticence of most sixteenth-century reporters about the steps by which their discussion had been raised makes it difficult to distinguish between the first two. But a few reports seem clearly to be about a direction to be given in the future, and it is likely that this, the first of our possibilities, would happen only when the trial itself was at Westminster. In an ordinary *nisi prius* case, the delay involved would make it impracticable.

The second possibility, which like the first would leave no trace on the record, is probably behind many sixteenth-century reports which open with some such phrase as "The case upon the evidence was . . .". It became common, being developed as an informal substitute for the special verdict; and like the special verdict it required, after the evidence had been heard, a measure of agreement between the parties about the facts. The trial judge would give a carefully formulated direction and take a general

verdict; and this would be subject to an agreed statement of facts for the court *in banc*. If the court considered the direction wrong in law, the verdict, which had been taken conditionally, would be entered in accordance with the direction that ought to have been given.

In both these situations the difficulty had been recognised and provided for at the trial, and the second at least partly depended upon agreement. To allow one party to attack the direction and undo the verdict after it had been definitely taken was a larger step; and since there was no way of knowing whether the jury had based their verdict on the misdirection, it involved the inconvenience of a new trial. New trials were ordered in the sixteenth century, but apparently only in cases where the jury had so misconducted themselves that the trial had to be held a nullity. It was in the seventeenth century that motions for a new trial became common, based upon misdirection; and apart from their impact on substantive law, such motions were of course also the medium in which much of the law of evidence was developed. Since the logic of the matter disappeared with the Judicature Acts, which conferred this with most other powers of the court *in banc* upon the Court of Appeal, it is perhaps worth observing that the power to order a new trial was strictly a product of the *nisi prius* system. A commissioner of assize trying a criminal case entered the formal judgment on his own authority, and there was no court *in banc* to which to apply for a new trial on the grounds of misdirection or misreception of evidence. That is why the possibility of a new trial in criminal cases was limited to those formally prosecuted before the king's bench itself, and committed by them to trial at *nisi prius*.

For English lawyers of this generation, to which a jury in civil cases is a rarity, these various devices seem complex. But, apart from Lord Mansfield's ingenious exploitation of the special verdict, it was the last two which became common; and they did not overlap but catered for alternative situations: parties and trial judge might or might not agree, when the evidence was heard, that the case really turned upon a doubtful question of law. A

measure of complexity was inevitable so long as the truth of evidence was always for the jury and its legal effect always for the court; and our modern simplicity has not been pure gain. Although legal questions were raised, as today, against a background of facts taken as known, they were yet raised in isolation and required to be answered in clear and intelligible terms: what should a jury be told about the legal effect of this fact? Under this discipline the courts made law in fewer and more precise words than are found in today's reports. And the legal historian of the future may see the disappearance of the civil jury as having consequences as great as its introduction. Just as questions of law could once be lost in a blank general verdict, so now they can be lost in a judgment which equally decides the case for one side or the other, but which for all its marshalling of authorities never gives a reason.

DISCUSSION AFTER TRIAL OF MATTERS RAISED BY PLEADINGS

Last in this account of the reversal of the pattern of litigation comes the fate of pleading. In the medieval legal process, it was the demurrer that made law. If at any stage in the pleading either side advanced a fact which seemed to the other insufficient, the other party could demur. This was to admit the truth of the fact, and stake the case on his view of the law. It has been noted that in the year books actual demurrers were rare: discussions were more often about a plea proposed by one side and a demurrer proposed by the other, and whether the plea was ever actually made depended upon the tenor of the discussion. But law was equally made by this, though less definitively. The change to written pleadings made this tentative discussion more difficult, if not impossible; and many sixteenth-century cases were indeed decided on demurrers. But life is rarely so obliging as to separate disputes into two classes, agreed facts and disputed law or the converse, and most litigants who demurred were forced to admit facts which they believed to be untrue. Under the medieval system, their only way of fighting on both was to let the point

of law pass in the first instance, take an issue of fact; and then if they lost bring a writ of error. The plea which they believed to be legally insufficient was on the record, and they could, at great expense and trouble, seek to annul the whole case.

In the sixteenth century, however, a new possibility emerged. The losing party could take the point before the court *in banc.* In the ordinary case the only way in which that court could give effect to a decision in his favour was to refuse to enter judgment at all. But in one situation they could enter judgment in his favour notwithstanding a verdict against him: this was when a plea in confession and avoidance turned out to be bad in law. In an action for trespass to the person, for example, if the defendant pleaded lawful arrest and the jury found for the defendant, the plaintiff was still entitled to judgment if it turned out that the defendant had lacked authority in law to make the arrest.

What matters here, however, is that the motion in arrest of judgment and the motion for judgment *non obstante veredicto* allowed questions of law arising out of the pleadings to be raised after the trial of the facts. From the point of view of the parties the freedom of the year book system, curtailed by written pleadings, was now restored in a different form. Oral pleading had allowed the question of law to be discussed, and then abandoned by the party who looked like losing on that in favour of a fight on the facts. The new system allowed the facts to be settled first, perhaps unnecessarily, and the law raised later. Though the converse is not entirely true, since statute had caused trivial errors in pleading to be "cured" by verdict, it is always true that one who succeeded in either of these motions would have succeeded on a demurrer without any trial taking place. His gain was that he had not been forced to stake everything on it.

How far this development was brought about by causes more specific than convenience we do not know. But in the legal turmoil of the sixteenth century convenience must have been a powerful force, and the two most common occasions for motions in arrest of judgment seem to have been actions of *assumpsit* and defamation. These were both in some sense new. Defamation had not

previously appeared in the common law courts at all, and actions were now flooding in. In these circumstances the constant question was whether the words were defamatory; and it was normally settled, not by a demurrer to the declaration, but by motion in arrest of judgment after verdict for the plaintiff. *Assumpsit* was not in the same formal sense new; but it was being used in new situations to provide a more or less general contractual remedy. And again the question whether the facts stated in the declaration were actionable was usually settled by motion in arrest of judgment after verdict, rather than by demurrer at the beginning.

SUBSTANTIVE RESULT OF PROCEDURAL CHANGES

Although all these mechanisms look as untidy as the pieces of a jigsaw puzzle, the pieces fit together to make a picture. The facts alleged in the pleadings and the facts appearing at the trial could all be raised after the trial, and their legal effect considered by the court *in banc.* Although it called at every stage for greater precision of thought, it was essentially our modern system; and if one looks forward from the sixteenth century, that was the most important result of these procedural changes. If one looks backward, the most important result is that both classes of fact were at last brought together. The logic of medieval pleading was directed to the possible misleading of juries. This was the consideration which had determined whether a fact could be lifted out and placed on the record, and therefore be thought about, or whether it had to be left within the general issue and so lost to legal analysis. But this was a procedural logic, and so far as substantive law was concerned it was arbitrary. In trespass to the person, for example, accident was lost within the general issue, justification brought to the surface; and we may still be paying the price of having left the former so long unconsidered. This bringing together of what had been so arbitrarily separated in time reacted upon the rules of pleading themselves. It became increasingly a matter of choice whether a defendant would

embark upon special pleading or plead the general issue; until finally in 1834 an attempt was made to give a truly legal logic to the general issue by making it merely a denial of the basic fact in the plaintiff's case, the making of a contract, the commission of the tort, or whatever it might be. But this still imposed too much technicality, and perhaps it was better that the general issue should disappear altogether from civil litigation, as in effect it has, leaving the pleadings merely to narrow the disputes of fact. What disappeared at last was the ghost of a legal system as it had been before it had any lawyers, or much law, a system whose highest ambition had been to settle disputes.

4 *The Rise of Equity*

PROCEDURAL BEARINGS OF EARLY EQUITY

Nothing in the history of English institutions is so obscure as the rise of those courts which are usually regarded as having exercised the residuary powers of the king, and in particular the court of chancery. Much has been written but little is known; and since the chancellor's equity is thought by some to be the most important English addition to legal thought, the gap is serious. It arises partly because the chancery kept no plea rolls. Although the common law plea rolls often do not answer the historian's questions, he knows at least that in their day they answered the questions that actually arose: they were a sufficient memorandum of the business done. And this suggests a more fundamental reason for the obscurity of the present subject. We should of course be better placed if we had more and better ordered documents to look at, but the real defect is in our vision: as always, we are looking for the wrong things, asking the wrong questions.

The most obviously relevant surviving documents are petitions, and one approach has been to scrutinise these for features, whether substantive or procedural, which would later be regarded as peculiar to equity. So far as substance is concerned, the result is largely negative. Many petitions of the fourteenth and fifteenth centuries complain of matters which in principle were remedied by the common law. Special treatment is sought because the petitioner is too poor to sue, or his adversary so powerful that sheriffs will not do their duty or jurors tell the truth. These the historian of equity can set aside as not fitting into the pattern

he is looking for; but he does so at his peril. They warn us to begin from institutions, not from doctrines of substantive law.

In the fourteenth century there was no law of England, no body of rules complete in itself with known limits and visible defects; or if there was it was not the property of the common law courts or any others. There were justice and right, absolute values; but it was not yet the lawyer's business to comprehend them in the sense of knowing what was the just and right result upon these facts and those. His business was procedural, to see that disputes were properly submitted to the appropriate deciding mechanism. The mechanism would declare that justice lay with the one side rather than the other, but this was the inscrutable manifestation of a result. In time the jury system, by compelling the reasoned consideration of facts, would create substantive rules and the concept of substantive law. But the end of that was far in the future. In the present there were only situations in which the mechanism visibly would not work. One has been considered already, the true beginning of that compulsion to consider facts: unlike God, a jury could be misled by deceptive situations, and that is what started the fertile process of pleading. This was a mischief that could be dealt with by adapting the mechanism itself. But, also unlike God, a jury could be intimidated or corrupted. Here no adaptation was possible. The petitioner believed that his case was beyond the ordinary mechanism, and he sought another way.

But in doing so he did not see himself as applying to a different system of rules, or even as applying outside an established set of rules to some superior having absolute authority at will. Justice was binding upon kings; and if it was prayed for rather than demanded, that was because kings were not subject to earthly sanction. The point is made by another kind of petition that came to the chancellor, usually regarded as different from those we are considering, but similar in principle and so obviously an appeal for regularity that the very word "petition" came to have a special sense: these were cases in which it was the king himself against

whom a claim was made by petition of right. What was sought in the one case as in the other was justice. What was special about both was that, for different reasons, the usual channel could not supply it.

The channels of justice themselves were not part of the immutable order. Convenience or propriety might assign a case to this court or that, but not unconditionally. An ultimate responsibility, and therefore power of interference, lay with the king, and was strikingly expressed in the great writ of right: even to one who "owned" his jurisdiction, the king would say "if you will not do right, the sheriff shall". The example can be carried further. When that form of words was settled, the courts of the sheriff were the normal, indeed almost the only vehicles of justice outside the feudal area. But when the court of common pleas was well established, it was not the sheriff who did justice in such cases: the sheriff would still take jurisdiction from the defaulting feudal court, but it would as a matter of routine be transferred again to the common pleas. The common pleas itself, by that time the routine channel of royal justice, had not started as such but as a more convenient alternative to the first such routine, the eyre; and its beginning as something special was to the end commemorated by the need for a writ in that court. Propriety of jurisdiction as between the king's courts and the old local courts had come to depend largely upon the amount claimed. But the thirty shilling creditor and the fifty shilling creditor were entitled to the same justice, though through different channels: if the fifty shilling creditor wished, he could have a *justicies* writ referring his claim to the sheriff instead of the common pleas.

These, then, are the terms in which we must think. Not only was there no equity, as a nascent body of rules different from those of the common law. There was no common law, no body of substantive rules from which equity could be different. There was justice, beyond human control and manifested in unreasoned answers to disputes; and it was from the need to reason, obliquely compelled by the substitution of a fallible for an infallible deciding mechanism, that substantive law later grew. Then there were the

channels of justice, the mechanisms themselves, the structure of courts and their procedure. These were not beyond human control. They were the business of lawyers and the whole content of what we should call positive law. And they had come to be seen as a royal responsibility. There were local and private courts, to which complainants could generally apply without royal authorisation; but such appeal as there was lay to royal courts. There were royal justices authorised to hear classes of case, like the justices in eyre, or authorised to hear individual cases, like the common pleas; and these authorisations, whether commissions or writs, came from the chancery. This was the head office of the organisation, and it was here that application was made when the ordinary mechanisms appeared to be incapable of working. The petition for equity has no more mysterious origin than that.

It follows that equity is in a sense older than any of its characteristics. It did not grow up to deal with flaws in a pre-existing system of law; and the idea that the law could be unjust, if comprehensible, would have been abhorrent. All failures were mechanical, arising either out of jurisdiction, there being no ordinary tribunal competent to deal with the matter, or out of proof, a competent tribunal being incapacitated in the particular case. Such incapacity might arise, for example, because a jury would be intimidated, or because it would be kept from the truth by the petitioner's opponent suppressing relevant deeds, or because the petitioner had been induced by fraud to supply conclusive proof. And however clear it may be to hindsight that the first case is different from the other two, there is no reason to think that it seemed different in the fourteenth century. It was excluded later by political considerations and ideas of due process, and by the increasingly substantive character of the law; and that is how equity came to have a sphere of operation that was in some sense distinct.

That sphere, and the characteristics of equity, of course matched and complemented features of the emerging common law. But these features were seen at the time as matters of jurisdiction and proof; and we must not think of the common law as having set

in some almost savage mould, or see the growth of equity as a symptom of advancing civilisation. The point appears most clearly in the history of fraud. Fraud is the informing principle behind much of equity; and some have thought that the very idea was lacking in the common law, which could understand a taking by force but not an obtaining by fraud. They have pointed to what looks like the invention of the tort of deceit in the eighteenth century, and to the readiness of equity to give remedies from the fourteenth and fifteenth centuries. But this piece of chronology is in the nature of an optical illusion. Fraud was a frequent cause of action in local courts from the earliest times of which we know. It was not frequent in royal courts because until the late fourteenth century no wrongs were meant to come there except those in which the king as well as the party had been injured. This is why the early records of the common law are filled with trespasses against the king's peace, but almost the only deceits of which they tell are those in which a royal court had been deceived. Fraud was beneath the notice of the king's judges rather than above their heads.

This accident was followed by another. When in the late fourteenth century wrongs as such came within the avowed ambit of royal jurisdiction irrespective of any royal interest, deceit duly appears in the records of the common law. But it lost its character as a cause of action in what we should call tort by being used to supplement the remedies in what we should call contract. Since deceitful statements are most often made to induce transactions, this was not so unnatural a development as it sounds; but it happened upon such a scale that true fraud was left with almost no part to play in the common law. A brass object is described as gold. The buyer's earliest action is in what we should call tort, and he complains that the seller deliberately deceived him. But the seller comes to be held liable if his statement turns out untrue, whether or not he believed it. Allegations of wicked deceit go on being made, but they are a pleading formality. The statement is now playing a different juridical part: it is a warranty which comes to be seen as a term of the contract, and it binds the

honest man as well as the cheat. If this change is immediately to be ascribed to commercial convenience, that in turn was probably a simple matter of proof. The buyer was deceived in one sense: but in the other sense of the word, who can say whether or not the seller deceived him? Against the true cheat, in this and other situations, there was now no special remedy. By using the word and idea of deceit, and denaturing them, the common law had shot its bolt. Now indeed there was something like a substantive gap in the law to be filled by chancery: and the student of modern contract law, lost in the mysteries of terms and representations, is the victim of this ancient accident.

As a ground of redress for one who had been induced to change his own position for the worse, fraud thus ended up in chancery. But nobody had ever thought cheating was lawful. In the fourteenth century the common law was not meant to be comprehensive: this was matter for local jurisdictions, with chancery seen as the head office of the system to which application might be made in exceptional cases. In the sixteenth century, when local jurisdictions were playing a much smaller real part, and when the common law was taking on the aspect of a substantive as well as a comprehensive system, the application to chancery was ceasing to look like a request for the same justice, withheld below by some mechanical fault. There seemed to be two parallel systems, and the relationship between them had to be explained in theory and worked out in practice.

THEORETICAL RELATIONSHIP BETWEEN LAW AND EQUITY

The explanation in theory, a commonplace by the late sixteenth century, was that any general rule must work injustice in particular cases, and therefore that the application of positive law must be subject to some dispensing power in the interest of a higher justice. This idea, established on the continent but dramatised in England by the jurisdictional separation of law and equity, became part of the world's legal currency; and equity in this sense may appear, not necessarily administered by separate courts,

in any legal system. But in England, and perhaps generally, the true newcomer was not equity but positive law. Consider fraud playing what we see as the part of a defence. In the sixteenth century it will be seen as a rule of positive law that a promise made under seal is absolutely binding, and equitable relief will be sought on the ground that the promisor was tricked. Here in embryo are the mysteries of our voidable contract. But in the fourteenth century the seal was a matter of proof, not part of a substantive rule: there was only one justice, but the ordinary machine would not in this case produce it.

The appeal to a higher justice was of course further explained, most elaborately in the early sixteenth century by St Germain in his *Doctor and Student*. St Germain was a barrister having extensive theological learning; and for him the higher justice was divine in origin, and its human manifestation was a matter of conscience. This was an important stage in English legal thought, not because it was new but because it linked the medieval world and the modern. There was nothing new in the appeal to conscience. The language is found in petitions from the earliest times; but it was not just designed to persuade chancellors who had nearly always been ecclesiastics; still less to persuade them to produce a different result from that reached by "the law". Justice was as single as truth, and conscience was man's knowledge of it. The year books show the court of common pleas discussing circumstances in which a defendant in debt might "safely in conscience" wage his law, swearing that he owed nothing; and what they were talking about was what we should call the rules of substantive law about debts. Positive human law was about the means by which this single justice should be manifested; and the appeal to the chancellor was for the same single justice, in circumstances in which the human machinery was going to fail. What was new in *Doctor and Student*, then, was not the idea of justice as divine in origin: that was older than Christianity. The new element was a positive human law beginning to be conceived in substantive terms, in terms of a rule that on these facts this result ought to follow, and on those facts that result. And sometimes the result was visibly

unjust. The achievement of St Germain was to reconcile this new concept of the nature of law with the medieval belief in divine justice.

For reasons that will appear, the actual terms of this reconciliation were important for the future; and it is worth considering how completely they may have been dictated by the past. Discussion has normally turned upon the fact that most medieval chancellors were clerics, and that canonist ideas may for that chance reason have played a large part in early equity. But there is probably more to it than that. How could divine justice manifest itself? There was no difficulty so long as all law-suits were settled by making a party swear to the justice of his cause, and submitting that oath to divine test. The true start of equity as well as of the common law was the replacement of the divine test by a fallible human result. This result might obviously fail to reflect a justice still seen as absolute; and it was apprehension of this that prompted application to the chancellor as head of the human system. But what was he to do about it? He had no special access either to absolute justice or to the minds of men; and he could not simply declare a result for himself. All he could do was to work upon the conscience of the party, where the rights of the matter were in some sense uniquely known.

This necessity, rather than the coincidence of clerical chancellors, seems to explain procedural resemblances between chancery and courts Christian, and makes it not unlikely that some matters dealt with in later equity had their first home in those courts. But most of all it seems to explain the nature of equitable decrees: results were not declared to be so; instead parties were told to make them so. When a seller of land refused to convey it, chancery did not declare that it belonged to the buyer notwithstanding this: it compelled the conveyance. Property in the land passed to the buyer because the seller after all conveyed it to him: the seller conveyed it because chancery told him to, and would punish disobedience. The equitable use of specific remedies has commonly been taken to reflect their absence from the common law. But they had not always been absent. They were well known in

local jurisdictions, and in the early royal courts; and they disappeared only because they proved unenforceable in practice. It is not this accident that is reflected in equity, but the nature of equity itself. Equity acts *in personam* because conscience does.

On these terms, and probably on no others, can jurisdictions live together and yet ordain divergent results. In the medieval common law for example, no rule was so clear as that which prohibited spiritual courts from adjudicating upon temporal debts; and if, as seems to be the fact, they did this on a large scale, it may be because they did not technically infringe the rule. They would not impose a direct obligation to pay the debt, but make payment a condition of mitigating punishment for the sin of breaking faith. Conscience was quickened by its proper spiritual sanctions. The chancellor had to use earthly penalties: but it was his ability to make the party change his own position, and so to admit the common law rule while avoiding its result, that made possible the coexistence for centuries of separate systems giving different answers.

The durability of the arrangement is as astonishing and as English as the durability of the Reformation settlement itself. St Germain's legal cosmography had seen justice as divine, conscience as its human reflection. But the spirit which made the Reformation possible saw divine justice as belonging to another world than this; and in this world it was never again possible to believe whole-heartedly in the existence of a single right answer to every dispute. If then we take our stand late in the sixteenth century we see the common law courts as the organs of the law of the land. The modern phrase describes the modern thing. The common law has largely taken on the aspect of a system of substantive rules. And it has also, by the fall in the real value of forty shillings, become the law which governs all but truly small cases: it has become the ordinary thing. It is against this background that we must imagine the court of chancery. A major court is hearing many cases according to a well-established procedural routine. It is a regular institution, but not applying

rules; rather it is using its discretion to disturb their effect. The secularisation of conscience made conflict inevitable.

CONFLICT BETWEEN LAW AND EQUITY

At the political level this turned on the source of the court's authority. The king's divine duty to provide channels for an absolute justice turned into divine right; and the discretion of the chancery, like the other discretionary powers of government, was left seemingly dependent upon the royal prerogative. The court was therefore not untouched by the constitutional struggles of the seventeenth century, though it eventually emerged unharmed. Our concern, however, is with the growth and settlement of the conflict at the legal level.

Before the sixteenth century there was in general no conflict, for two reasons. The first is practical: so long as local jurisdictions did a large proportion of the country's judicial work, the failures complained of were often their failures, and the common law judges were aligned with rather than against the chancellor. But more important was the current concept of the legal process itself. Judges and chancellor both saw themselves as concerned to secure the application of the same absolute justice, rather than to do justice seen as a product of human thought about which men might differ. To consider again the promise under seal induced by fraud: so long as the deed was seen as a matter of proof, something like evidence of an abstract indebtedness, all would agree that justice was going to miscarry because of the fraud. It is only when the deed is seen as creating the debt that the question begins to look like one of substantial injustice: there is now a substantive rule of law to be defended and attacked.

But even when this had happened, and when the visibly substantive rules of the common law were being overridden at the discretion of the chancellor, the dialogue between the two sides often shows true perplexity rather than a true conflict between partisans committed to their causes. Medieval rules about proof and the like, sensible in their own day, had crystallised out as

substantive rules of law which only the most bigoted common law judge could defend whole-heartedly. And since the chancellor operated by ordering the conduct of the party with regard to his admitted legal rights, and not by denial of those rights, there was generally no formal attack on the rule, and therefore no compulsion to defend it. Like many basic contradictions, the comfortable course, and in this case probably the wise one, was to ignore it.

In one case, however, it was difficult to ignore. To say that the chancellor only ordered the conduct of the party hardly glossed over the contradiction when the order was that a party who had actually won at common law should abstain from enforcing his judgment. Nor was this merely a case particularly provocative to pride. There were conceptual difficulties. The more obvious is that the proceedings in chancery look like an illegitimate form of appeal. The less obvious, but the deeper, has a medieval and a modern face. When the legal process is seen as procuring a result which reflects a single absolute justice, it is hard to admit that a result can be properly procured and yet be wrong. And when the legal process is seen as the application of substantive rules, it is equally hard to admit that the substantive rules, properly applied, are somehow wrong.

In this situation there was a long history of doubt and difficulty. It seems clear on the one hand that common law judges often welcomed applications to the chancery by litigants whom they were themselves unable to save from their own rules. On the other hand a certain unease in chancery may be seen in the wording of a late-sixteenth-century note: "this Court forbeareth directly to examine any judgment given at the common law"; and then, after mentioning cases in which such a direct examination seems to have been made, it finishes: "but whether these and such other may seem rather to examine the manner, than the very matter and substance of the thing adjudged, it is worthy of consideration." These last words indicate the solution as well as the problem. In the second decade of the seventeenth century Coke forced the issue, characteristically in cases in which the judgment at law was in favour of parties wholly without merit; and the

matter had to be referred to the king. The king was advised that, as a matter of practice, injunctions after judgment had often been accepted; and that, as a matter of theory, they did not "assume to reverse and undo the Judgment, as Error or Attaint doth, which the Chancery never doth, but leaves the Judgment in Peace, and only medleth with the corrupt Conscience of the Party". Equitable examination, in short, was always of the manner rather than the matter, and always external to the law. The order to the party after judgment was therefore no different from an order before judgment, or before action started, or in cases in which there could be no action at law. The two systems moved on different planes and could not collide.

THE REGULARISATION OF EQUITY

To the extent that there had been a serious attack upon the equitable jurisdiction, then, it was the foundation in conscience that enabled the chancery to withstand it. But conscience itself raised a difficulty, and a far more serious one. The discussion about the relative importance in a legal system of certainty and abstract justice is unending: but it begins at a definite stage of development, namely when the law is first seen as a system of substantive rules prescribing results upon given states of fact. In England this discussion was at once institutionalised: certainty resided in the common law courts, justice in the chancellor's equity. But there were calls for the regularisation of equity itself. Lambarde, writing about 1590, is clear-headed in his perplexity, and asks: "whether it be meet that the *Chancellor* should appoint unto himselfe, and publish to others any certaine *Rules & Limits* of *Equity*, or no; about the which men both godly and learned doe varie in opinion: For on the one part it is thought as hard a thing to prescribe to *Equitie* any certaine bounds, as it it to make any one generall Law to be a meet measure of *Justice* in all particular cases. And on the other side it is said, that if it be not knowne beforehand in what cases the *Chancellour* will reach forth his helpe, and where not, then neither shall the Subject bee assured how, or

when he may possesse his owne in peace, nor the Practizer in *Law* be able to informe his Client what may become of his Action."

The answer is foreshadowed in a note by a chancery reporter: "where a common inconvenience will follow, if the common law be broken, there the Chancery shall not help. For albeit the party cannot with a good conscience take the advantage of sundry things to which he comes, yet the Court of Conscience is not thereby bound to help the other, but must leave some things to the conscience of the party himself." These utilitarian words were written in the late sixteenth century. Some progress towards regularisation was made in the ensuing sixty years, largely by means of general orders issued by various holders of the great seal. But it was not until after the political upheavals of the seventeenth century, in which the very existence of the equitable jurisdiction was threatened and perhaps endangered, that equity took on its modern aspect as an intellectually coherent system of rules. The sixteenth-century distinction between compellable conscience and the conscience of the party became Lord Nottingham's distinction between his natural and his civil conscience. What mattered now was the civil conscience of the court, which was nothing other than a new system of law; and the conscience of the party slowly passed out of consideration. The dialogue between certainty and justice, law and morals, had been acted out in real life; and the end of it was two systems of certainty, two systems of law.

The process of regularisation will not be traced, though some aspects will of course be mentioned in connection with the substantive branches of the law. But it is to be observed that the development of equity, more than of any other body of English doctrine, was the work of identifiable persons. The common law itself is to a surprising degree anonymous, largely because the intellectual initiative has come from the bar rather than the bench and has been directed to the single case rather than to the state of the law. In the single case the difficulty has always been to escape from the past, and there has been little opportunity to look to the future. Only where events or a bold hand had produced a clean slate, as with the mercantile work of Holt and Mansfield, could

individuals in some sense mould the law. In equity the slate was largely clean, and Nottingham in the seventeenth century, Hardwicke in the eighteenth and Eldon in the nineteenth were in a real sense masters of the future, able to approach individual problems with a legislative mind.

But the intellectual coherence thereby achieved in the principal doctrines of equity was bought at a cost. The single mind, applying itself to problems in this kind of way, can do only so much. Although inquiries into the facts of cases were done by others, it was long thought that the actual decision must remain for the chancellor himself or for a deputy sitting when he was not. And even when it became settled that the master of the rolls might sit as a judge in equity in parallel with the chancellor, there was always an appeal from him to the chancellor himself; and indeed the chancellor himself might always be asked to reconsider his own decisions. Not until 1813 was the judicial staff of the court altered, and not until the middle of the century was it much improved. In the common law, as has been seen, there were three courts each with about four judges. Since the only real hearing for most cases was that before the single judge at *nisi prius*, the effective judicial strength was of the order of a dozen; and even for cases taken by motion before a court *in banc*, there were the three separate courts. It was this feature, even more than the clerical abuses which the chancery shared with the common law courts, that accounted for the delays in the chancery and the sense of helplessness felt by those driven to litigate there. The fog which Dickens observed in the court obscured its vision of much human unhappiness, but not of juristic principle; and the great intellectual strength of equity even today, though partly and paradoxically due to the paramount claims of certainty in the field of property law, owes much to the singleness of the vision with which its foundations were laid.

II. PROPERTY IN LAND

5 *Tenures*

LORDSHIP AND OWNERSHIP

From the earliest settlements until the industrial revolution the economic basis of society was agrarian. Land was wealth, livelihood, family provision, and the principal subject-matter of the law. To begin with, moreover, land was also government and the structure of society. Today we think of the ownership of a suburban garden, or even of a great agricultural estate, as being something like the ownership of a motor-car. They are just forms of wealth, the objects of legal protection. Lordship, the Latin *dominium*, is to us an ambiguous word, because to us the concepts of ownership and jurisdiction are distinct: to understand this starting-point, we must think away that ambiguity, and not try to resolve it. The rights of a great landowner were not over empty land but over the people who worked the land, or over inferior lords with rights over those people. Lordship was property, the object of legal protection from above, just as it was the source of legal protection for rights below.

The words "jurisdiction" and "rights", moreover, must not conjure up an idea of rights fixed by general rules, or of jurisdiction as being just a matter of who was to apply those rules. That this came to be the case, at every level except the lowest, was a major change; and it was followed by the virtual end of feudal jurisdiction. General rules came to be enforced, and the rights of tenants other than those holding immediately of the king himself came to be protected by the king's courts. But to begin with the

relevant rules were those of each lord's court, and the rights which they protected might depend to a greater or lesser extent upon the will of the lord. And that is why feudal jurisdiction remained a reality at the lowest level. The peasant was in some sense an owner of land. But this was the return for his duties as a worker on the agricultural unit; and his "rights" were subject to something like a managerial discretion. When in the fifteenth and sixteenth centuries the lord's will ceased to play a part even in connection with villein holdings, that lowest level of feudal jurisdiction also ceased to be a reality: and the process was a re-enactment of what had happened at higher levels three hundred years before.

A single plot of land a generation or so after the Conquest may have been in some sense the property of several different people: a peasant, the lord of his manor, that lord's lord, the king. But only between the peasant and his lord in the manor court was it just a plot of land; to the lord's lord the unit in question was the manor, which included rights over the peasant; to the king the unit was perhaps some great honour, which included rights over the lord of the manor. And at each level the intensity of the property of the tenant was inversely proportional to the degree of discretion in the lord's jurisdiction over him.

In theory, then, and up to a point in fact, there were at that stage as many laws of land as there were lordships. But we can draw a rough distinction between lordships at the lowest level and all other lordships, and say that they applied different kinds of rule; and these two kinds of rule are the twin sources of the common law of property in land.

AGRICULTURAL TENURES

Lordships at the lowest level were the economic units, the most typical being the midland manor. It was these units or groups of such units that changed hands as a result of the Conquest. But their new lords took them as units, not as areas of land; and the internal life of each unit probably continued to be governed by its own customs. Some of these customs would lay down agrarian

routines, such as rights of pasture; and our modern rules about profits *à prendre* have very ancient roots. Others would regulate the terms of each man's holding, and in particular what was to happen when he died; and these, with local exceptions, largely yielded to uniformity under pressure from above. But it is important to emphasise that at this level the tenant had from the beginning what we should call a right of property, more or less intense but always real; and that it was a heritable right, though perhaps partible rather than descending to a single heir.

At this lowest level, in short, it is likely that the Conquest brought no general break, and that the conditions of land-holding within the existing economic and jurisdictional units continued to be governed by the varying local customs of Old English society. But at higher levels the predominant conditions were of very different origin. They were the ideas of military feudalism. The king's tenants-in-chief, and often their tenants, were understood as holding upon terms which had grown up around the relationship of a lord and his fighting man. These terms were to infect all the superior tenures in the century after the Conquest, and to shape the common law of property; and they were not native English.

MILITARY TENURES

Their starting-point was, in modern terms, contractual rather than proprietary. The relationship of lord and man was a personal relationship. The lord retained the fighting man for his life, and paid him with an endowment in land which would support him. The man's obligation was to be faithful to his lord. The lord's obligation was, in our language, to guarantee the payment, to protect the holding of land. But, because the whole arrangement was personal, that holding was a holding for life.

How far military tenures were thought of in such terms a century after the Conquest, or even a generation after, is a question we may never be able to answer. The logic was appropriate to a single tier of tenures, in which the tenants were

themselves to fight. It was imported, at a stage of development about which we cannot be sure, into a country with a largely different background, and was applied not just to a single tier but to a system of dependent tenures. At the top the tenant's obligation was generally to produce a contingent of men; and generally he satisfied this by a series of subinfeudations. As a system by which the king raised an army, this was unsound for obvious military reasons; and the services were commuted into money payments. It is one of the ironies of the common law that so much should have followed from vain premises. As a system of land-holding, the life tenure was equally inappropriate as part of a network of tenures; and it is clear that heritability became a fact before it became a theory.

HERITABILITY AND THE OWNERSHIP OF LAND

There were two forces behind the change. Simple convenience would often induce a lord, no doubt with the advice of his other men, to admit his dead tenant's son, taking his homage and granting him the land on the same terms as his father had held it. And legal compulsion, when it came, was partly self-imposed. The lord who granted to a tenant "and his heirs" was binding himself to do this; but the binding was by what we should analyse as an obligation, and the heir was without what we should call a property right until he had indeed done his homage and been admitted. Nor, in an age of oral transactions whose terms were soon forgotten, must we suppose that these two forces were clearly distinct. Rather should we think of heritability and the canons of inheritance themselves slowly hardening in feudal jurisdictions. At the last stage, even in the case of inferior tenures, it is clear that the king's court played a part. The two main instruments, considered in the next chapter, were the great writ of right and the assize of mort d'ancestor, the former compelling a lord to do justice to one claiming to hold of him by hereditary descent, the latter ensuring that the heir should get seisin on his ancestor's death. By custom, by an obligation laid upon himself

by the lord, and lastly by compulsion from above, the lord's free choice on the death of his tenant has become a true right in the heir; and the lord's jurisdiction, from being a real power, has become a mechanical duty, and one which, in the thirteenth century, he will relinquish without much protest.

But still the right to hold for life had not yet swelled up into "ownership". Like all formal words in legal transactions, those words "and his heirs" once meant more or less what they said. They gave a legal right of some sort to the heirs, and this was not the same as giving "ownership" to the tenant. The difference comes over an alienation; and it was only indirectly that the tenant for the time being at length acquired a power to alienate without regard to the claims of his heirs. His alienation would itself be a feudal grant, a subinfeudation, by which the grantee became his tenant; and as lord of that new tenure the grantor would be under the usual obligation to protect the holding. This obligation, the obligation to "warrant", would descend upon his heirs, and bar them from claiming the land for themselves.

And so it was that in the thirteenth century the common law had acquired its classical "fee simple", needing formal words for its creation until 1925, the words "and his heirs" until 1881. The grantor who omitted them passed no more than the aboriginal life estate to his grantee. But the grantor who put them in did not thereby give anything to the heirs: they were not "words of purchase" but "words of limitation" indicating the estate given to the grantee. Subject to some oddities that estate, being fully alienable as well as descendible, was something very like "ownership".

It was a devious path to a simple and ancient end; but great consequences followed from the path that was taken. The grantor who first added "and his heirs" was indeed conferring a right of some sort upon the heirs. He was consciously reaching into the future and undertaking that as lord he would admit his tenant's heirs successively. And since those were the terms in which he thought, there was no reason why he should not reach differently into the future and, for example, narrow the class of heirs whom

he undertook to admit: "and the heirs of his body" or the like. Such grants caused grave conceptual difficulty when the simple "and his heirs" had come to create the "fee simple", something like ownership. Where was this ownership, this fee simple, when the grant was not simple but more precisely carved out, *taillé*? This was the starting-point of the English entail, to be discussed later. For now it is a small incident in a larger story. The lord reaching into the future and making undertakings which added in different ways to the elementary feudal particle, the holding for life, was creating a concept which would survive first the reality and then the theory of the feudal tenure, and would later be taken up in equity and infinitely elaborated. This was the concept of ownership divisible in time, the most striking respect in which English jurisprudence has added to the Roman achievement, and perhaps the most unfortunate. The ownership which resulted in the common law was so intense as to be self-destructive: the disposition of one generation could prevent disposition by the next.

THE INCIDENTS OF TENURE

This was the most important and the most paradoxical result of the starting-point in a tenure for life. But there were other results, which can most readily be understood by beginning once again from the proposition that the military tenure was, in modern language, a contractual rather than a proprietary arrangement. The land was the pay of the tenant, not in income but in income-bearing capital appropriated to him for his life. When he died, this was once again at the disposal of the lord, who could retain a new fighter with it. From this termination of the arrangement there grew first what was known as the escheat. Even when the lord accepted his original tenant's heirs, and even when he had to accept them, still it was an arrangement which came to an end when the line of heirs failed; and the lord then got his land back. Besides this escheat on the death of a tenant without heir there was also an escheat if he were brought to justice for a felony; and this will be mentioned in connection with crime.

Another consequence followed. If the tenant left a son, and if the lord with the advice of his other men let in that son, taking his homage and granting him the land on the same terms as his father had held it, that was not something the lord was at first bound to do. It was a choice, for which he could ask a payment; and as hereditary descent became the regular thing, that payment became formalised as the "relief". For taking up again his ancestor's holding, the adult heir paid a sum which became fixed, but was once matter for discussion or bargain.

Even more profitable to the lord would be the death of his tenant leaving an infant heir. An infant cannot fight, so that even if the tenure is regarded as a hereditary contract there is a temporary failure of consideration. The lord got a wardship of the lands held of him, but not a fiduciary wardship: he kept the income for himself, although the law came to protect the infant against those capital depredations known as waste. This wardship of land held by military tenure is to be contrasted with the wardship of "socage" land in which the guardian was accountable to the infant heir for ordinary income as well as for waste. Socage tenures, particularly common in certain parts of England, were free tenures at or near the peasant level, the lordship of which had been more jurisdictional than proprietary; and the heir's right to inherit was a survival of custom which had never been infected by the logic of military tenure.

Military wardship, however, did not affect just the land. There was also wardship of the heir's person, the most valuable ingredient of which was the right to control and therefore to sell the heir's marriage. The logic of this is most obvious in the case of the female heir, whose husband would be the lord's fighter; but even with a male heir the loyalty of the issue would be at stake, and the right covered boys as well as girls. Except for villeinage this seems to be the only situation in which the common law had to treat a person in some sense as property; and about that no more can be said here than that it got into a great tangle. Another tangle, however, does deserve mention. A tenant might hold lands of several different lords; and though each could have

the wardship of the land held of him, there was only one heir and only one marriage. In disputes about which lord should have these, often conducted like a modern interpleader, the law hesitated between the lord of the richest holding and the lord of the oldest. The eventual victory of the latter made good legal sense: the homage which the first lord took had priority over homage to later lords, and similarly the tenant could not by later transactions derogate from the first lord's vested right to the wardship of heirs. But in economic terms the result might be surprising. If the earlier tenure were of a single poor holding, the later of a great and rich complex, the marriage which the lord of the first holding had for sale was that of the heir to the second; and its price would be fixed accordingly. Under Edward I one can imagine the purchaser of a wardship or of a seignory examining the tenurial position as a modern investor examines subsidiary corporate holdings.

Nor are these terms merely fanciful. There had grown up an active market in wardships, and litigation involved a purchaser more often than the lord himself. The reality of military tenure had vanished: but the economic consequences of its logic, and in particular the so-called "incidents" of escheat, relief, wardship and marriage, were entrenched in the structure of life throughout the middle ages; and some of the consequences of those consequences are with us yet.

SERVICES AND INCIDENTS

The transition of the superior tenure to a purely economic relationship finds its chief legal reflection in the rise of heritability and alienability and the correlative loss of real power by the lord. Smaller but telling symptoms are to be seen in the lord's remedies against the tenant who defaulted on his services. By the thirteenth century the principal remedy was distress; and the tenant who disputed the lord's claim might bring the action of replevin, never much widened in England, but freed from its feudal background in the United States and able to become the general claim to property in chattels. Its feudal importance was that the king's law

would compel the lord to justify his claim. If the lord had never been seised of the tenant's services, he might himself be put to bring an action for their recovery, a writ of right of customs and services. What he could not do was to resume possession of the land. There was not even any legal process by which he could get it back, unless the tenant was so hardy as to deny holding of him at all. Such a power had of course been inherent when the relationship was a reality; but it took two statutes in the late thirteenth century to give an action for forfeiture. This action, known as *cessavit*, was subject to stringent conditions; and it was significantly first introduced to protect an entirely economic kind of "lord", the medieval equivalent of our buyer of an annuity, who granted away his capital in land for the service of a guaranteed subsistence in food and the like.

But although the power of distress was of great importance in the middle ages, the lord's right to his services had few lasting consequences in the common law. There are two reasons for this. One is that the lord's right was too secure to raise legal problems. There was no useful way in which the tenant could evade it. Short of the mischief which provoked the invention of *cessavit*, namely a dereliction of the land so that there were no chattels to take, nothing that the tenant could do would deprive the lord of his power to compel performance by distress. In particular the right of distress was unaffected by the tenant's alienation. The lord would take whatever chattels he found on the land, and if they belonged to a grantee of his tenant, then that grantee might be coerced into doing the services, and left only with a right to indemnity from the tenant whose liability they really were. The second reason why so central a feature of life as the feudal services left so small an imprint in the later law is economic. The services were mostly commuted into money so that the lord, like a modern investor in gilt-edged, had an income which was safe from human machinations, but was destined to become worthless as the value of money fell.

Neither of these things was true of the incidents. The value of an escheat was that of the land itself, the value of a wardship was

what the land would bring in during the minority, and the value of a marriage depended upon that of the heir's inheritance. The real value of these rights would thus be as great in the sixteenth century as in the thirteenth. Nor must we be misled by the words "incidents" or "casualties": they were as regular as death. A tenant might leave no heir or an infant or an adult heir, but he could not die in any other condition; and the undisturbed operation of the rules would have diverted to lords a substantial proportion of the real value of all tenures. But such rules do not operate undisturbed; and as with modern estate duties the principle of evasion was to die not entitled to the assets.

MORTMAIN AND *QUIA EMPTORES*

Of the thirteenth century devices only the one which had lasting consequences needs discussion. It may most easily be approached by way of a situation which could deprive the lord of his incidents although this was not normally the tenant's aim. Moved by piety or by concern for his own or his family's salvation, he wished to endow a church. Normally he would do so by subinfeudation in frankalmoign, so that the church would hold of him but for no earthly services. The tenant had of course impoverished himself: he had parted with the land and got no services of money value in return; and what is more he would never become entitled to any of the incidents of tenure because his tenant would never die. But this was his own doing. The mischief was to his lord, and it was this that provoked legislation prohibiting grants in mortmain. The tenant himself, of course, continued to be responsible for the services due to his lord, who could, if he defaulted, distrain against the church. There was no loss there. But when the tenant died, the lord would get an escheat or a wardship not of the land but of an empty seignory, bringing in no income but prayers.

Almost the same loss would flow from a subinfeudation to a mortal sub-tenant to hold for the traditional service of a rose at midsummer. There was then the outside chance of a double

escheat, or of a "wardship by reason of wardship" in which the lord got the wardship of an infant sub-tenant as part of the inheritance of his infant tenant; but ordinarily the death of his tenant would entitle the lord to an escheat or wardship of just the annual rose. This mischief led in 1290 to the great statute *Quia Emptores* which ended grants in fee simple by subinfeudation. The grantor was in future to grant his land to be held directly of the lord, himself stepping out instead of remaining as tenant of the old tenure and lord of a new one. His death was then no longer relevant. The lord's incidents would accrue on the death of the grantee; and it was to the grantee that the lord must directly look for his services which, if only part of the holding was being alienated, had to be apportioned.

This statute epitomises in a few lines the changes of a century and more by which great social forces had been channelled into technical rules about property. Consider its opening words: "Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords . . .". These may be compared with a passage in an ordinance made just thirty years earlier by the county court of Chester: ". . . that none shall make grant to anyone in the fee of another, nor shall anyone presume by grant to enter the fee of another, without first securing the consent of the chief lord of the fee . . .". This is the language of lordship as power, with the chief lord of the fee able to control the holdings within it; and although the concept was still living, the reality was dead. The county court of Chester was fighting against history; and by the date of its ordinance there was probably general agreement elsewhere that a lord could not prevent any alienation by his tenant, who had become in our language an owner of property. If he granted it away by subinfeudation, there was the economic damage to the lord. If he granted it away by substituting the grantee for himself as immediate tenant of the lord, there was of course even more direct damage of the same nature if the grantee was an undying church; and this is why mortmain continued to be a problem after *Quia*

Emptores. But the more obvious and invariable damage of a substitution is to the feudal relationship: the lord cannot even control who is to be his own tenant, let alone who is to have subordinate interests within his fee. All this is admitted by *Quia Emptores* which expressly empowers tenants to alienate at their own free will, so long as they do it by substituting their grantees for themselves. The feudal realities are recognised as dead, and the economic realities are saved.

Seen from the tenant's angle, *Quia Emptores* is the culmination of the process which began with the rise of heritability. The relationship between himself and his lord has no content beyond the lord's economic rights. These rights have become a sort of servitude, and the tenant has become an owner. The tenurial reality of a grant to one "and his heirs" is now wholly lost, as may be seen most vividly in connection with an escheat. Suppose that a lord originally granted to a tenant "and his heirs", and that after *Quia Emptores* that tenant or one of his heirs alienates to a grantee "and his heirs". This alienation must be by way of substitution, and the failure of the original tenant's heirs is irrelevant. It is now the failure of the grantee's heirs that brings an escheat to the lord. But this is a property of the "fee simple", and flows from a rule of law and not from the words of any grant. If the words still governed the matter, an escheat to the lord could follow only from a failure of heirs of the original tenant; and failure of heirs of the grantee should, if anything, bring what we should call a reversion to his grantor.

The fee simple has become an estate, "and his heirs" magic words to create it, and this estate, this ownership, has become an article of commerce. The feudal services are income, the incidents are capital gains, and land and lordship are being bought and sold for money. For simplicity of exposition we have spoken as though *Quia Emptores* was aimed at a deliberate evasion of the incidents; but this is only partly true. Just as the grantor in mortmain was usually a benefactor who harmed his lord incidentally, so the grantor for nominal services was usually a vendor who chose to sell for a capital sum in money rather than for a perpetual income

of real value. That the choice was made because the capital payment would be "tax-free" whereas the valuable service would enrich the lord during minorities and the like is, of course, very likely; and this may be reflected in the large number of freehold rents in, for example, the city of London, where the incidents had never played any part. We should think not in terms of the modern tax planner, but of the vendor's solicitor advising on the merits of alternative modes of sale.

CONSEQUENCES OF *QUIA EMPTORES* AND OF THE INCIDENTS

We have made much of *Quia Emptores* because hindsight can see it as acknowledging the end of an age. But the realities of that age had long been dead, and those who made the statute were not looking back to them. Still less were they looking forward to its consequences. Although reciting the mischief, it did not in terms prohibit subinfeudation, and investigation may show that it did not immediately stop it. But the doctrine that there cannot have been a subinfeudation since 1290 appears early in the year books, and its victims were persons who had certainly been innocent of any attempt to deprive a lord of his incidents. These were vendors who had sold their land not for a capital sum but for an annual rent, and who now found that they could not distrain for it because by the statute the land could not be held of them and so must be "out of their fee". The particular muddle that resulted is too small and intricate to be examined here; but an important legal institution may have grown out of it, and that is the husbandry lease. The term of years had mostly been used for very specific purposes; and its increasing use as an arrangement between a landlord and a tenant farmer in the modern sense has commonly been attributed, like other unexplained phenomena, to the Black Death. But after *Quia Emptores* the lease was the simplest secure way of parting with the land in return for a fixed annual income. It was also the simplest way in which the lord of a manor or larger unit, to whom a holding had come by escheat or assart, could part with it again and yet keep his unit intact.

If the husbandry lease did develop partly to fill a gap left by *Quia Emptores*, the legal consequences are only the most striking example of a more general result of the statute and of the process which the statute completed and symbolised. The lease started as a matter of contract; and it grew into a counterfeit proprietary interest because the contractual protection was insufficient. Other needs had similarly to be provided for by what we should call the law of contract rather than the law of property. On the grantor's side, and as a direct result of the statute, obligations such as that of warranty could no longer rest upon tenure, and immediate technical difficulties were thereby raised. On the grantee's side there was the much slower process, in the case of superior tenures long complete at the date of the statute, by which land ceased to be used as the "payment" for services desired of the grantee by the grantor. In its early days the common law of contract was particularly scanty in the case of contracts for service, and this is one reflection of a society whose labour law took the form of manorial jurisdiction and of peasant holdings subject in some sense to the discretion of the lord. All this was beneath the attention of the king's courts and unaffected by *Quia Emptores*. But change, when it came, followed the same pattern as the events discussed in this chapter. As the peasant holding became a true property right, the lord's jurisdiction became unreal, being first subjected to royal control and then abandoned to royal courts. At the lower level as at the upper, land became just property, a thing to be bought and sold.

But tenure and its incidents were to have a long life yet, the subject-matter of a later chapter. After *Quia Emptores* tenures which disappeared by escheat could not be replaced, and the feudal chain could only contract. The tendency was therefore for lordship to be concentrated in the king, and for the king to become increasingly the one who gained from the feudal incidents and increasingly the loser from their evasion. A tenant could no longer drain off the economic value of his holding by a subinfeudation; he could only alienate it outright. But evasion would result if before dying he made an outright alienation to friends for

them to deal with according to his instructions. This became a universal practice among landowners, not because they primarily sought to evade the feudal incidents, but because they could not otherwise dispose of their principal wealth by will. From this practice grew our modern law of trusts, and its development was gravely affected by the feudal interest of the king. Tenure, wholly responsible for the common law concept of ownership divisible in time, was therefore partly responsible also for the medium in which it has mainly flourished, the relationship of trustee and beneficiary. The two most considerable products of English jurisprudence largely derived from the same accident.

6 *Early Actions*

SEISIN AND RIGHT

The greatest difficulty in this subject exists in our own eyes, for ever dazzled by the Roman vision of possession and ownership to which, from the thirteenth century, the common law ideas of seisin and the right increasingly conformed. The right became something rather like *dominium*, abstract and ultimate. But whereas *dominium* was conceived of as absolute, a relationship between person and thing good against the world, the right of the common law was always relative: what could be determined for ever was only the better right as between the two parties to an action. And in the classical common law, this relativity was a matter of age. The better right was that generated by the older seisin; and any seisin generated a right which would be good, unless granted away, against all later comers.

But this right was a concept needed only by one who was out of the land and wished to claim it; and even then, as will appear, the occasions on which he had to resort to it were by the end of the thirteenth century already rare. Most of the legal load was carried by seisin. Like *possessio* seisin became fundamentally a fact. Like *possessio* too, there is an element of contrast: the fact may be wrongfully so. A writ of right must be brought against one who is seised, and if it succeeds that seisin will have been proved wrongful. But seisin paradoxically contains larger elements of rightfulness than *possessio*, and has larger proprietary consequences. One who has the right but has never become seised, for example, cannot make a grant, and his descendants will not themselves establish a right merely by being his heirs: they must make themselves

heirs of the ancestor from whom his right derived. Litigation moreover, from the late thirteenth century, was conducted mainly in terms of seisin. The right had become a mystical ultimate, to be written by those who copied manuscripts of Bracton in reverent capital letters and repeated: DREYT DREYT.

It has been suggested, however, that these basic proprietary concepts of the classical common law are the results of a great change in the legal framework, the change from a feudal to a national, a common law about land. In the thirteenth century freehold land became what it is to us, an object of property, capable of passing from hand to hand rightfully or wrongfully; and the lord's rights became merely economic, a sort of servitude attached to the land, but irrelevant to its conveyance and, except for the rights of wardship and the like, irrelevant to its devolution. As between lord and tenant, the tenant was clearly the "owner".

But the idea of ownership has no place in a truly feudal framework; or if it has it must always be attributed to lord rather than to tenant. The tenant's rights depend upon the lord, and the lord is both the grantor who makes the grant and the law which protects it. The grant is made, or perfected, by putting the tenant in seisin; and since that noun is younger than its verb, the seising of a tenant by his lord may have been its primary meaning. Equally a lord could disseise his tenant; and if there had been no law but the lord's will, this could not have been a wrongful act. But feudal custom ordained that a tenant could be disseised only for cause, primarily for a failure to perform services, and then only by the judgment of his peers, his fellow tenants in the lord's court. It was of the essence of the relationship that so long as he kept his side of the bargain, the lord must keep faith with him. Seisin was not an abstract concept like *possessio*, a relationship between one person and a thing as against the world at large. A second person was involved. It was the tenant's holding of his tenement by the authority of the lord. And as the feudal realities faded, as the lord ceased to be law personified, seisin was left as an abstract *possessio*, existing *in rem*, and having unaccountable overtones of rightfulness.

The right was a similarly polarised concept. It was not ownership, not even rightfulness because rightfulness, the immediate authority of the relevant law, was implicit in seisin. It necessarily implied that that law had itself somehow gone wrong, that the lord had accepted the wrong tenant. It arose, perhaps exclusively, out of a grant by the lord to a tenant "and his heirs". The only grant is that made to the grantee, and he must be put in seisin by the lord. When that grantee dies his heir has a "right" to be seised by the lord; but until that is done he owns nothing, has nothing beyond that right. If then the land indeed passes down the line of heirs, this is not the automatic devolution of property subject to rules of inheritance. It passes because the lord passes it, because each successive heir is seised by him; and he does this in pursuance of his original promise which, since he is the law, can equally be conceived as a legislative act. But if, knowingly or not, the lord admits an outsider to the exclusion of the heir of his original grantee, he creates a conflict. The outsider is seised, is the lord's tenant of the land, and has the rightfulness of immediate authority. The excluded heir has only his right; and that right exists only under the same immediate law, can be given effect only by the lord and his court. The willingness of the king's law to constrain the lord's in such cases was the beginning of heritability as a rule of the common law.

It was also the beginning of the common law about land, of a jurisdictional situation in which the rights of a tenant came to have an existence independent of the lord's law. This was the process which left seisin looking like an odd sort of *possessio*. But upon the right it had an even more radical effect. Loss of control by the lord included loss of control over alienation: the dispositions of a tenant became effective without even the validation of the lord and his court. The grant to one and his heirs created a sort of ownership, the expectancies of heirs being lost with the control of the lord, the law upon which they depended. And in all this the original nature of the right is lost, and it becomes an odd, a very odd sort of *dominium*. It is against such a background that the real actions must be considered.

THE WRIT OF RIGHT

The developed writ of right came in two forms. The *praecipe* form went to a sheriff and began an action in the king's court. The writ of right patent went to the lord of whom the demandant claimed to hold, and began an action in that lord's court. In the thirteenth century, at any rate, the actions so begun were similar in nature, and the difference was simply one of jurisdiction. If the demandant claimed to hold in chief of the king, the case could only go to the king's court; and Glanvill gives the example of a claim to a barony. If the demandant claimed to hold of a mesne lord, then *prima facie* the writ patent should issue to that lord; but his court would prove to be incompetent if for example it turned out that the tenant claimed to hold of another lord, and there would then be a tedious process of removal. In such a case the demandant might seek to save time and trouble by purchasing a *praecipe* in the first instance. But if he did so, and the tenant after all claimed to hold under the same lord as himself, then the inconvenience of retrieving jurisdiction fell upon the lord. *Magna Carta*, prohibiting the improper issue of *praecipe* writs, did no more than provide that any inconvenience should fall upon demandants rather than upon lords: it was not, as used to be thought, aimed at a royal policy of undermining feudal jurisdiction.

It does, however, show that in the early thirteenth century the feudal jurisdiction was still regarded as property worth defending. By the end of the century this is no longer true. Writs of right had then largely been replaced by other kinds of action which always went to royal courts. But even when a case was in fact started by a writ patent in a lord's court, it became the regular thing for that court to take no action, so that it would be removed first to the county court and then to the common pleas. The writ of right patent ends its days as representing a property right in jurisdiction which seems hardly worth exercising.

But jurisdiction as property was only the ghost of jurisdiction as power. The profits of justice were all that was left when a

court could do no more than apply rules which existed outside that court. But there had been a time when the question who was to have a holding was truly a question for the lord's decision. The control of his choice by rules was the process which produced "ownership" in land held by the superior tenures; and this was probably the real part played by the writ patent. In form it was not an authorisation to the lord but an order that he should do right to the demandant, and it ended with a threat: "If you do not, the sheriff shall." It was in execution of this threat that the case was removed if the lord's court did not act; and though the whole process became a formality for starting a law-suit, the language is that of command to one taken to be in effective control.

The mandatory rather than permissive tone of the writ needs emphasising because it contrasts not only with the thirteenth-century attitude that jurisdiction was a property right in the lord as against the king, but also with the earlier rule that the tenant need not answer for his freehold without a royal writ. Four stages of development seem to be represented here. In the earliest, the holdings within the fee, at any rate upon the death of a tenant, were within the discretion of the lord. In the second, represented by the words of the writ, one claiming a right is enlisting the king's help against the lord to get that right enforced. In the third stage, even the lord willing to help the demandant may not act without royal authorisation; and here his power is further controlled in the interest of the tenant. And lastly he is simply entitled to the profits of a justice entirely outside his real control.

It is only against such a background that the actual working of the writ of right becomes intelligible. Whether in the king's court or in that of a mesne lord, the law-suit always follows the same pattern. The demandant sets up what we should call a title, but it is a title of one particular kind: he claims by hereditary descent. His count, the formal statement in court of his claim, begins by asserting the seisin of a named ancestor in the reign of a named king; and it elaborates this assertion by setting out

the nature of the profits taken by that ancestor from each of the parcels claimed, "as in rent, in grain, in sale of wood, in pasturing his cattle, in toll of the mill" and so on. This is, as it were, the root of the demandant's title. He then traces the pedigree, the descent of the right, from that ancestor to himself; and apart from a formal offer of "proof" that is the end of his count.

Before turning to the tenant's answer it is worth considering the implications of this form of claim, remembering that there was no other. If the demandant's father had been granted the land by one whose ancestors had held it since Domesday, the demandant started with the seisin of his father; he could not even mention the ancestral holding of the grantor. But then there was no need to. The grantor or his heir, in the days when all this was a reality, was the lord of whom he held and in whose court he was making his demand. This would of course not be true if the grant had been by substitution. But, again in the days when all this was a reality, a substitution would have worked only because the lord had accepted the new tenant in place of the old, and in that lord's court this acceptance was the true beginning of the demandant's title. Our idea of title had no place in the tenurial situation. There were the physical land, the cataloguing of its physical exploitation, the need for a physical transfer of seisin upon any sort of grant. But neither this seisin not the right to it existed, as our possession and ownership exist, in a vacuum "good against all the world". The world was narrowed to the lordship; the right demanded was the right to be tenant of that holding; and this was the right which the lord was commanded by writ to do. In a sense it was a right against the lord, a claim to the benefit of the undertaking in some actual or presumed grant to an ancestor "and his heirs".

Subject to a preliminary complication, the tenant's answer was as invariable as the demandant's claim. The complication was the possibility of a voucher to warranty or some analogous process. If the tenant was in under a grant from some third party or his ancestor, he could vouch that third party to warranty. If the third party admitted his obligation to warrant, he became

in effect tenant to the action: if he then won it, nobody was disturbed; but if he lost, the demandant got the land in question, and the third party had to find land of equivalent value for the tenant. If the third party denied his obligation to warrant, the principal plea was suspended until this question was settled. If he was bound to warrant, and did so, and won the principal plea, then again nobody was disturbed. If he was bound to warrant, but either failed to do so or lost the principal plea, the demandant got the land in question and the tenant was entitled to an equivalent from the third party. If the third party was not bound to warrant, the demandant got the land in question and the tenant lost it without compensation.

Although warranties became essentially contractual, it is clear that they developed in the feudal framework, and that the tenant who vouched would in early days always be calling upon one whom he claimed as his lord. The tenant's voucher was therefore the passive counterpart of the demandant's writ of right. And one would guess that the vouchers—there could be more than one—would, in the days in which heritability was being established, sometimes lead back to the same lord, who had wrongly assumed that he was free to make a new grant: the rule requiring compensation in land from a failing warrantor would be particularly apt in this case. They could also, as has been mentioned, disclose that the tenant's claim was to hold of a different lord, so that the dispute was about the lordship as well as the demesne, and was outside the jurisdiction of the lord of whom the demandant claimed to hold.

It might of course happen that the original tenant to the action or his ultimate warrantor admitted the demandant's claim. But normally he, or later his counter for him, pronounced an almost unalterable formula denying the seisin of the ancestor and the right of the demandant. This general denial formed the issue in the action which, until the time of Henry II, had to be tried by battle. But the battle was not without its logic. The demandant produced a champion who swore that his ancestor had been the man of the demandant's ancestor, had seen the seisin set out in

the demandant's count, and had undertaken that he and his line would defend the right in issue. The tenant himself or, as later became necessary, a champion on his behalf, then swore that the oath of the demandant's champion was perjured; and the battle indicated its truth or falsehood. The demandant's champion was a hereditary witness; and to Glanvill an advantage of Henry II's grand assize, a jury process to be discussed shortly, was that twelve witnesses are better than one.

What was the question upon which he testified and which the battle decided? In the truly feudal context, the context in which heritability had to be established, the answer is intelligible. If the demandant's ancestor had indeed been seised, and had not been seised as a mere intruder or merely for his life, then the demandant was entitled. It did not matter how the tenant was in, whether as mere intruder, as heir of a widow holding merely for her life upon the death of some ancestor of the demandant, as direct grantee of the lord who wrongly took this land to be at his free disposal, or in any other way: and that is something that the demandant never mentioned, that the court never knew at the time, and that we can never tell today. But although this seems to us odd, it became so only as the right became a sort of ownership detached from the feudal framework. In the truly feudal context, in which the lord was indeed in control of his fee, he must normally have accepted the tenant and have taken his homage; and it was upon that and not upon any other facts that the tenant's "title" depended. The demandant's count is, as it were, addressed to his lord, and the right which he claims is a right against his lord as well as against the tenant; and it was indeed dependent solely upon the fact and nature of his ancestor's seisin, the subject-matter of the champion's oath.

This is further illustrated by a variant which became possible after the grand assize had been introduced: the tenant could, for a payment to the king, have a specially narrow question put to the assize: was the named ancestor in fact seised in the reign of the named king? But before turning to the grand assize, the later history of battle will be used to emphasise the conceptual point.

Although it became rare, battle was not abolished with other ordeals after the Lateran Council's decree of 1215 because that decree operated by prohibiting the participation of priests. In the ordeal by water, for example, the water had to be conjured by a divine agent so that it should not accept a liar. But in battle there was only the champions' oath, and though there is reason to think that this had once been addressed to a priest, it was later addressed to the court. Since professional champions came to be employed, it was, of course, hardly ever true; and in 1275, to avoid perjury, statute excised the words which made the champion out to be a hereditary witness: "... but let the oath be kept in all other points". The trial was now entirely mystical. But so, by that time, was the right itself; and the whole pattern of the action had lost its logic, as an example will show.

Suppose that the demandant's father was the grantee of the land, that he had granted it away to the tenant, and that the demandant now seeks to recover it on the ground that his father was mad when he made his grant. If he brings a writ of right and the tenant chooses battle, this issue will never emerge into the open. The seisin of the father and the pedigree set out in the count are true, and the battle is a magical test of the demandant's "right". In fact, as will appear, the writ of right was during the thirteenth century replaced in such cases by writs of entry, which were designed to bring the true issue into the open. But the example may be pushed a stage further: suppose that the grant to the demandant's father was made by the tenant's father, who was also mad. If justice is done the demandant's champion will lose the battle, presumably because he lied unwittingly: the father's seisin was not rightful. And yet any testimony that the champion could have given would have been true. Of course this refinement of our example is special. Only if the same land had passed to and fro between the same two families could the real issue lie behind the seisin from which the demandant's count began. But in such a case, the action had equally lost its logic.

Within the closed world of a lordship, and against a tenurial background for any grant, the seisin of an ancestor under the lord

was a valid starting-point. And title could be derived from it in the abstract, without saying how the tenant had come to be in, because, let the tenant vouch for whom he would, the right must be good against anybody within the lordship and against the lord himself. Only when the world is open, lordship little more than a servitude over land, and land freely alienable without reference to the lord, does the demandant appear to be setting up a title against the world, and for that purpose an inadequate title. The right against the lord to the holding is beginning to turn into some form of ownership, a title existing in a vacuum. Later it will begin to seem anomalous that this title can only descend, and cannot be transferred without a physical transfer of the land; and this "livery of seisin" will come to be regarded as a formality necessary to effect a transfer of the title, which is conceived as something separate. All this happened against a background of actions more fitting than the writ of right. But the proximate starting-point—it is impossible to tell how far the rise of heritability may have owed something to Old English custom—was the tenant calling upon his lord to make good some presumed grant to an ancestor and his heirs.

The writ of right has been discussed without reference to the grand assize, because that institution probably had a place in these changes, changes which effectively put the writ of right itself out of use. Henry II provided that the tenant or his ultimate warrantor might choose to have the matter determined not by battle but by the verdict of knights of the neighbourhood. The only procedural details to note are that the choice was the tenant's, not the demandant's, and that if the case was in a feudal court it had to be removed to a royal court because the process was a royal one. The question put to the knights was the same as that decided by the battle: which of the two parties had the greater right? But whereas the battle was supposed to be infallible, the knights were not; and two modifications were introduced which show how questions of law were forced into the open by the introduction of jury processes. One is that the demandant could object to the grand assize, but at first apparently not to battle,

on the ground that he and the tenant were of the same stock of descent. The true basis of his claim in this case must have been that he rather than the tenant was entitled as heir. The question was therefore what we should call one of law; and probably within a decade of the introduction of the grand assize the rule was established that it must not go to the lay knights but to the court. But Glanvill's account suggests that battle could be relied upon to answer it.

The second modification arose in another case in which the demandant's count, so far as it went, was true. Suppose that the demandant truthfully asserted the seisin of his grandfather and correctly recited the pedigree through his father to himself; and suppose that his father had granted the land away to the tenant or his ancestor. The tenant ought to win: but the knights might be deceived by the truthfulness of the count into finding for the demandant. In this case, therefore, the issue to be put to the grand assize was embellished; the knights were to answer whether the demandant had the greater right as he had counted, or the tenant by virtue of the grant. This is another illustration of the kind of process which caused the development of pleading and made the common law. But it has a different and more immediate relevance to the changing place of the writ of right. Until the thirteenth century was well advanced, the grant alleged by the tenant was always a subinfeudation. The demandant was claiming the land in demesne, and the tenant was claiming to be the demandant's tenant. The right in dispute was therefore not that upon which the demandant had relied, his hereditary right to hold of his lord. When he had spoken his count he was in his lord's court and was, as it were, looking upwards to his lord. But the tenant was not denying any of that: he was trying to make the demandant look downwards, and acknowledge a right in the tenant against the demandant similar to that asserted by the demandant against his lord. It is no coincidence that the case has been removed to the king's court on the grand assize being claimed: this right is indeed not the lord's business.

Whether or not the possibility of such a grant being made

without validation by the lord's court had to do with the institution of the grand assize, it shows how elementary ideas depend upon jurisdiction, upon the law in which they have their existence. The writ of right and even the battle had made sense when the right was just the hereditary right, when land could only descend in pursuance of an actual or presumed grant to one and his heirs, when only the lord could make a grant. Even the possibility of a subinfeudation without his playing any part broke up that elementary right, and began to make the pattern of litigation inappropriate. When the lord's jurisdiction ceased to include the control of any grant by his tenant and began to shrink into jurisdiction in the modern sense, then the writ of right and the grant to one "and his heirs" lost their original logic together: the grant now incongruously created and the writ incongruously protected a sort of ownership.

THE ASSIZE OF MORT D'ANCESTOR

In the essentially non-feudal world of the thirteenth century and later, the assize affords what may be described as a possessory protection for heirs. The demandant in mort d'ancestor is indeed an heir claiming as such, but not, as in a writ of right, basing his claim upon the seisin of a remote ancestor: it is one of his parents, or their or his brother or sister who has died. The question for the assize comprises three points: had this relative been seised on the day that he died; had he died within a limitation period; was the demandant his nearest heir? If yes to all these, the demandant was put in seisin. The principle was later extended to relations more remote by the writs known as aiel, besaiel and cosinage. And although in the course of time they all extended their scope, the underlying use was to ensure that on the death of a tenant no outsider could go in, with or without a claim of right, and compel the heir to bring his claim by writ of right or otherwise. The heir had this summary remedy for getting in himself; and if some outsider thought he had a better claim, it was for him to assert it by action.

But the assize was not conceived in an open world, and it was not originally aimed against outsiders. It was conceived in a feudal world and aimed against the lord. By the Assize of Northampton in 1176 the heir was to have seisin of his dead ancestor's holding forthwith, and then to seek out his lord to pay his relief and do whatever else was needed. Only if the heir was an infant was the lord allowed a real seisin; and even then he must take the heir's homage, acknowledging his right to the tenement, before he entered upon his wardship. No longer was a lord to resume seisin upon the death of his tenant, even for the purpose of giving that seisin to the heir. The heir was to go straight in; and the assize was explicitly provided for the case in which the lord sought to deny him this.

The assize then was in origin a late step, almost a final step, in the rise of heritability. The great writ of right had acted indirectly, by compulsion upon the lord's law. In its own immediate case, the assize acted directly: the lord must let the heir go straight in. The heir's right is becoming independent of the lord's law; and a grant to one "and his heirs" already looks more like a once-for-all thing creating a lasting "estate". But this original orientation of the assize was remarkably quickly forgotten. It is not apparent in Glanvill's account; and there is no means of telling how many of the assizes in the earliest rolls were brought against the lord himself. The writ directed the summons not of the lord but of the person who actually held the land; and to begin with this would perhaps most often be one to whom the lord had allotted it. The smallness of the parcels claimed in early cases suggests that the chief beneficiaries were not the military tenants contemplated by the legislation, but peasants whose holdings the lord might wrongly suppose to be within his disposition as unfree. But, however it came about, the assize had in the thirteenth century become just a "possessory" remedy for a particular kind of situation; and its feudal beginnings played no part.

THE ASSIZE OF NOVEL DISSEISIN

The classical novel disseisin was a summary remedy to enable one put out of his holding to get back again. The assize, twelve men of the neighbourhood, was summoned to answer a set formula which reduced to two questions: had the tenant unjustly and without judgment disseised the demandant? Had it happened since some event, such as a royal journey, fixed from time to time as a limitation behind which the writ would not reach? There was at first no discussion; and if the answer to both questions was yes, the demandant was put back. In the thirteenth century this was the simplest of possessory remedies in the most obvious sense. It enabled one ejected to regain possession without having to establish more than the bare fact of his ejection; and if the other party thought he had some right it was for him to proceed by action. Taken in conjunction with the tenant's option in the writ of right between battle and the grand assize, it ensured that the man in possession could only be displaced by one with a title which he would have to make out, and to make out, if the tenant so chose, by a rational mode of trial.

Of the working of the assize in this classical period, little needs to be said. In the fourteenth century play began to be made with the allegation "unjustly" and, as will appear in a later chapter, the assize remarkably became the main vehicle of litigation about title. But in the thirteenth century only such things as actual judgments could be put forward; otherwise it was a factual inquiry. A disseisin was of course wrongful even if peaceful; but if the assize found that it had been done *vi et armis* the defendant was imprisoned until he bought off the king's displeasure. One could be disseised of an incorporeal right such as a rent, and the scope of the assize was much extended in this respect. Lastly it is to be noted that the limitation period became unreal. An automatic but clumsy adjustment was for a time achieved by fixing the king's last voyage to Normandy, a frequent event. In the thirteenth century legislation made sporadic changes, and then the matter was neglected altogether. This had certain side effects,

but mattered less than might appear in the assize itself, because that could be brought only by the disseisee and only against the disseisor, so that there was an effective limitation to the lifetimes of the parties. In analogous processes elsewhere the limitation was a fixed period before the action: for example the city of London's assize of fresh force, which the Londoners believed to be older than novel disseisin, had to be brought within forty weeks of the facts complained of.

The inconvenient method of limitation, however, serves to introduce the difficult question of the origin of the assize. It is generally supposed to have sprung from the Assize of Clarendon in 1166, but the relevant part of the text is lost. There is some reason to think that what this legislation provided was not the regular civil process of later days, for which a limitation device like that in London would obviously have been more suitable, but an essentially criminal sanction; and it may even have been aimed only at some immediate restoration of order and not have been intended to endure. On this view a duty was cast upon local people of presenting to justices in eyre disseisins since the king's coronation or some similar event; and it was a later development that allowed victims as a matter of course to take the initiative, buying a writ by which an inquiry would be directed at their suit. This would explain the verbose form of the writ, beginning with a redundant recital of the plaintiff's complaint; it would explain also Glanvill's choice of language to describe the parties, *appellans* and *appellatus*; and it would explain the odd fact that he discusses it last of all the assizes. When he wrote it may have been relatively recent as an ordinary civil process.

"Civil" or "criminal", however, there remains a more fundamental question about the original aim of the assize. In the thirteenth century it was used against the mere wrongdoer; but against him, when the feudal relationship was real, the tenant would surely have the summary assistance of his lord. This seems a curious point at which first to take matters out of the lord's hand; and if it is thought that anarchy had so broken his control that he could not help, then there is a difficulty about mort

d'ancestor which was aimed against a control altogether too close. Perhaps then the two assizes, always regarded as closely related, were first aimed in the same direction. Perhaps novel disseisin was also aimed against the one person to whom the tenant was most vulnerable, namely his lord.

This proposition is closely related with that already made about the specifically feudal nature of the concept of seisin. We hear of persons being seised and disseised, and of orders from the king and other lords that persons should be reseised, before seisin comes into general use as a noun. But a tenant became so because he was seised, put in seisin, by his lord; and the primary connotation of a disseisin may equally have been not just dispossession in the abstract but the taking back of the tenement. A lord could do this properly, upon judgment of his court, if his services were not done and in other circumstances. But suppose a lord acted improperly, suppose that unjustly and without a judgment he disseised his tenant: those are the very words of the assize, and perhaps that is the mischief at which it was aimed.

Other words in the writ point in the same direction. If the alleged disseisor is not to be found, the sheriff is to summon his bailiff to hear the assize. Nothing could be more natural if the writ was aimed at the lord, or more curious if it were aimed at a mere wrongdoer. The sheriff is to see that the tenement is reseised of its chattels: this supposes that they are available and it became a dead letter, being replaced by the award of damages. But it would make sense if a process like distress were primarily aimed at; and those manuscripts of Glanvill which captioned as replevin the writ ordering the return of the chattels may not have been merely confused. Again one could from the beginning be disseised of his common of pasture; and a writ called novel disseisin would lie if one's tenement had been impaired by the raising or lowering of a mill-pond. These and the other "assizes of nuisance" would be a curious collection of matters for the earliest royal intervention against mere wrongdoers. But like the common pasture the mill was normally controlled by the lord, and this may have been their common feature.

The suggestion is, in short, that "disseisin of a free tenement" was something far more specific than dispossession from a parcel of freehold land or the like. The "free tenement" was the tenant's side of the feudal compact; and the denial of the assize to the termor, and the early records of rustics imprisoned for seeking to use it, fall into a clear place. In his free tenement the tenant was to be protected, not against any action by his lord but only against improper action. The assize was intended to compel that due process upon which the feudal framework rested: the lord must not act *injuste* and *sine judicio*.

But ironically it was probably the assize, intended to preserve the feudal framework, that more than anything else brought it down. In the earliest rolls we can rarely tell who the defendant was: *ita disseisivit eum* say the recognitors, and that is all we know. Sometimes, however, we know the defendant is the lord because he pleads proper seignorial action, generally distraint *per feodum*. But he is obliged to prove it by producing the suitors of his court before the justices; and it may have been this that effectively strangled feudal jurisdiction. What lord would take the land into his own hands, no matter how much the services were in arrear, if he might have to go to such lengths to justify it? And so distraint *per feodum* dies, leaving the distress of chattels as the vestige of direct seignorial control. What lord will protect his tenant if eviction even of a wrongdoer may lead to similar consequences? Perhaps it was in this way that the assize came to be used not mainly against the lord himself or his new grantee, but against mere wrongdoers.

WRITS OF ENTRY

The writs of entry were the main vehicle by which litigation concerning freehold land passed from feudal to royal courts. Their form was that of a *praecipe* writ: the sheriff was to order the tenant to yield up to the demandant, or to answer in court for not yielding up, such and such land "into which he had no entry save through the demandant's father who granted it to him while he

was out of his mind" or the like. In the earlier writs, the defective entry alleged was usually a defective or limited grant. Grants by infants, guardians, life tenants, husbands selling their wives' lands and so on, could all be recalled by those entitled; and the earliest example alleged an expired grant for years, a gage. But later the entry supposed might be a disseisin, and the writs thus complemented the assize, which lay only between the original parties and not for or against their heirs.

These writs like other *praecipes* started proceedings in a royal court, becoming appropriated to the common pleas, and were to that extent like the *praecipe* form of a writ of right. But the point of the writ was to exclude "the right" from consideration, to exclude the ancient general issue and the possibility of battle. The tenant was obliged to answer to the entry alleged against him. If he was found to be in by those means, which would be determined by a jury, judgment in this action would go for the demandant. But it would then be open to the tenant, as it was after a possessory assize, to start again with a writ of right.

Like the possessory assizes, these writs were seen in the thirteenth century as a matter of possessory protection, enabling one with recent and known facts on his side to recover the land without putting the right in issue and so without giving the wrongful holder the option of battle. But their original logic may have been different. The word "entry" appears to have a specifically feudal connotation. *Quia Emptores*, for example, forbidding subinfeudation in the interest of lords, speaks of the grantees "entering" their fees. And at another level, lords often took "entry" fines from their villeins. An entry seems to be a coming into land as seen from above, as seen by the lord. In the days of true seignorial control, the lord himself would control such entries and with his court would, for example, simply eject one to whom his tenant had purported to grant without authority, or would simply take back his land if a tenant died in circumstances causing an escheat. But this control, like distress *per feodum*, would be a victim of the possessory assizes, its exercise being now too cumbrous and troublesome. On this view, what

lords had formerly done for themselves or for their tenants in the exercise of their own jurisdiction was unintentionally strangled. And if so, the writs of entry did not begin as extensions of possessory protection from the simplest situations covered by the assizes; rather they were a reaction. The assizes, in which the tenant was looking up to the lord and seeking to curb his control, had curbed it so effectively that the lord could not act even properly within his fee without great trouble. The writs of entry, and indeed the use of the assizes against mere wrongdoers, were a royal substitute.

The relationship between an entry and the right, on this view, can best be seen from an example. Consider again the demandant whose father had granted the land to the tenant. The situation was discussed in connection with the grand assize, to show that the writ of right was conceptually inappropriate. The demandant's hereditary right, the right against the lord in whose court the action had started, was not in dispute. Since the grant relied upon by the tenant would always be a subinfeudation, the tenant was seeking to compel the demandant to look down and concede a similar right in himself. But now suppose a new fact: that the demandant's father was mad when he made the grant, and that that is the true basis of the demandant's claim. As a matter of concepts, his hereditary right, the right upon which he must count in a writ of right, is still not in dispute. As a matter of jurisdiction therefore, it is not his lord's law that is concerned but nominally his own: he himself is the lord of the tenure alleged between himself and the tenant, but he may not even have a court and may be unable to oust the tenant except *sine judicio*; and even if he can, the assize will discourage him. If he turns to his lord and counts upon his hereditary right, inappropriate as it is, he has no way of stopping the tenant from taking issue on it and choosing battle. He needs some other remedy.

The writs of entry may therefore have started within the feudal framework; and this origin may explain a major mystery to which they were subject, that of the "degrees". The nature of the rule can be stated simply. There was a limit to the number of

hands through which the land might have passed after leaving the seisin of the demandant or his ancestor if the present tenant was to be reached by a writ of entry. Beyond the degrees, the demandant must use a writ of right. The rule is usually stated in terms of the "third hand" or the "fourth degree"; but the sources use different means of reckoning, and the safest guide is that the writs never use more than two connecting words to get from the tenant back to the defective entry. A demandant might say that the tenant had no entry save *per* (through) X *cui* (to whom) Y granted it, which Y disseised his ancestor. Or he could say that the tenant had no entry save *per* X, *cui* his ancestor had granted it while out of his mind. If the ancestor had parted with the land willingly, therefore, one of the two words is used up on that step, and there could be only one hand between ancestor and tenant; but if the land had in the first place simply been taken without the cover of any grant, there could be two.

The result—we cannot be sure that it is systematic enough to be called a principle—is fairly clear; but the reason is not. Two kinds of explanation have been suggested. One depends upon the proposition, for which the evidence is doubtful, that there was a general limit in real actions to the number of vouchers to warranty. A writ of entry within the degrees named the persons who could be vouched, and the tenant who was in through another could not vouch that other and did not need to do so: his entry was not as suggested in the writ, and that entitled him to judgment without more. A limit on vouchers would therefore have limited the writ. A second kind of explanation makes the rule a protection of feudal jurisdiction: it is seen as an arbitrary boundary between writs of possession which go to royal courts and the proprietary and feudal writ of right.

That the rule came to have this protective effect is clear. Its abandonment effectively brought writs of right to an end. But we do wrong to think of a rule consciously maintained for this purpose, and then consciously reversed. The reversal is attributed to a statute of 1267 which, it is worth noting, had its genesis in baronial demands. But the statute was in terms confined to a

special class of writs of entry, those in which the original diversion of the land from its proper course was by disseisin; and it was passed after a time of disturbance in which disseisins had been frequent. What is more, there are earlier indications that in some kinds of case at least the limit had been thought inappropriate or had not worked: for example the successions of abbots were not counted as were descents to heirs. But the statute was soon followed by general abandonment of the limit, and writs of entry became common which simply alleged that the tenant was in *post* (after) the disseisin, limited grant, or whatever it might be. In these writs the links between that first diversion and the tenant were not even recited, and there was concomitantly no special restriction on vouchers by the tenant. As between the parties, if the tenant was indeed in as alleged, the demandant was entitled. Since the demandant could now reach as far into the past as necessary to find his facts, he would always choose to use a writ of entry; and except for certain special cases, the writ of right with its battle, its cumbrous grand assize, and its inevitable delays, fell out of use. And with the writ of right, feudal jurisdiction over freehold land came to an effective end.

But it is at least possible that the degrees were not invented to protect "the right", but represented something ancient. The demandant in a writ of entry, relying upon a grant made by a mad ancestor, did not put his own hereditary right in issue; and the number of devolutions on his side did not matter. If it was indeed an ancestor and not he himself from whom the land had first gone, his writ was said to be *cum titulo*: he had to make himself heir to his ancestor by tracing the pedigree. But the number of steps was of no consequence and played no part in the degrees. Nothing there could compel him to go to a writ of right; though if in his writ of entry he incautiously counted that his ancestor had been seised "as of right", the tenant could if he chose treat the action as a writ of right instead of answering to the entry.

The degrees came in exclusively on the tenant's side. But the tenant, if he did not deny the entry altogether, would normally

be asserting that the demandant's ancestor was sane when he made his grant, at first always a grant by subinfeudation. He would be asserting against the demandant a "right" of like nature to that asserted by the demandant in a count in a writ of right. The effect of the degrees, therefore, was to insist that after so many devolutions the demandant could no longer go back to impugn some initial transaction: he must put in issue the right between himself and the tenant. If we think ourselves back to a time when land could be transferred and a tenure created without writing, and when the terms of a limited or special transfer need not be recorded in writing, time and devolutions would necessarily raise what can perhaps most nearly be expressed as a presumption of rightfulness. We can speak in terms of evidence, of the matter passing beyond the knowledge of the countryside and into the domain of the divine test of a hereditary witness; but it is perhaps unreal to regard this as different from substance. In at least one case devolution had a substantive effect: a gift in marriage, as will appear, lost its special character after the third heir entered. And when more materials from the dark times have been brought together, it may turn out that devolution through "the degrees" played some part in the establishment of perpetual heritability itself.

THE CHANGE IN UNDERLYING IDEAS

The specifically feudal connotations of the words seisin, right and entry have been emphasised because they have only lately been adumbrated; and they seem important. It is now necessary to emphasise the completeness with which they disappeared. In the real actions of the thirteenth century, the only relic of the feudal relationship is the lord's nominal jurisdiction over an action in the right. Lordship of course lingers on for centuries, a truncated and economic affair, a mere shadow. But the world in which land is now dealt with and in which disputes now arise is a flat world: equal deals with equal over mere pieces of property, and disputes over these as over anything else are for the ordinary

courts. The substantive legacy of the world of true feudal control, in which everything happened in the vertical dimension, has acquired a life of its own: the common law scheme of estates could have been born only in the three-dimensional environment of tenure, but it was to thrive on the flat earth.

The forces which drained the feudal realities so quietly away may never be known; but purely legal considerations were certainly among them. Those which operated upon grants, such as the part played by warranties in creating heritability and alienability, can not be considered here. But attention must once more be drawn to the great change involved in the transfer of actions. The count in the writ of right addressed to the lord and his court would necessarily mean something quite different when addressed just to any court, to the Roman sky. Without the feudal assumptions, the right could only become abstract, a sort of ownership, deriving somehow from an equally abstract seisin, a sort of possession.

That Roman ideas and Roman language played some part is possible. Glanvill in one place contrasts *proprietas* and *possessio*, but elsewhere he uses the more English Latin of *rectum* and *saisina*; and to him the Roman language may have been used to point only a similarity of relationship between the two Roman and the two English ideas. On the view outlined above, the possessory assizes were indeed "possessory" in an intelligible sense, even though "seisin" and "the right" were not abstract but polarised toward the lord. But for Bracton those ideas have plainly become abstract, and Roman language may have helped to Romanise the ideas.

Whether Roman learning played any part in the establishment of the possessory assizes is an old question. Its terms are altered if seisin was the feudal concept suggested; and direct Roman influence becomes perhaps a little less likely. But the answer may never be known for certain. That the possessory assizes not only led a transfer of jurisdiction, but largely caused it, appears to be a new suggestion. It comes to this: that novel disseisin, intended as a sanction to compel proper feudal

behaviour, by accident stifled what it was meant to preserve; and that the use of the assizes against mere third parties and the evolution of the writs of entry at once followed.

The rationalisation which ranged these actions up a single scale, with the writ of right as the far point, produced the common law idea of relative title. The lower remedies were all possessory in the sense that the tenant could not go behind the seisin alleged; but he could do so in another action, going higher into the right until he reached the mystical ultimate of the writ of right itself. And even that mystery was assimilated into the relative scheme when the writ of entry in the *post* so largely replaced it. The ideas which resulted have proved immensely strong, strong enough to live with the scheme of estates and to survive with it into our own world. Their combination, exemplified in the squatter's settlement, the creation of estates far into the future by one with a merely possessory title, is a possibility which could not have come to a Roman lawyer even in a nightmare. But the common law digested feudalism.

7 *Later Actions*

The later history of the actions for the recovery of land is as obscure as the earlier, but from a different cause. What hangs in the air is not the remote mist of a lost conceptual world but the dust of lawyers' offices. The writs of entry, by ranging themselves as they did, established a hierarchy of better titles; and their elegant precision compels respect after six centuries. But at the time they soon became a nuisance. They were too slow and, we may suspect, too precise, restricting in advance the area of discussion more narrowly than the times would bear. Something a little more crude was needed; something much more crude was found. The claimant simply entered. But the story of what happened then was to merge with another, the story of the term of years. And since that began in the mist, this chapter must open with what may seem a digression.

PROTECTION OF THE TERM OF YEARS

In our language, the creation of a lease for years was not at first the grant of a property right but the making of a contract; and the only tenure to survive in England today did not begin as a tenure at all. There was no relationship of lord and man between the parties and no homage was done. Correlatively no warranty was inherent in the arrangement, and a contractual substitute had to be evolved; there was no obligation to acquit; and we hear nothing of "defence". Indeed, in comparison with an ideal feudal grant, the parties are reversed. There the grantor was at first the buyer, the services the thing bought, and the land the price paid. But in the case of a term of years the grantor was

clearly in the position of seller, and the termor was an investor and sometimes in effect a money-lender. Looked at from the view-point of the lessor's lord, the transaction did not affect him. Suppose the lessor died leaving an infant heir: the lord did not take a wardship subject to the term; instead the term was suspended, the lord got the land itself, and the termor's rights revived when the heir came of age. The farmer, like the bailiff, was simply one with whom the feudal tenant made some arrangement for the exploitation of his land; and neither the lord nor anybody else was concerned with it.

It is indeed in the bailiff's company rather than that of the tenant for life that we should probably think of the termor; and the difficulty which historians have seen in the different treatment of tenant for life and tenant for years arises because we think of them together and contemporaries did not. Even if some tenancies for life were created with motives like those behind tenancies for years, the question for us is why these tenancies for life were so well protected, not the other way round; and there is an easy answer. All tenancies for life were protected because they fitted into the actions: the right to seisin for life was the unit from which the whole structure had begun. One who ejected a tenant for life was subject to novel disseisin at his suit. One who ejected a tenant for years was subject to novel disseisin at the lessor's suit. For this purpose, as indeed for the purpose of unauthorised alienation, the lessee and the bailiff were the hands of their principal.

The lessee who was ejected therefore had no remedy of his own except against his lessor; that would be in covenant, in contract. If the ejection was by the lessor himself, or by one acting with his authority, there was a breach. If it was by a third party, all would depend upon the terms of the agreement; but the lessor who retrieved the land from the ejector would presumably any way be bound to restore it to the lessee for the remainder of the term. However clear the lawyers came to be that the lessee had no seisin, he was entitled as against his lessor to physical possession.

The first extension from covenant appears to have been a definite event about 1235, though perhaps inspired by earlier cases in which the lessor together with others who could not be reached in covenant had ejected the lessee. This was the introduction of a writ for use against the lessor's grantee. The lessee ejected by him would have a remedy in covenant against his lessor, but could not get the land back because the lessor no longer had it; and against the grantee there would be no action at all. The writ *quare ejecit infra terminum* allowed direct recovery of the land from the grantee; and the lease, like the equity of redemption and the restrictive covenant in later centuries, had taken the first seductive step on the path from contract to property. But it is clear that this first step was confined to the case of obvious injustice, that is the grant made by the lessor; and the writ was sometimes known as the *occasione cujus venditionis* from words in it which recited that grant.

This needs to be emphasised because Bracton, writing about a quarter of a century after the appearance of *quare ejecit*, although he twice recites the writ with its reference to a grant by the lessor, says that it lies against any ejectors. On the face of it, this is a mistake. But a little later, and perhaps when he was writing, actions were being brought which did not recite a grant and appear to have been indeed available against any ejectors. These were the actions *de ejectione firmae*, and they alleged that the ejection had been done *vi et armis* and *contra pacem regis*. These writs have commonly been regarded as belonging to a definite and different entity, "trespass". But there was no such entity in the thirteenth century. The two charateristics now relevant which have been attributed to it are the restriction of the remedy to damages and the allegation of *vi et armis*. But it was only in the fourteenth century that the common law courts gave up making specific orders in certain actions begun by writs alleging *vi et armis*. And as for the allegation of *vi et armis* itself, there was a general rule that it could never be alleged against one acting within his fee. In *quare ejecit* the defendant, as grantee from the lessor, had necessarily acted within his fee; so that *vi et armis*

could not have been alleged against him. It follows that there is no evidence of any original difference in nature between *quare ejecit* and *ejectio firmae*. *Quare ejecit*, which dealt with the most blatant and no doubt the most frequent case, certainly appeared first. But we must not assume that it was instantly labelled as an entity, a form of action with a definite boundary. Those who sanctioned writs against strangers, and Bracton himself, may have seen the action against a mere stranger as an *a fortiori* case, and the different wording of the writ as a formality consequent upon the defendant having no right in the fee.

If so, they were perhaps the first common lawyers who got into difficulty by trying to give a personal obligation a proprietary effect; but at the time the difficulty probably appeared as procedural. What was the court to do if the question turned out to be one of title as between the lessor, who would not even be a party to this action, and the defendant? In the sixteenth century this possibility was to be exploited, and nominal leases made to enable that very question to be settled in this action. At the close of the thirteenth century the courts seem to have taken fright, mistrusting any action against third parties. One writer apparently thought that the lessee was left with no remedy except covenant against his lessor; and although there is no other evidence that even the *quare ejecit* form against the lessor's grantee ceased to exist, there is evidence of doubt about awarding recovery of the term itself upon that writ.

This confusion between property and trespass, or wrong, arose also in the analogous context of wardship. The action of *ejectio custodiae*, for one ejected from his wardship, began as a trespass writ alleging *vi et armis* and *contra pacem*, and having the stringent process appropriate for those allegations. In that case the preponderance of the proprietary element was recognised in the early decades of the fourteenth century, the allegations ceased to be made, and the process was correspondingly relaxed. Only the plea rolls will tell us for certain what happened with the term of years, but it looks as though the two actions fell apart. *Quare ejecit* lay on the proprietary side of the line, being available only

against the lessor's grantee and perhaps only while the term was still current; and it apparently gave recovery of the term. *Ejectio firmae* retained its allegations of breach of the king's peace and its concomitant stringent process, was available against strangers, and gave only damages.

For this last limitation only one reason is found stated in the sources: the action is one of trespass, and it is unheard of for such actions to give redress for the future. If the word trespass is taken to mean just wrong, this proposition may reflect a juridical assumption of some importance to us. It was advanced in the late fourteenth century, at a time when actions for wrongs were breaking new ground in the king's courts. Hitherto only wrongs in which there was a supposed royal interest, such as breach of the king's peace, could be brought to those instead of the local courts; and the removal of this jurisdictional boundary raised conceptual boundary disputes. What could be sued on as a wrong? The boundary which gave most trouble was that between wrong and what we call contract, between trespass and covenant. In that dispute we shall again discern the idea that wrongs are by nature in the past, and that actions about wrongs are essentially different from actions claiming rights.

In the case of contract that difference was somehow slurred over at the turn of the fifteenth century; and in the sixteenth, plaintiffs whose grievance was the mere failure to carry out a promise were allowed to get their remedy in actions which formally complained of wrongs. The remedy in that case was only damages, and this is all they would have got in covenant itself. But it may be no coincidence that at the same time the lessee was allowed to get specific recovery of his term in *ejectio firmae*. What was abandoned in both cases was a theoretical dogma that actions for wrongs could concern themselves only with the past, with harm actually done, and that they could not provide sanctions for rights, for what ought to be done. In neither case are the legal arguments for this abandonment known, if indeed there were any. Decisions as important for the future as any ever taken are recorded only in exiguous notes.

Even on the factual level, we lack the economic detail to know what was the pressure for specific recovery of terms. But we are probably mistaken if we think just in terms of a belated response to a long recognised need. Even in the fifteenth century the mere wrongdoer, the thief of land, is unlikely to have been a frequent figure. Defendants in *ejectio firmae* would usually be persons with some claim to the land; and, since those claiming under the lessor would be sued in *quare ejecit*, this claim would necessarily be adverse to the lessor. The action might therefore any way involve questions of title as between the plaintiff's lessor and the defendant; and to give specific recovery would be to give proprietary effect to the decision of those questions. The hesitation in allowing recovery of the term at the end of the fifteenth century may therefore have flowed from the same basic cause as the apparent uncertainty about the very existence of the action at the end of the thirteenth. And the judges who hesitated may not have been merely pedantic over this, any more than they were when they hesitated over allowing an action for a wrong to enforce a contractual obligation.

The judges who finally gave way over contract probably had some idea of the kind of consequences that might follow, though not of their magnitude. It is unlikely that any one expected what actually happened in the case of *ejectio firmae*, namely that it would be used for the trial of freehold titles; and indeed it was not until the third quarter of the sixteenth century that this began to happen. But if about 1500 the possibility would have seemed remote, it would have been on practical rather than theoretical grounds. Writs of entry had long been rare, and litigation over freehold titles had long been devious.

ACTIONS CONCERNING FREEHOLD IN THE FOURTEENTH AND FIFTEENTH CENTURIES

The real actions were left at the point at which the writs of entry had effectively replaced the writ of right. It is therefore in the fourteenth century that the story must be resumed; and, with

the abundant evidence then available, that should be easy. In fact, however, nobody has done the work. Only Maitland has braved the technicalities which cover the subject in the year books, and elucidation will eventually come from the plea rolls. This account must therefore be as uncertain as it will be short.

The writs of entry fell into disfavour, and this was probably because they were too precise in narrowing discussion from the outset, so that a demandant with a good claim might yet be caught out. The very quality which enabled the writs of entry to replace the writ of right led to their own replacement by a less refined mechanism: the claimant simply went in.

On any view of the beginnings of novel disseisin, it is clear that the assize would at first restore one who had been seised and disseised, even if the disseisor had such a right as would then enable him to recover the land by action. Whether or not the result was ever contemplated, it therefore followed that even one with a just claim had little to gain by simply entering. If his adversary did not bring an assize, his heirs might bring a writ of entry based upon the disseisin; so that even acquiescence would leave an unquiet title.

It was a change in this feature of novel disseisin that transformed litigation concerning land. The assize, it will be remembered, was to answer whether the defendant had disseised the plaintiff *injuste* and *sine judicio*; and the change seems chiefly to have been brought about by playing upon the adverb *injuste*. The steps are not known, let alone the reasoning behind them; and until they are known, we can not be quite sure that we have correctly apprehended the result. But it seems to have come close to a total reversal of the original rule, so that one with title could enter, and if an assize of novel disseisin was brought against him could win it, in all but a very few cases. These exceptional cases, of which the most notorious was the "descent cast", the magical rule that one could not enter upon another who had come to the land by inheritance, survived until the nineteenth century; and their forgotten logic preserved the learning of the writs of entry, perplexed

generations of young lawyers, and no doubt made the fortunes of their elders.

What actually happened in the fourteenth century seems to have been that the claimant was increasingly advised to enter. The tenant could, of course, accept this, go out, and himself bring novel disseisin. But normally he would resist and put the claimant out. If the claimant's entry was not a disseisin, it followed that he himself became seised thereby and that to put him out was to disseise him. Great artificiality resulted. In 1334 a claimant was hauled out by his heels when half-way through a window, and an assize on this determined the validity of a deed of grant. Thirty years later another claimant was held to have been disseised although he had not dared actually to enter at all; and curious learning about "continual claim" preserving rights of entry seems to have followed.

Novel disseisin therefore became a principal vehicle for litigation about the title to land, and a principal vehicle for important legal discussion. The most striking effects were institutional. Serious difficulties could be adjourned by the justices of assize and raised before the common pleas at Westminster; and it was probably in such cases that special verdicts were first frequently taken. But when there was no such adjournment, questions which would have been raised and decided in the common pleas on writs of entry were now emerging outside the purview of that court and of the serjeants. And the *Liber Assisarum*, the one year book not devoted to their doings, probably came into being mainly to meet the need so created. Litigation concerning land, the first staple of the common pleas, was the first major category to be withdrawn.

History had repeated itself. In the thirteenth century lawyers had come down a rung on the ladder of actions, leaving the writ of right rarely used, and then only by those whose cases were for one reason or another out of reach of the writs of entry; and their move marked the effective end, even in theory, of seignorial jurisdiction over freehold land. In the fourteenth century they stepped down one more rung, leaving the writs of entry as the

rarely used resort of those whose cases were out of reach from the new stand-point; and again there were important jurisdictional implications. But this second downward step was not so simple as the first. The claimant did not just bring novel disseisin where formerly he would have brought a writ of entry. He had to go in first, and bring the assize when put out again. The question in that assize was his right to go in; and the assize actually brought by the claimant was therefore the mirror image of an assize which the tenant might have brought against him when he went in. His right to go in, his right of entry, was the pivot upon which the whole mechanism turned; and the phrase around which learning gathered in year books and abridgments is *entre congeable*.

The historian would give a good deal to hear two kinds of conversation which must have resulted from all this. One is that between a prospective claimant and the lawyer advising him. The practical merits of convenience, cheapness and speed were no doubt obvious. A legal peril would have taken more explaining. The claimant might have no right of entry for two reasons: he might on the facts have no right at all, and in that case he would lose justly; but also his right might have been "tolled" by some occult event like a "descent cast", so that he would lose the assize and yet be entitled to win if be brought a writ of entry. A more anxious part of the discussion between the claimant and his lawyer may have had its counterpart in governmental circles. What was actually going to happen when the claimant asserted his right of entry and went in? There was an evident risk of disorder, and in 1381 there was passed the first of a series of statutes prohibiting forcible entries. In terms this subjected to imprisonment and ransom at the king's pleasure, the old penalty for a disseisin committed *vi et armis*, two classes of person: those entering even peaceably, without any right of entry; and those having a right of entry but using violence or "*multitude des gentz*" in its exercise. The intention, presumably, was to permit peaceable entry by those entitled; but the claimant choosing to proceed in this way must have been very confident of his right. The effect still lies hidden in the plea rolls; but it looks as though

the exercise of rights of entry was at least discouraged. And from the fifteenth century the question of title to land is raised by the pleadings in actions of all kinds, particularly trespass *quare clausum fregit* and writs based upon the statutes of forcible entry themselves. It may turn out that there was no common form for claiming land, and that lawyers devised ways of trying title on a bespoke basis for individual clients.

USE OF EJECTMENT BY FREEHOLDERS

We come now to the confluence of the two stories outlined in this chapter, namely the use of the leaseholder's *ejectio firmae* as the new and final common form for the trial of freehold titles. The claimant made a formal entry as before. But instead of being put out himself, so that his right of entry would be tested in novel disseisin, he arranged for a lessee to be put out. The lessee brought *ejectio firmae*, which he was entitled to win if the true claimant indeed had a right of entry. The action therefore turned upon precisely the same point as the assize which the claimant could have brought if he had chosen to treat the ejection of his lessee as a disseisin of himself. An element of pantomime was involved, and the advantages of *ejectio firmae* over novel disseisin must have been considerable. But we do not know what they were. It is possible that for some reason there was less danger under the statutes of forcible entry, more probable that there were procedural advantages: certainly an adjournment to Westminster by justices of assize was less easy to ensure than raising a discussion *in banc* after a trial at *nisi prius*.

By the middle of the seventeenth century this action of ejectment had become the usual mechanism for claiming land. The claimant or his attorney entered, made a lease to his accomplice, and left the accomplice to be turned out. The turning out might be done by the true tenant or someone on his behalf, or by anybody else including a second accomplice. This last possibility shows how far the court had to take over control if justice was to be done. Judgment for the lessee would be followed, not just by execution against the defendant, but by a

writ ordering the sheriff to put the lessee in possession of the land. If therefore the claimant had arranged for one accomplice to be ejected by another, the arrival of the sheriff's men might be the first that the actual tenant had heard of the matter. The steps by which the action was moulded to its task are of little interest, except as an illustration of what Maitland called the "Englishry of English law": but from a live performance in which real people acted, being made to take such elementary steps as giving notice to the true tenant and making rational provision for costs, it was slowly turned into a recital of the fictitious doings of fictitious people; and the faithful John Doo and Richard Roo, after years of apprenticeship as pledges to prosecute, were promoted to a more exciting role. The true tenant was permitted to defend the action instead of Roo, on terms that he admitted that Roo had ejected Doo, and that Doo had gone in under a lease from the true claimant; and all that was left in dispute was the true claimant's right to enter and make a lease.

In the nineteenth century the fictions were got rid of; and ejectment was made universally applicable by the abolition of the few cases it could not reach, in particular the cases in which a right of entry was tolled so that a real action was still needed. These convolutions were therefore the immediate source of the modern action for the recovery of land; and it is the more remarkable that we do not really know why they were gone through. The story will later be matched by others. In the sixteenth century almost all the old actions were replaced by varieties of trespass and case; and for replacing the older personal actions we shall at least think that we can see good reasons. Certainly large substantive effects followed from the procedural changes. The use of ejectment, however, appears to have had no effect on the substantive law regarding freehold land. All kinds of oddity followed, most notably that a judgment was no bar to another action: it formally concluded nothing beyond the particular trespass supposed to be in issue. This inconvenience had to be dealt with first by chancery injunctions and then by rules of court preventing successive actions on the same real

claim. But the nature of that claim, the right of entry which was the true issue in the action, was the product of the older actions. It could have been tested in novel disseisin; and one with a right of entry could *a fortiori* win in a writ of entry.

COPYHOLD

One substantial change was connected with the use of ejectment, however, and that was the assimilation of copyhold land with freehold. Little has been said of villein land; and its story, although of the first importance as a matter of social and economic history, had no major effects on the intellectual development of the common law as a whole. The realities of the medieval situation are obscure, both as to the personal status of villeins and as to their rights in their land; and although these two things became distinct because a free man, an adventive, might take a villein holding, each darkens the other.

In the broadest outline, the development of unfree holdings reproduces after an interval that of the superior tenures. Both begin with the land playing the part of the payment for services actually desired; and to the extent that the lord had what we should identify as managerial control of some sort, the ownership of the land must remain in him. The passing of what we can only call ownership from lord to tenant reflects the ending of such control. Both kinds of tenure go through a phase in which control sinks to a mere jurisdiction to apply rules having external force; and both end with the tenant being the effective owner, protected directly by the king's courts, and the lord having only economic rights over the land in the nature of servitudes.

But whereas in the case of the superior tenures, the law of the king's courts kept pace with events, and perhaps partly caused them, in the case of villein land it never caught up. The starting-point, a difficult one to move away from, was that the freehold in villein land was in the lord and that the tenant was merely a tenant at will. Within the manor he might be protected both against his neighbours and against arbitrary action by the

lord by the customs of the manor, a local law; but this was enforced in the lord's court and not the king's. The point may best be seen by considering the death of a tenant. There were customs of inheritance, perhaps at this level more ancient than the law governing the lord's own inheritance. But the custom was for the lord to admit the heir: the heir's title was an entry on the court roll recording his admission, and his document of title, so long as copyhold lasted, a copy of that entry. To the lord's court, and this is a point we should remember in considering the heritability of freehold land, it may long have been a meaningless question whether this admission was a declaration of existing rights or a fresh grant by the lord. To the king's court, and this is what matters in the present context, it neither declared nor created any right: the tenant was in at the lord's will.

The logic of this dictated what appears to be the earliest royal remedy of the copyhold tenant. Only the lord's court could give him justice; and all the king's court could do was to act upon the lord. This was done by the chancellor, and the copyholder appears to have gained a measure of equitable protection late in the fifteenth century. But such indirect means as this can have been of little use; and in that most obscure period of freehold actions before the use of ejectment, it seems that the copyholder, like the freeholder, was raising questions of title by various actions of trespass. Ejectment brought these questions in directly, so that by the early seventeenth century the copyholder was protected in the same way as the freeholder—namely by the abuse of an action properly belonging to the leaseholder.

Although copyhold now had equal protection, it retained its separate identity for three useless centuries, providing a measure of economic obstruction, traps for conveyancers, and puzzles for the courts. These puzzles concerned such matters as the entailing of copyholds, and they were of absorbing legal interest. Today their only value is as an object lesson in the great intellectual difficulty a legal system can encounter when it seeks to rejoin matters which became separated for reasons which are extinct. Of this the law of torts will provide another example.

8 *Settlement of Land at Law*

THE HERITABLE FEE AND THE RISE OF THE ENTAIL

The settlement of wealth has been perhaps the most distinctive contribution of the common law to legal achievement. It grew out of the settlement of land, so long the only important form of wealth. And that in turn grew out of the tenurial situation. The development starts from the proposition that "To A and his heirs" first meant what it said, that A's heirs were almost the beneficiaries of a promise that they should be admitted to A's holding, and that it would be the grantor, the lord, who admitted them. The lord is at once the grantor and the law that protects his grant; and the writ of right looks like the first inroad of external law, the king's law, into the situation. It is in the identity of law and grant that the entail has its origin. A grant was not just an act of creation, an event which left the creature having an independent existence. The grantor could reach into the future because he or his heirs would always be there controlling the grant. What came to look like the form of the gift, the boundary of what was given to the grantee, would at first have been more readily analysed as an undertaking by the grantor about his future conduct: I will admit your heirs.

But "To A and his heirs" was only a particularly common grant, and the grantor might equally reach into the future with a less extensive undertaking, a restricted gift. If, for example, he gave "To A and the heirs of his body", the *forma doni* was different from "To A and his heirs"; but the difference was not the gulf between the later fee simple and the later fee tail seen as creatures of the grant, and there was no fee simple from which the other

could be different. The grantor was narrowing the class of heirs whom he undertook to let in. In the tenurial situation there was no conceptual difficulty about the nature of the right, and no practical difficulty about remedies.

In fact, however, "To A and the heirs of his body" was not common until later. The principal ancestor of the entail was the *maritagium*, the gift in marriage. In the typical case we are to think of a father whose daughter is marrying, and who seeks to provide for her and the new family. He himself holds heritably of a lord, and this has two consequences: first, his lord is entitled to services from his holding; and secondly, he is not free to make any grants he pleases without reference to his lord and to his heir. What he may do by custom is to make a provisional gift to the new family of a reasonable proportion of his holding. This gift retained its incomplete character until the third heir had entered, and here is another glimpse of some mystery behind the "degrees". We have not the materials to analyse the donee's rights in the meantime. The principal symptoms of incompleteness are that until the third heir entered no homage was done to the donor; that the comprehensive warranty imported by homage was therefore absent; that the donees were in some sense holding in the name of the donor and could not plead without him; and, most important, that if the heirs of the marriage failed the land reverted to the donor. If moreover the gift was expressed to be free, which was not necessary, then as between donor and donee the services due to the donor's lord from this part of his holding were to be done by him and to fall upon the donees only when the third heir entered and homage was done. Of course this arrangement did not affect the lord, who could distrain on any of his tenant's holding, so that what the donor in free marriage was really undertaking was a duty of acquittance.

Remarkable things begun to happen to such gifts in the thirteenth century; and it is important to begin with some idea of what was special about them in the twelfth. Even when "To A and his heirs" had done its work in producing a fully heritable fee, that fee was not yet freely alienable without reference to lord

and heir. It follows that the difference between this fee and the *maritagium* was nothing like that between the later fee simple and the later entail. The change which came about when the third heir entered and did homage was not yet that the land became freely alienable: it was only that the donor's reversion upon a failure of heirs of the marriage shrank to an escheat upon a failure of heirs general. From this it follows further that the divergence between the later fee simple and the later entail mainly reflects a movement of the fee simple. The fundamental change is the free alienability of the fee created by "To A and his heirs".

Precisely how that change came about we do not know. The logic was probably that of warranties; and the driving force was probably the ending of true seignorial control. But it looks as though the change carried with it the effective alienability of land held in *maritagium*. Gifts in marriage and the like came to be construed almost as conditional gifts of the fee, in effect "To A and his heirs if an heir is born of the marriage". Upon the birth of issue, the land could be alienated, and the expectations of the heirs and the reversion of the donor undone. This looks odd to us; but what probably seemed odd at the time was that "To A and his heirs" produced an alienable right. The future was to compel the recognition of two fees, the fee simple and the fee tail; and of these the latter was the closer to the original fee. But if there was any concept in the first half of the thirteenth century it was a single concept: once one had a fee it was alienable, and the only limit that could be imposed was a condition precedent to the acquisition of the fee.

But the conditional fee was not what donors in marriage or the like intended; and protests in the middle of the century were eventually met by the Statute *De Donis Conditionalibus* in 1285. The point can best be seen by considering remedies rather than concepts. The only important mischief of the conditional fee was an alienation. If the tenant died seised, his heir was entitled and could enforce his right by mort d'ancestor. Mort d'ancestor would produce the wrong result only in the rare case in which, for example, the *maritagium* was given on a second marriage, and the

heir general, to whom mort d'ancestor would award the land, was born of the first marriage. For this case a special writ was evolved for the heir to whom the land "ought to descend according to the form of the gift"; and this was the model for the writ of "formedon in the descender" provided by the statute for the different situation in which the heir was undoing his ancestor's alienation. The end of the story therefore reflects its beginning. It was the alienability of fees in general that had made mischief for the heir.

If the tenant died seised but without an heir of the marriage, or if he had alienated without having had such issue, then the donor was entitled to his reversion. After the statute and immediately before it he enforced this by "formedon in the reverter", a writ saying that the land ought to revert to him according to the form of the gift. This and the writ of escheat appear to have grown together during the thirteenth century from a common ancestor in the form of a writ of entry. In this as in all other respects the situation in the twelfth century is dark; but the need for a writ of entry was probably caused by the decline in regular seignorial control, making it difficult or impossible for a donor simply to re-enter in such circumstances. Again, then, it seems that only an alienation after the condition had been satisfied by the birth of issue worked mischief for the donor; and this again arose out of the alienability of fees in general, the final ending of seignorial control, and not out of some special feature of conditional fees or gifts in marriage.

There was also a third sort of person who might need protection. Instead of retaining the reversion for himself, the donor of a limited fee might follow it with a remainder. The remainderman's rights would then arise in the same circumstances as the reversion, and might before the statute similarly be defeated by an alienation after the birth of issue. After the statute, at any rate, this interest was protected by a "formedon in the remainder"; and the action is not without interest. All three varieties of formedon followed the pattern of a writ of right, and the demandant rested his case upon the seisin of an ancestor. In the case of the writ in the

descender, the ancestor relied upon was the donee in tail. In the case of the writ in the reverter, it was naturally the donor. But the remainderman was nobody's heir, and he came to be fathered upon both: his count set out the seisin of both donor and donee, although rather lamely it could connect him with neither. This difficulty confronted any remainderman and not just one whose remainder followed a limited fee, and for this reason formedon was their only remedy. This in turn raises a difficulty for historians. There is no unequivocal evidence that formedon in the remainder existed before *De Donis*. But there is abundant evidence that remainders were being limited long before that. If there existed only the real actions we have considered, it is hard to avoid the conclusion that conveyancers were, in Maitland's phrase, "devising futilities". Once again, it seems likely that the story begins in the dark of seignorial control, that the remainderman like the heir or the heir of a marriage was at first the beneficiary of an undertaking by the grantor who was also the lord, and that this was his protection.

So far, then, the story is that of the fee rather than of limited gifts. The alienability of the fee, which made something like nonsense of the writ of right, reduced gifts in *maritagium* and the like to conditional fees, and so made sense of them in their new environment; but it was an undesired sense. The logic of English lawyers has always been tough. In this case it looks as though the logic of the conditional fee was particularly tenacious. When *De Donis* was passed, the tenurial framework which had supported the *maritagium* as an arrangement which could persist through several generations had long ceased to be a reality; and even though a shadowy tenure existed between grantor and grantee, the idea that a grant, an event now, could give a fee and still control it in the future, may not have been within easy reach. Either it gave a fee or it did not: if what it gave was heritable, it was a fee; if it was a fee it was alienable. The draftsman of the statute may have intended no more far-reaching change than a variation on the idea of the conditional gift. Whereas earlier construction had, in our language, given a life estate to the donee

at once and passed the fee to him if and when issue was born, the statute can be read as giving a life estate to the donee at once, and as passing the fee upon the birth of issue to the issue. This would have preserved the entity of the fee at the price of restraining alienation only by the original donee. And since the fee was a present reality and the enduring *maritagium* a remote memory, the result would have been reasonable.

The earliest year books show that some lawyers believed this to be the effect of the statute; and the rejection of their view had great consequences. The social and economic importance of the entail itself is obvious. But more than that, it was perhaps only the entail that preserved into a non-tenurial world the idea that an owner could so reach into the future as to defeat ownership itself. Even to a Roman lawyer it would have been juristically reasonable for a grant to pass a life interest to the donee at once and then ownership, the fee, to his issue if he had issue. But logic took over from reason. This construction of the statute would make the issue of the donee into a sort of remainderman: he would be entitled to the fee at birth as purchaser, that is to say as grantee. All sorts of difficulties would follow about his right during the lifetime of the donee, about his death before the donee and so on. And he would also face the remainderman's difficulty: upon whose seisin should he rely when suing for the land? In fact he relied in his action of formedon in the descender upon the seisin of the donee, and gave himself title not by purchase from the donor but by descent from the donee. He claimed as heir and not as grantee or remainderman. Perhaps more than anything else it was the need to fit into the pattern of the real actions, fixed when there was only heritability, that established the entail as a thing in itself, a fee different from the fee simple.

The process by which this happened is obscure, as well it might be. But if the issue of the first donee took by descent and not by purchase, must he not take something limited as it had been in the first donee's hands? Why should he, any more than the first donee, be free to alienate? And then there were memories of the

maritagium. The decisive step seems to have been taken in 1312. In formedon in the descender by the grandson of the first donees, it was argued that he was beyond the help of *De Donis*: he admitted that his father, the donees' son, had gained seisin, and so, argued his opponent, the gift had been fulfilled in the father's person (*comply en sa persone*). But this was the last real stand of the unitary fee, of the idea that only the original donees in tail were restrained from alienating. The most masterful of English judges had a masterful answer: the draftsman meant the statute to apply to the issue as well as to the donee and to bind them until the fetter was dissolved in the fourth degree; and it was only by oversight that he did not say so. Bereford's speech is most famous as showing that legislation was seen as internal amendment to the body of custom in the king's courts, and not as something outside and above it. It may also have been the true beginning of the entail. The first was the step that mattered. If the issue was restrained as well as the donee, and the grandson's rights of the same nature as the son's, there was no reason why the descent of this sort of fee should not be limited for ever. It would of course have been possible, and Bereford had this in mind, to say that the entry of the third heir satisfied some condition and freed or purified the fee; but still it was necessary in the meantime to accommodate fees of two kinds. The degrees were sometimes mentioned, with increasing bafflement, into the fifteenth century; but there is no evidence that they ever limited the duration of an entail.

It is hard to say which story is the more extraordinary: the evolution of the fee simple as ownership, with only its name and its necessary words of limitation to remind us of its tenurial beginnings; or the throw-back which produced the fee tail, when the heritable but almost inalienable fee can have been only a remote memory. But this juridical monster, beyond the desires of donors seven hundred years ago, beyond the intention of the legislator and far beyond reason, is with us yet. And even if we lay it belatedly to rest, its own issue will not fail: settlements will last as long as wealth.

LATER HISTORY OF ENTAILS

Tentative as any account of the beginnings of the entail must be, we know more about that than about its history between the fourteenth century and the sixteenth. We do not know in point of law how secure it was, or was thought to be; nor do we know in point of fact what use was made of it, or how long individual entails actually lasted. Nor, which is perhaps a more serious gap, do we truly understand the legal technicalities by which entails came to be barred; and therefore we cannot tell whether those technicalities were master or servant, whether the courts were driven by logic or led by ideas of policy. But we are probably too simple-minded if we view the matter as just a struggle between the living and the dead. If the entail had first been clearly established, and if after that lawyers had begun to seek ways of breaking it, then indeed we could attribute to those involved through a century and more the states of mind of some family at the end of the story, grandfather seeking to tie up, and father seeking to untie to the disappointment of son. But the question of barring comes up before the fee tail has established its separate nature. It comes up not directly between the generations but between son and father's grantee: and it is with the grantee that the merits rest. In the end the grantee will be an accomplice in a scheme to defeat the settlement; but he begins as an innocent purchaser from one with a defective title.

WORKING OF WARRANTIES

A grantor would always warrant to his grantee the title to the land granted, and it was possible for anybody to warrant the title of another. A warranty had two effects. One has been mentioned, but will be repeated for the sake of clarity. The tenant against whom a real action was brought would vouch his warrantor, or would bring an independent action against him called *warrantia cartae*. If the vouchee accepted the duty to warrant, or if it was proved against him, then he took over the defence of the principal

action. If he won it, no land changed hands. If he lost it, the demandant was awarded the land he claimed in the principal action, and the tenant got a simultaneous judgment against his warrantor for land of equal value. This was known as the *escambium*, the land taken in exchange. But if the vouchee was not the original warrantor but only his heir, then although his duty to warrant was as full as his ancestor's, his liability to provide *escambium* was limited to lands which he had by inheritance from the warrantor. He was liable if he had *assetz* by descent, and it is from the French word for "enough" that the English language derived its singular noun "an asset".

The other effect of a warranty was to preclude one bound to warrant from himself claiming the land. This seems to have been responsible for the evolution of the fee into something like ownership. The warranty of the original grantor-lord prevented himself and his heirs from reclaiming the land first from the grantee's heirs, and later, probably, from his alienees: and hence the fee which was not only heritable but also alienable without reference to the lord. More immediately relevant is the parallel process by which the fee became alienable without reference to the heirs. The grantee who held to himself and his heirs could himself make a grant without reference to his heirs because they were bound and therefore barred by his warranty.

BARRING OF ENTAILS BY WARRANTIES

It was probably the logic of this bar that had turned the *maritagium* into the conditional fee, and one would expect the question to be dealt with by *De Donis*. What was to happen if father, the donee in tail, alienated with warranty? There are signs of ill-considered amendment to the statute, and some express provision may have been lost. But to have held the son barred by his father's warranty would have nullified the formedon that the statute gave him, and the draftsman may have thought it too obvious to need saying that there was to be no bar.

What actually happened was that the son came to be barred to

the extent that he had assets by descent, other land having come to him in fee from his father. This was settled within a generation of *De Donis*, and the case that tells us this also shows us the grantee as an innocent victim. Father, having alienated with warranty the land given to him in tail, later made an *inter vivos* grant of his other lands to his son: the idea was that the son should have nothing by descent, and so should not be barred from his formedon. This was a dishonest attempt to evade what was then a clear rule, but we do not know how the rule was reached. Assets by descent were at home only in the liability to give *escambium*, and at common law there had never been any limit on the barring effect of a warranty. Seven years before *De Donis*, however, another statute had dealt with the husband alienating his wife's land with warranty, whether during her lifetime or as tenant by the curtesy after her death: their son was to be barred only to the extent that he had assets by descent from his father. The *maritagium* would be common ground between the two statutes, and it is possible that the general rule was derived from this earlier statute. There is, however, another possibility. In an obscure case of 1292 the father's grantee, instead of claiming that the son is barred by his father's warranty, seeks to vouch him. On the face of it voucher of a demandant is absurd; but if it was generally thought that *De Donis* overrode any bar, then this tenant was conceding the land demanded, and preparing to make an independent claim for *escambium* based upon the warranty. This claim might have been less confusingly made in an independent action of *warrantia cartae*; but it was not without logic. And since the right to *escambium* did depend upon assets by descent, the rule actually reached, holding the son barred to that extent, would prevent circuity of action.

This would help explain a magical distinction between such warranties, lineal warranties, and collateral warranties in which a demandant was heir to the warrantor but claimed the land by some other title. Suppose a grant to one in tail with remainder over: tenant in tail has no issue, alienates with warranty and dies; and coincidence has arranged that the remainderman should be

his heir general. He claims the land from the alienee by virtue of his remainder: is he barred as heir to the warrantor? After doubts he was held to be absolutely barred irrespective of the descent of assets, so that the warranty was allowed its normal common law effect. If we forget about the barring of entails as a lawyer's trick, and see the matter as yet another dilemma between two innocent victims of a wrong, the collateral warranty was decided in favour of the innocent grantee; and this was the result produced by general principle. In the case of the lineal warranty, principle was probably taken as altogether excluded by *De Donis*, which preferred the innocent heir in tail; and allowing the grantee to bar him to the extent of *assetz* looks like a compromise reached by the simplification of a distinct cross-claim. This compromise seemed reasonable to the city of London, which in 1365 applied it by ordinance to collateral warranties. But the common law made no move until the reign of Queen Anne, so that collateral warranties became a trick, useful when members of the family would agree to sign up and then to die in the right order, for the barring of entails.

The compromise reached in the case of the lineal warranty has some general interest. The whole system of *escambium* shows a grant of land as essentially a grant of wealth; and what the compromise ensured was that the heir in tail would get the value of the land entailed. The overreaching policy of the Settled Land Acts restored a very old view of a settlement. Another point looks back to *De Donis*. The assets which descended to the heir and barred him had to be land of which the father could have disposed, held in fee simple. They could equally be disposed of by the heir, so that only he was protected and not his issue. It again suggests that the statute itself at first reached no further.

FINES AND RECOVERIES

The barring effect of warranties, therefore, was not invented. A solution had to be found for genuine disputes between two interests, and that solution could be abused. That this equally

happened with the barring of entails by collusive litigation is almost the only proposition which can confidently be made about that obscure subject. Fines and recoveries became much more important than barring by warranties, and there is much technical learning from the eighteenth century and later. But the important part of the process has not been worked out, and only a tentative outline can be given.

Although fines and recoveries both used the mechanics of litigation, and although the text-books on property have taught us to think of them as a pair, they were of different ages and different natures. The fine that survived into the nineteenth century was a conveyancing mechanism that had worked in much the same way at the end of the twelfth. It took the form of a compromised law-suit, generally an action of covenant or *warrantia cartae*. The terms of the agreement were written out three times on a single piece of parchment which was then cut into three, one part remaining with each party and one, across the bottom and known as the "foot", with the court. Livery of seisin was as necessary as if a private charter had been drawn up, but the fine had three advantages. There was first the evidential security of the arrangement; and the faith of conveyancers has been justified by the use which historians today can make of the feet of fines accumulated through some seven hundred years. Secondly, because there were no difficulties of proof, fines were easy to enforce; and at the end of the thirteenth century the old action *de fine facto* was replaced by a yet simpler process of *scire facias*. Thirdly, the dispositive as well as the evidential authority of a fine was greater than that of a private grant. For example a married woman could not convey her own land away; and although her husband could do so, she or her heir—though the latter might be barred by his father's warranty—could recall the conveyance after the husband's death. But her land could be alienated by fine, upon which she would be separately examined by the court.

This power to do more than the parties could do by their own act is not a trick harnessing the force of a judicial decision, and it

comes from a time when judicial decision was not seen as the only business of courts. In the king's courts of the late twelfth century, the fine looks so much an established routine that it is possible to suspect the writ and compromised action of being drill added to an older custom of seeking royal authority for private arrangements. And in the days of true feudal control, arrangements concerning land would call for feudal authority. A final concord made in the court of an honour should not be assumed to show just a lord copying the king. It equally shows a lord and his court giving the authority needed, the only authority there could be, for dealings with the lands held of him.

The fine may thus have had diverse origins. But however large a part the genuine compromise of a genuine action had once played, the litigious form played no part from the time the evidence becomes considerable in the late twelfth century. There was no need, and this is the essential point of difference from recoveries, for courts or legislature to deal with fines on the footing that what they did might affect actual disputes. *De Donis* could and did provide that a fine levied by the donee in tail should be void. It could not have provided that a judgment against him should similarly be void without enabling a wrongful possessor of land to defeat the rightful owner by settling it.

The effect to be given to a fine was thus a matter for direct decision, and was mainly regulated by legislation. The preclusive effect against third parties was at first considerable, but the express provision in *De Donis* ensured that the heirs in tail and their reversioner could not be barred, though there was room for argument about the remainderman. The court would not accept a fine if it transpired that the land was held in tail; and if a fine of such land did get through, it was no answer to a subsequent formedon. The security of the entail was thus not threatened, and was not affected when in 1361, because of the mischiefs to third parties, statute provided that strangers to fines were not to be barred at all. But the uncertainty so introduced proved more harmful than the possibility of fraud, and statutes of 1484 and 1489 went to the other extreme, establishing an even greater

preclusive effect subject to safeguards of publicity and lapse of time; and this time entails were affected. After some uncertainty, a statute of 1540 declared that a fine was to bar the heirs in tail. Nothing was said about reversioners and remaindermen, but their position was clear under the earlier acts: they were barred, but only in the unlikely event of their making no claim within five years of the accrual of their rights. But once again, it is to be emphasised that these results did not follow from the litigious form of a fine, or from any legal logic. They were chosen, though not very coherently.

This is not so in the case of the recovery which, certainly until the fifteenth century, perhaps until the sixteenth, was indeed seen as a law-suit, its efficacy depending upon the force of a judgment. It was of course a collusive law-suit and often fraudulent; and legislature and courts could and did intervene to protect the victims of fraud. But they could not, as they did with the fine, regulate its effects as an identifiable act in law, because it was not an entity distinct from genuine actions. The known formality for passing a clear title was built up from many individual decisions, no doubt traceable but not yet traced, about the preclusive effect of a judgment. A third party brings a real action demanding the land from tenant in tail: what can heir in tail, reversioner or remainderman do about it?

The first question is whether they can intervene in this action. In the thirteenth century a coherent scheme had been built up. A tenant for life ought not to defend an action alone, but should bring in the person entitled to the fee by voucher to warranty or in some cases by a process known as aid-prayer. But of course if the tenant for life had instigated collusive proceedings against himself, he would not vouch or pray aid; and to deal with this, statute in 1285 allowed heir or reversioner—there was no mention of remaindermen—to take the initiative and "pray to be received to defend their right". This statute, however, is a nice example of the main point underlying the story of recoveries: fraudulent abuse of judicial process is difficult to deal with. The legislator thought of the obvious cases of the tenant for life confessing the

demandant's title or losing by default: but he did not foresee the tenant who would put up a sham fight by pleading faintly. That tenant had to be thwarted by a second statute in 1390.

But by the time of this second statute, something else has happened. Entails were not mentioned in 1285: they are mentioned in 1390, but the only kind of tenant in tail against whom receipt can be demanded is the one who is in effect a life tenant, namely the tenant in tail after possibility of issue extinct. The gift was entailed to the heirs of a particular marriage, and one of the spouses has died without issue. There is and can be no heir able to inherit, and the reversion must take effect upon the present tenant's death. If he puts up an accomplice to demand the land from him, the reversioner can demand to be received and prevent the recovery. And under an act of 1572 the recovery, even if it goes through, is void against reversioner or remainderman. In the terms of later substantive law, tenant in tail after possibility cannot bar the entail.

The chance of intervening in the law-suit, of preventing the recovery from being made, thus became limited to this case: and since it was a case in which there could be no heir, it follows that the heir could never intervene. But this had not always been so. In the early fourteenth century heirs in tail prayed to be received, and were received, in actions against their parents, the donees. This seems to reflect the early analysis of *De Donis* as passing the fee to the issue upon the birth of issue; and it is likely that the rights of both heir and reversioner to be received in the ordinary case were casualties of the changing concept of the entail. The thirteenth-century scheme of voucher, aid-prayer and receipt had envisaged the simple situation of one entitled for life, another in fee. But now there were two fees in every entail: one in the reversioner, another in tenant in tail. And if tenant in tail had a fee which was going to pass by descent to his heir, the heir could have no fee now. It was in this confusion, it seems, that both heir and reversioner lost their right to be received. They could not prevent the tenant in tail from losing the land by judgment.

The second and less tractable question then arose. Tenant in tail

has lost the land by judgment: can the others later get it back again in spite of this recovery? For the heir there were certain possibilities of direct attack on the judgment by error or attaint, but these would not normally arise unless the action had been genuine. Our concern is with later assertions of title under the entail against the tenants now in possession under the recovery. The demandant might proceed indirectly; but it is easiest to imagine him bringing a formedon against the tenant who would plead the recovery in bar.

The historian who tackles this subject will have to trace the three kinds of formedon separately. One would expect that the heir would be barred more easily than the reversioner or remainderman, but again the conceptual obscurity of the entail no doubt played its part: the vulnerability of the heir's title would depend upon the extent to which it was seen as deriving from the ancestor rather than from the original grantor. But the subject has not yet been examined in this way, and must be approached, probably anachronistically, in terms of barring the entail instead of barring this claim or that.

Suppose the simplest case of tenant in tail putting up an accomplice to claim the land from him and losing. Whether or not he should, if the action was genuine, have taken steps to bring in his heir apparent or any remaindermen, he should certainly have vouched his grantor, normally the reversioner. Suppose now that he had done so, and that the reversioner had warranted and lost: if justice has been done, it follows that the land had never been the settlor's to settle, the demandant is entitled to the land he claims, and tenant in tail has his rights against the grantor on the warranty. Suppose further that the grantor provides *escambium*: tenant in tail will hold it on the same terms as the land he has lost, and the rights of his heirs, remaindermen and reversioners, will have been overreached in the modern sense, detached from the land originally settled and attached to the *escambium*. But suppose no *escambium* is forthcoming: tenant and all others entitled under the entail have lost; they never had any right to the land and their right, on the

warranty, proves valueless. They are disappointed but not wronged.

If therefore a recovery was pleaded as a bar to a formedon, it was inevitable that the courts would accept it as good if tenant in tail had vouched the grantor, irrespective of any actual loss to those entitled under the entail, and equally inevitable that they would reject it as fraudulent if he had vouched nobody. But suppose he vouched somebody else? It had become common for warranties to be given *in vacuo*, and this was in itself a device for barring entails. But it was not necessarily fraudulent. Suppose an honest but unlucky tenant in tail who first finds that his grantor had no title and who secures from the person he believes to be truly entitled a release of his rights with warranty. He is then confronted by a second claimant, who sues for the land. Tenant in tail knows that his grantor was not entitled, so he relies upon the warranty of the first claimant and vouches him. This is sensible, not fraudulent.

But there will be nothing on the record to distinguish this case from that in which tenant in tail, with intent to defeat others entitled under the settlement, takes or affects to have taken a release with warranty from another accomplice, a landless man against whom a judgment for *escambium* will be ineffective. Neither the voucher of one other than the grantor, nor the absence of genuine compensation, conclusively indicates the cheat. Frauds and fictions do not appear on the record, and much common law development has depended upon this. In the case of recoveries only readiness to make individual investigations could have prevented what happened. And the courts, perhaps not unwillingly, were driven to the result that entails could be barred by collusive recoveries in which warranty was given and the action lost by the "common vouchee", a court crier whose only care was to invest the money he thereby earned in something other than land.

The developed trick was in fact more complicated than this, beginning with a conveyance by tenant in tail to another accomplice called the "tenant to the *praecipe*". It was against him that

the collusive action was first brought, he vouched tenant in tail, and tenant in tail vouched the common vouchee; and when the dust had settled the entail had vanished more surely than with the simpler form. The point of this double voucher was technical: a recovery would destroy any right of a vouchee, but would destroy only that estate of the tenant for which he was actually seised at the time of the recovery. If therefore tenant in tail had entered into earlier transactions with the land, he might not be seised under the entail; and if so the recovery would not bar others entitled under it. But, there seems to be no lasting interest to this, except that it may indicate the extent to which the courts abandoned themselves to logic. It is when wider issues are clouded, as with revenue law in more modern times, that judges seem most content to leave parties to the rigour of the game.

CONTEMPORARY ATTITUDES TO ENTAILS AND THEIR BARRING

Logic did odd things in the fifteenth and sixteenth centuries; and for most of them we have no evidence about contemporary moral attitudes. But there is some evidence about entails and their barring. Early in the fifteenth century a London merchant, perhaps more scrupulous than most landowners, was so remorseful at having bought land which he knew to be entailed that he directed his successors to make some restitution to his vendor's heirs in tail. Early in the sixteenth century St Germain devoted some of the most telling discussion in his *Doctor and Student* to the matter. The debate is opened by the Doctor, who recites with affected incredulity ("I have heard say", "I have been credibly informed") what was then no doubt the usual procedure, the recovery with single voucher. How, he asks, can this stand with conscience? The Student in his turn professes not to understand the doubt: how can it be wrong to do what is necessary "for the [safety] of the buyer that hath truly paid his money for the same". Then they are off. It is a long argument, including some theology from the Doctor and an artfully arranged series of examples from the Student in which natural justice more or less obviously requires that the recovery should be upheld. For the Student,

De Donis was a bad law "made of a singularity and presumption of many that were at the said parliament, for exalting and magnifying of their own blood". For the Doctor it may have been "made of charity, to the intent that he, nor the heirs of him to whom the land was given, should not fall into extreme poverty"; and any way a positive law must be obeyed if it is not against the law of reason or of God. For the Student it is equally positive law that a recovery bars the entail. For the Doctor "the judgment is derived and grounded of the untrue supposal and covin of the parties, whereby the law of the realm . . . is defrauded, the court is deceived, the heir is disinherited". This drives the Student to desperate speculation about the vouchee acquiring lands; but after a while he rallies and observes that these strictures may have been true of the earliest collusive recoveries, but do not apply to a known common form. In the end they reach agreement. It would be wrong to require those who held under past recoveries, "so many and so notable men" as the Student laments, to yield up what they held. But those who went through recoveries perhaps imperilled their souls, and the responsibility was upon those who allowed the law to remain in such a state. "And . . . it were therefore right expedient, that tailed lands should from henceforth either be made so strong in the law that the tail should not be broken by recovery, fine with proclamation, collateral warranty, nor otherwise; or else that all tails should be made fee-simple, so that every man that list to sell his land, may sell it by his bare feoffment, and without any scruple or grudge of conscience". This is the Doctor's conclusion, and the Student can only agree "that the rulers be bound in conscience to look upon it, to see it reformed and brought into good order"; though he meanly adds "that there be divers like snares concerning spiritual matters suffered among the people, whereby I doubt that many spiritual rulers be in great offence against God".

But if the Student was ungenerous, at least he conceded defeat in an indefensible position. The remarkable part of the story, however, both the particular story of entails and their barring and the wider story of the logical tricks which were transforming the

law in the sixteenth century, is that the position did not need defending. There was no attack. The Doctor and his successors did not seek to change the common law: they concentrated upon the reform of substantial injustice in the chancery. Formal dishonesty was left unchecked, and by these means the medieval law was made over for use in a modern world.

The recovery itself became what it already was to the Student, a common assurance upon which, for example, uses could be declared, its solemnity proof against intellectual doubts and against the grumbles of the disinherited, the Athanasian creed of the common law. After the Doctor there was no articulate protest for two hundred and fifty years; and although Blackstone considered the automatic enlargement of every entail into a fee simple, he favoured a less radical solution. This, warranted "by the usage of our American colonies", was to allow their barring by deed enrolled: it was adopted in 1833 and, unbelievably, the structure of entails and their barring is with us yet.

SETTLEMENT AND RESETTLEMENT

But of course, the logic of lawyers is not merely wanton. Their astonishing structures reflect actual desires. The Doctor's prescription of abolishing entails was indeed proposed, and was thwarted by much that "singularity and presumption" that the Student attributed to those who had passed *De Donis*. One of the legislative projects that preceded the Statute of Uses sought to turn every commoner's entail into a fee simple. This came to grief on many grounds; but dynastic sentiment and wishes "for exalting and magnifying of their own blood" were more real, and not only among the nobility, in the sixteenth century than in the thirteenth or fourteenth. The thrust of conveyancers, as never before, was toward the creation of enduring settlements.

Outside the sphere of uses, the entail was the most promising method; and various attempts were made to provide that any move to suffer a recovery or to bar in any other way should operate as an immediate forfeiture. Logically these were quite as

acceptable as the recovery itself or indeed as the entail. But logic was given its head no longer. The matter is now indeed seen as a struggle between the generations, and the position reached by logic is regarded as a reasonable compromise in life. The entail is accepted on terms that it can be barred.

But it is only tenant in tail who can suffer a recovery. All that the settlor can do to postpone the time at which his settlement will be destructible is to keep tenant in tail at bay. Sometimes in the late sixteenth century, often in the seventeenth, he makes his first beneficiary tenant for life only, and the first tenant in tail will be that beneficiary's son. The result resembles that reached by the earliest interpretation of *De Donis*. Then the issue in tail was thought to be the first to get a fee, and the fee was thought to be alienable. Now again the issue will be the first to get a fee, and this fee is known to be barrable. Logic has led the law to the limits of unreason, and brought it back to its starting-point.

Even tenant in tail cannot suffer a recovery until he is in possession or has the co-operation of the tenant for life in possession. A real action lies only against a tenant actually seised. If therefore there is a tenant for life who will not assist in the recovery, tenant in tail can neither be nor make a tenant to the *praecipe*. The most he can do is to levy a fine, for which a personal action is the vehicle and to which seisin is therefore irrelevant. But a fine bars only the issue in tail and the not reversioner or remainderman, and therefore produces in the hands of the purchaser a "base fee", a fee simple determinable upon the failure of the vendor's lineal heirs, surely the most absurd imprint ever left by logic on human affairs.

These things were the legal bases of the classical strict settlement, which did not endure but reproduced itself in each generation. Father settles on himself for life with a rent-charge for father's life in favour of son, then upon son for life, then upon son's first and other sons successively in tail. Grandson is born, father dies, and grandson comes of age. Son and grandson now collaborate in a recovery, destroying the first settlement, and resettle as before, with son getting the first life interest, grandson the rent-charge

and the second life interest, and with no prospect of a tenant in tail able to do anything until great-grandson is born and comes of age. Had the common law never moved away from the first supposed effects of *De Donis*, permitting no more than a settlement with life interests and a single fee, each generation could have produced much the same result. But it would not have happened. The true importance of the whole apparatus was only this: that the younger generation could not dispose of its fee without the consent of the older. As each heir came of age the offer of an immediate rent-charge was obviously better than the wasteful sale of a base fee. And it was this leverage, combined no doubt with the high mystique surrounding the whole matter, that enabled conservatism and sentiment to keep so much of the English countryside in the same families through the agrarian revolution of enclosures, through the industrial revolution and the rise of other forms of capital investment, until that world came to its end in the 1914 war.

REMAINDERS

For the sake of continuity in discussing the entail, another feature of settlements at law has been assumed, namely the validity of remainders. These present a problem already noticed. The remainderman was nobody's heir, and until he had himself gained seisin he could not assert his rights in any of the normal real actions. This is a problem to which there is no clear answer for most of the thirteenth century. For the twelfth—and remainders seem to be as old as grants of land—the answer may lie in seignorial control: the grantor is the lord and is in a sense the law that controls his grant, and the remainderman like the heir is relying upon what we should analyse as a promise. The word *conventio* is actually used to describe a remainder in a case of 1220. But the writ of right and all the other royal remedies provided only for heirs. Bracton, perhaps significantly, speaks of remaindermen as "quasi-heirs", and says he will give a writ suitable for them: perhaps more significantly, this promise is not

kept. He may have been unable to find a specimen: modern scholars have not yet found one even in plea rolls after his time. After *De Donis* it seems that the remedy for all remaindermen, and not just those after entails and the like, was formedon in the remainder. In that action the rêmainderman is indeed presented as a quasi-heir, though nobody could decide whether to father him on grantor or first grantee; and he ended by relying upon the seisin of both.

Even when the remainderman was secured by a basic action, he was constantly overlooked or rebuffed. If for example a tenant for life alienated, the heir or reversioner had a writ of entry to retrieve the land from the grantee, but only on the death of the tenant for life. In 1278 statute provided an immediate writ of entry for the heir if doweress alienated, and this was soon extended to other tenancies for life by analogy. But the remainderman, to whom the mischief was the same, was held not to be within the scope of the analogy. He was similarly left out of the statute of 1285 which allowed reversioners to "be received" when tenant for life was about to lose a real action by confession or by default; and in the first half of the fourteenth century there was great doubt about allowing him receipt, although this was in fact done.

The reasons for this seem essentially conceptual. The reversioner, or the heir in the case of dower and curtesy, clearly had the fee now. But had the remainderman anything during the prior estate? If not, it was inappropriate to allow him receipt or an immediate remedy if tenant for life alienated. And if he had the fee now, how had he got it? There had been nothing like a livery of seisin to him, not even such attornment by the tenant for life as would have been necessary to complete a grant of the reversion. It could be said that the livery to the particular tenant carried the fee to the remainderman; but then there is an insoluble difficulty about what the later law will call contingent remainders, in which at the time of the grant the remainderman does not exist, is not ascertained, or has to satisfy some condition such as the attainment of a specified age. Here, if all rights leave the grantor when he

makes his grant, the fee can only go, as the year books put it, into the clouds.

CONTINGENT REMAINDERS

We cannot be sure about what happened in such cases, and even less about why. It seems that the first reaction was to hold the remainder bad. But the difficulty seems to have arisen only in one kind of case, namely where the remainder was to the heirs of a living person, and to have emerged with the dogma that a living person can have no heir. This dogma was associated with another, inevitable in a system which had done what the common law did with a grant to A and his heirs: this was that heirs took by inheritance and that if one was named as heir he could not claim as purchaser. This in turn coincided with, though we do not know how far it flowed from, an elementary policy interest which may have had a tacit influence on the whole subject of remainders. Now that lordship had become an economic relationship, much of the value of which lay in the incidents due to the lord when the heir of a dead tenant entered, any arrangement by which the new tenant would come in as purchaser would deprive the lord of wardships and the like.

The cases in which a remainder is limited to the heirs of a living person can, as the most recent study points out, be divided into two kinds. If the living person is himself granted an interest, we are in the realm of the notorious rule in *Shelley's Case*. This was a reaffirmation late in the sixteenth century of a result reached in the fourteenth; and that was to give the fee to the living person. For example a grant to A for life remainder to B for life remainder to the heirs of A gave A the fee simple which, subject to B's life interest, he could alienate at once. If A's heirs ever came to the land it was by inheritance. The feudal result was that the lord got his incidents. The conceptual result was that the difficulty of the contingent remainder was avoided. The fee did not have to float among the clouds, unable to come to earth until the death of A ascertained his heir: it went at once to A.

But a remainder to the heirs of a living person who was not given an interest raised insoluble problems. In a grant to A for life remainder to the heirs of B, it was intended that B's heir should come in as purchaser: there were evident possibilities of evading the incidents; and, if the arrangement was to be held good, the fee was back in the clouds. Its validity was doubtful in the late fourteenth century, and seems to have been accepted with reluctance in the fifteenth. The reasons for the change are not known. There may have been specially hard cases or it may have been a concession to an increasing practice of conveyancers. We lack any systematic study of the forms or the terms of actual conveyances, although the materials are abundant.

One of the most important cases in which such a remainder was accepted is known only from the abridgments, which differ in an important respect. One version says that the remainder to the heirs of a living person will be good if that person dies in the lifetime of the grantor. If this is other than a misunderstanding, it may reflect an idea that the fee does not after all leave the grantor when he makes his grant. But there seems to be no other suggestion that a remainder is a grant of delayed action, the grantor's rights leaving him by instalments; and the later theory is clear that the grant is complete when made, and the livery of seisin to the first grantee somehow carries the right of the remainderman. The other versions of the case speak of a grant in tail, remainder to the heirs of the living person; and they say that the remainder will take effect only if that person has died in the lifetime of the tenant in tail. Since tenant in tail must have died without issue for the remainder to take effect at all, this would represent the rule later governing all contingent remainders, namely that they must vest before the ending of the prior estate. Modern books have sometimes treated this as needing explanation, and suggested obvious feudal objections to an abeyance of seisin. But it was probably inevitable on conceptual grounds. If the grant operated at once, and the livery of seisin to the first grantee carried the right of the remainderman, the remainderman must at least be able to take seisin when the prior estate ends. The remainder

supported by its prior estate was not so far from Bracton's picture of the remainderman as quasi-heir.

Not until the very end of the year books are there signs of contingent remainders of any other kind. The remainder to the heir of a living person was no more than a well-known anomaly, an exception to the general picture of remainders taking effect at the moment of the original grant. There was no category of contingent remainders, of which this happened to be the only permissible kind. The source of such a recognised category, indeed, seems to have been in attempts by conveyancers to do something quite different, namely to cut short estates by gifts over. The remainder subject to a condition precedent arose from provisions intended mainly to take the land away from the holder of some prior interest.

Such provisions may first have been put in when devices to bar entails were commonplace but not yet respectable, the aim of the settlor being that any attempt by tenant in tail to bar should operate as a forfeiture, passing the land to another. This met a special difficulty about persons other than a grantor taking advantage of conditions; and as barring became an accepted routine, such conditions were struck down as seeking to deprive entails of their inherent characteristic. But they seem to have started a fashion among conveyancers of experimenting with conditions, and these had to be dealt with somehow.

The general problem was at first hardly appreciated. In 1535, to the surprise of the profession but without much ado, the common pleas passed a fine by which a grantee in tail was to serve as the grantor's standard-bearer; and if the grantee should fail, "the land should remain to a stranger". The discussion was of a curiosity, and the argument put forward for the validity of the gift over would not have withstood scrutiny. The condition was said to be precedent to the remainderman's right to possession, not to his remainder itself. This then was seen as a condition cutting short the prior estate. But what matters is that the right was called a remainder, and that all agreed, without reference to the case of the heir of a living person, that a remainder must

vest at the moment the grant is made. If it is not to vest until a condition is satisfied, it must fail.

Acceptance of the reasoning in this report would have made it possible to treat all gifts over as remainders, and conveyancers would have had their philosopher's stone, able to magnify the blood of their clients by indefinite perpetuities. But the case was a casual discussion of the terms of a fine, not like some modern binding decision; and what the report really teaches us is that although, as we know from Littleton, conditions were infringing upon remainders and causing some confusion, remainders were clearly understood as vesting at the time of the original grant. The heir of the living person was an oddity, and the later contingent remainder was not contemplated.

It appeared fifteen years later, being brought into the world almost fully formed in a case in which one of the counsel responsible for the 1535 fine presided as chief justice. The limitation was innocuous: to husband and wife for their lives, then to one of their sons for life, and if that son should die during the lives of husband and wife, then to another son for life. There were conditions of residence which provoked discussion now irrelevant, but the real argument was about the contingency in the remainder to the second son. It was held to be valid, and the case shows how two different lines of reasoning, here the learning about remainders and the learning about conditions, can be accommodated by a small conceptual shift. A remainder could be subjected to any condition precedent that was not illegal or impossible, and the notion that a remainder must vest at the moment of the grant was abandoned. The reasoning of what had hitherto been a mere anomaly, the case of the heir of the living person, was generalised: the right leaves the grantor at the moment of the grant and is carried by the estate precedent. It must therefore vest not later than the ending of that estate. But, and here conditions subsequent are put aside for separate treatment, the remainder must not be repugnant to that estate precedent and cannot cut it short: it may vest before it ends, but there can be no right to possession until it has ended.

This added to the range of what conveyancers could do for their clients, but its limits were to an unusual degree predictable at the outset. On the negative side, there was nothing here that provided for estates to be cut short, and the rules about forfeiture and the protection of entails could be handled on their own merits. On the positive side there was an obvious danger that settlors would seek to build up perpetuities by indefinite series of contingent remainders. Special rules thwarted the more blatant attempts. But the lasting safeguard, and the lasting trap for settlors, was that contingent remainders were destructible by the termination of the precedent estate before the remainder had vested. The safeguard against perpetuities depends upon the proposition that any gift to an unborn person was contingent, and would fail if the precedent estate ended before the remainder-man was born. Settlors could not confidently reach further into the future than the ending of lives in being. The trap was in the working of this. If land was granted to A for life, remainder to his grandsons equally, the remainder would fail altogether if no grandson had been born when A died; and if only the first of a final total of ten grandsons had been born, that one took all to the exclusion of the others. The metaphysical support of the precedent estate had consequences in the real world.

It was, moreover, the precedent estate that provided the support, and not the life of its owner. If in the example A had forfeited his life estate, and if his ten grandsons were born after that forfeiture and before his death, the remainder to them failed just the same. This let logic loose again. Suppose a settlement upon A for life, remainder to his first and other sons successively in tail, remainder to B in fee simple. This was the heart of the strict settlement already discussed, and the machinations now to be described therefore imperilled it. If before he had any sons, so that the remainders in tail were still contingent, A granted his life interest to B, or if B granted his fee simple to A, A's estate "merged" in the fee: it ceased to have a separate existence, the contingent remainders therefore failed for lack of support, and no

entail ever came into existence. In the seventeenth century this was countered by the extraordinary device, which became common form, of "trustees to preserve contingent remainders". In the example the conveyancer would, after the life interest to A, insert a remainder to trustees for the life of A; and then he would grant the remainders over as before. If A destroyed his estate there was then another and exactly equivalent prop to support the remainders. After beautiful argument not to be followed here, it was agreed that this remainder was itself vested and so immune from destruction; and conveyancers could plan their settlements on the basis of natural lives and deaths.

In the nineteenth century, statute made contingent remainders immune first from artificial and then from natural destruction. By reason of the developments to be discussed in the next chapter, this learning was all becoming unreal. Settlors had more effective ways of tying up land, and other limits had been set to what they could do. Moreover, with the growth of other forms of capital, the tying up of physical land was causing economic distortion; and the Settled Land Acts were to take settlements back in spirit to their starting-point. Land was to be treated only as a form of wealth, and overreaching powers were to ensure that only the wealth could be settled. But it is necessary to remember that these things did not begin to seem unreal until the nineteenth century was well advanced. The rules under which so much of the wealth of England was held for so much of its history were made and unmade by these processes, so extraordinary when looked at as a whole and backwards, so reasonable step by forward step.

9 *Uses and Trusts of Land*

THE PROBLEM OF ORIGINS

The noun use, in the sense under discussion, has in principle nothing to do with the modern verb to use. Property held by one person to the use of another was held for that other's benefit, *al oeps* in Norman French, *ad opus* in Latin. The person for whose benefit it was held was called the *cestui qe use*; but the phrase is an abbreviation and does not mean the one who uses. To begin with the term most often describes an agent acting on behalf of his principal: a bailiff may collect tolls *ad opus communitatis ville* or *domini regis* or of the franchise owner; and conversely the owner may complain that a wrongdoer has taken the tolls *ad opus suum*. In Latin other words may be used, sometimes *commodum*, more often *usus*, which itself appears generally to be nothing to do with using but to be a translation of *oeps*. In French *oeps* is always employed until it changes into *use*; and this difference in constancy between the languages is significant. Lawyers in court often had occasion to mention such situations. But, in Plucknett's phrase, it was "a situation rather than an institution". Plea roll clerks had no term of art because there was no definite legal concept to be described.

The question of origins can be divided into two. From what situation or situations did the institution immediately develop? And were these situations themselves in any way derived from an older institution or idea? To take the second question first, Germanic law had an institution not altogether unlike the later use, that of the *salman*. But there is no evidence that he ever came to these shores, let alone survived to play any part in the rise of

the use. And even if Old English custom had known this or some similar arrangement with land of which the mode of protection had been obliterated by feudal theory, it would have perished. Traditions do not survive unsupported; and the realistic question is whether there was something in the immediate and not the remote background, whether analogous relationships were being made and protected somewhere out of our sight. The chief possibilities are in local and in ecclesiastical jurisdictions.

As for local jurisdictions, fiduciary relationships were not unknown in towns, where ancient ideas may have been protected from feudal disturbance. These relationships look as though they were connected with the customary power to devise; and it is impossible to read the early wills enrolled in the London husting without supposing a mode of enforcement much like the chancery jurisdiction over trusts centuries later. In 1259, for example, one ordered "his houses to be sold and provision made thereout for some honest chaplain, a scholar studying in a university, to celebrate for the good of his soul and the souls of others, and on his ceasing so to study, then for some other student, at the hands of his executors, and so in perpetuity". Such arrangements must be the subject of a rule found in a custumal of 1324 from Godmanchester: if any one receives lands or other property in perpetuity and fails to maintain the perpetuity, he shall lose the property and it shall at the community's order be assigned to certain persons in order to keep up and carry out the said perpetuity. Again, although the London orphans' court, whose name now survives only on the western shore of the Atlantic, clearly acquired a separate existence after the equitable jurisdiction of the chancery was established, it got it by delegation from a much older body; and the city's system of fiduciary wardship appears to be older than that established for guardians in socage in the mid-thirteenth century.

If, as some have supposed, the key to the matter is the power of a court to order personal conduct, then here too the London courts never abandoned this as the king's courts did. But it was

the courts of the church that above all others proceeded in this way. The only known jurisdiction of the church which is obviously relevant is that over wills, and it is of particular interest that this did not extend to customary devises of freehold in towns. According to an early annotator of the late thirteenth century book known as *Britton*, "will and intention not carried into act are spiritual matters": but, he said, spiritual judges would lack the means of enforcing any judgment about freehold, and so of necessity these devises went to lay courts. The suggestion that early uses were enforced by the courts of the church has met with little favour. There is no evidence for it, and prohibitions would issue against suits concerning lay fee. But prohibitions would also issue against suits concerning lay chattels and debts, unless they arose out of wills or marriage; and we now know that later at least the church courts heard many suits about ordinary debts. Breach of faith was a sin, and it was as hard for the church to accept exclusion from certain kinds of subject-matter as it is for modern courts to define the categories of fraud. Until we know more than we do now about what the church courts were actually doing in the thirteenth and early fourteenth centuries, we cannot assume that they played no part. And if indeed they did play none, and if the matters now to be discussed were indeed a fresh beginning, it is still at least possible that some earlier idea or institution was lost when the lay and ecclesiastical jurisdictions were separated: lost because by nature it would belong to the ecclesiastical, and because the lay could not afford to release any important jurisdiction over land.

SITUATIONS IN WHICH ONE MIGHT HOLD FOR THE BENEFIT OF ANOTHER

Of the situations in which land was held by one for the benefit of another, those concerning the church will be considered first. An ecclesiastical body might figure, in modern language, as trustee or beneficiary or both. If it was trustee, then the enforcement problem would not arise. Indeed, the church would have

said, though in other language, that all its property was held upon charitable trusts; and as between one charity and another, the reality of the question lay in the internal accounting of individual religious houses: this income for the poor, that for the soul of the founder, and so on. As to what we should call private trusts, a religious house as such was probably disqualified from accepting property on such terms; though when uses became common, individual churchmen would often be feoffees to uses, and were perhaps amenable to ecclesiastical discipline even where a layman would not be.

More relevant, even if only because the problems became more visible, is the situation in which laymen hold for the benefit of a church. Two situations are discussed. The Franciscan friars were forbidden to own property; and difficulties arose over their houses. At the end of the thirteenth century attempts were being made in Rome to resolve these, naturally based upon civilian concepts. The friars might not have *dominium*, but they might have *usus* or *usufructus*. This was the background to a remarkable case in the year books of 1308, in which the Friars Minor of Oxford, in answer to a claim for certain houses in St Ebbes, say that they claim nothing *nisi tantum usum et aisiamentum*. They produce a grant which indeed purported to give them *usum plenarium et aisiamentum*, and claim that they are only tenants at will of the grantor's heir. The case never reappears, perhaps because the heir happened to be the king. But it is doubtful how far this situation can be regarded as in the main stream of development of uses. The Franciscans' problem was soon solved by allowing them to own their houses, and confining the prohibition to capital wealth; and they seem to play no later part in the story. But the 1308 case remains of interest. The grant of *usus* had surely been inspired by the Franciscans themselves, and if the matter was analysed at all it must have been in civilian terms. *Usus* here was not translating *oeps*, and the grantor probably did not see himself as, in our language, declaring a trust: he saw himself as giving a Roman right to use and enjoy. English law could accommodate this in only one way. The grantee

had to say that he was tenant at will, just as a villein must say of his holding; but he did not necessarily think himself rightless.

The other situation in which laymen might find themselves holding land for the benefit of a church was of general importance and may be in the main stream of uses. It arose out of the statutes of mortmain. This legislation was inspired by the same motives as *Quia Emptores*. Religious houses did not die leaving heirs, so that when land got into their hands, incidents were permanently lost. If we look solely at grantor and ecclesiastical grantee by subinfeudation, of course, the only loser seems to be the grantor; and why not? But there was a loss to his lord, whose wardship of the grantor's infant heir, for example, would bring in nominal services with no chance of a "wardship by reason of wardship" and so on; and if the grant was by substitution, as it would have to be after *Quia Emptores*, the loss is even more obvious. But as things turned out, it was the king rather than lords in general who gained by the legislation. While providing that land granted to religious houses should be forfeited to the grantor's lord, or if he did not act, to his lord and so up the tenurial chain, it also provided that any such grant might be made with royal licence. The result was not to prevent religious houses from acquiring land, but to make them pay money to the king every time they did so. And the further result was that land was often held by laymen to the use of religious houses. This was not at first a simple evasion. The price of a licence might be fixed after bargaining with the king, and the money might take years to raise. Religious houses buying or being given land were therefore forced to arrange for it to be held in the meantime by lay nominees, and there was no fraud about this. But it naturally became common to leave things as they were indefinitely, not bothering about the licence; and a statute of 1391, enacting that lands held to the use of religious houses were caught by the mortmain legislation, was inspired by this revenue interest. The provision about uses comes second in the act, which deals first with the unlicensed enlargement of parish graveyards; and the

numerous early licences in respect of small plots of land suggest that graveyards had indeed brought in a steady income.

GRANT AND REGRANT

This situation, then, although it might last many years, was probably always thought of as a temporary arrangement rather than an enduring relationship; and there is no difficulty in understanding how it became common although there was no legal means of enforcement. Few men in the fourteenth century would have dared openly to cheat the church. Even more obviously temporary, at first, was the next situation to be considered, and much the most important. This had nothing to do with the church and arose out of settlements. The preceding chapter described how the idea of ownership divided in time separated from the tenurial background in which it had begun, so that the various estates in land acquired an independent conceptual existence. This created a wish among settlors so commonplace to us that we can hardly imagine it as a novelty: they wished to include themselves in their own settlements. The principal motive for this will be explained later: it is of central importance. But perhaps first came the tenant who saw that his lord's right of wardship would be diminished or circumvented if his land were held by himself and his wife jointly for their lives, to go to his heir only after the death of the survivor. Then perhaps there came the tenant who could recognise his fee as a fee simple and could know that a more limited kind of fee existed, the fee tail, and who wished to make himself tenant in tail or tenant for life with remainder over in tail. Many problems grew out of this, one already noted. This kind of settlor would normally start with a fee simple, and would wish it ultimately to remain with his own heirs general; and he would thereby raise the question later associated with *Shelley's Case*.

But a more practical and immediate difficulty confronted him: the law did not cater for a grant to oneself. Even if livery of seisin is seen as just a required formality, a man could not deliver

to himself. But of course the incongruity was deeper than that; livery of seisin survived from a world which did not have to accommodate so metaphysical an operation as changing one's estate. The tenant in fee simple who wished to settle upon himself and others had therefore to begin by granting his fee simple to a third party; and the third party would actually make the settlement. For the sake of what simplicity could be had, this was ignored in the chapter on settlements; but it was common, and the artificiality thereby introduced into the warranties surrounding many settlements may have played a part in the devices by which they came to be broken. That, however, is by the way. Our interest is in the third party to whom the land was granted for the purpose of his granting it back again. While he had it, he was clearly holding for the benefit of others.

In itself this situation was within the reach of the common law. If the grant to the third party was made conditional upon his carrying out the regrant, and he did not do so, then the grantor could re-enter and take back his original estate. He would have failed of his purpose, but he would not have lost his land. This was established by the middle of the fourteenth century, but we do not know how old it then was; and as time went on, certain limitations appeared upon its usefulness. The first is obvious enough. A grant could not be conditional unless the condition was known when the grant was made. The settlor must declare the terms of his settlement when conveying to the third party; and any change of mind might imperil titles under the settlement. The second limitation, not unconnected with the first, has already been mentioned. Only the grantor or his heirs could re-enter for breach of condition; and they could apparently always do so if the condition had not been satisfied even though the third party intended to do what he could to satisfy it. Suppose that a grantor conveyed to a third party intending that the land should be reconveyed to the grantor for life with remainder to his younger son; and suppose the grantor died before this reconveyance was made: the elder son could re-enter as heir and so defeat the younger. The condition in short was not wholly satisfactory even for the

protection of the simple grant and regrant, being at once too limited in scope and within that scope too strict. Grantors seem to have relied rather upon the good faith of their grantees, often choosing churchmen.

RELATIONSHIP WITH DEVISE

Of all the situations considered, this is most likely to be the origin of the use. The connection will be traced in detail, if at all, only by the accumulation of evidence about actual dispositions. But it will probably turn out that the landowner who desired to change his estate was not a rare but a frequent figure, and that he merged imperceptibly into the testator. Consider again the grantor who desired a reconveyance to himself for life with remainder to his younger son. Since, with customary exceptions, freehold land could not be devised by will, this was the only way short of an out-and-out gift in his lifetime by which a landowner could provide for his younger son, or for anybody except his heir. But if he made the grant to the third party conditional upon the regrant being made, his heir might be able to re-enter for a technical breach in various events including his own premature death. He might therefore expressly make his grant to the third party unconditional, and simply trust him. But if he was willing to do that, there was no reason why he should not go a step further. Instead of deciding now what to give to his younger son and what to his daughter, he could postpone the choice, could indeed make a will. He would have to grant now to the third party, taking back the land for the rest of his life under some nominal transaction; and the heart of the arrangement would be that the third party would ultimately convey according to directions to be declared in his will.

Before turning to the implications of this, it is desirable to be clear about what we know and what we can only conjecture. We know that, when uses were an established institution, one of the most important purposes for putting land into uses was to secure a power to devise. In the present state of knowledge it can only be

conjectured that this was neither a new employment of something which had come into existence independently, nor a sudden invention which was itself the true origin of uses, but a natural development from the grant and regrant. When capital wealth was entirely in land, primogeniture and the absence of any power to devise meant that most rich men could not provide after their death for younger or illegitimate children, for their souls, or even for their creditors. Their chattel wealth was divided equitably; but it would be relatively tiny. And so far as land was concerned, feudal principle allowed no concession to human feeling beyond the widow's dower. Even the dynast dying with all his wealth in fee simple may have felt the position to be unsatisfactory, since he could not protect his grandson against alienation by his son. In these circumstances the pressure, the demand which conveyancers were constantly asked to meet, would be for means of diverting property or its control from the heir after the client's death. Some magnates may have bought customarily devisable tenements precisely in order to have an investment at their free disposal. But normally the only advice conveyancers could give would be to make an *inter vivos* grant: and since most people desire to enjoy their property during their own lifetimes, this grant would normally be a settlement upon the settlor himself with remainders over.

If this is right, the rule that one could not change one's estate without the interposition of a third party is not just one of a series of small matters from which uses developed. It was a small thing in itself, a technical accident, but it affected an operation which many people desired to carry out. By a further and very English accident, the only protection which the common law could give against the third party was the condition, and this could benefit only the heir, so that the arrangement could be upset by the very man it was meant to exclude. The third party had therefore to be trusted, but if he was to be trusted, why not trust him to convey after the settlor's death rather than now? And so the institution of the use and the will of land grew together, and essentially by accident.

THE FEUDAL INCIDENTS

If this was the plot, one would expect a sub-plot. Behind the heir there was always the anxious figure of the lord: what would not descend to the heir on his ancestor's death would equally not come by way of wardship or escheat to the lord on his tenant's death. *Quia Emptores* and the statutes of mortmain had protected the lord against grants by his tenant which permanently impaired the incidents arising from the tenure. But as to ordinary individual grants, the lord had to take his chance. If a dying tenant with an infant heir conveyed to a healthy young man, the lord lost that particular wardship; but his right to incidents continued in respect of his new tenant, and he could not object to the conveyance. Only the king retained the old power of all lords to insist that grants by their tenants needed their licence.

But suppose that the dying tenant with an infant heir conveyed to that heir. This was an ordinary individual grant and also an ordinary individual cheat. The heir was to be smuggled in duty-free as purchaser; and in 1267 statute provided that the lord should none the less have his wardship. The same statute also discloses a more sophisticated device. The tenant would convey his land by subinfeudation to third parties, reserving a rent service at least as great as the annual value of the land, and falsely acknowledging that this was paid up to a certain future date. This date was that at which the infant heir would come of age. The third parties were accomplices always intended to surrender to the heir at that time, and any temptation to keep the land was repressed by the large rent-service that became payable. The statute provided that the lord could bring the ordinary writ claiming wardship against the third parties; and if the arrangement was found by inquest to be collusive, it was treated as a lease for years over which the right of wardship took precedence.

Quia Emptores, by prohibiting subinfeudation in fee simple, would on the face of it have put paid to that device, though at least one conservative estate planner seems to have tried to do it incongruously with an entail. But the growth of the conditional

grant, which worked independently of tenure between the parties, in fact enabled the same thing to be done more simply. The tenant would make his grant to the third party conditional upon his regranting to the heir when he came of age: if he did not, the heir could simply enter. In the middle of the fourteenth century the courts were apparently prepared to apply the 1267 statute to this, making inquiry into collusion. But of course the terms of the problem were rarely so straightforward, the grant to the heir often being one of several possibilities in alternative events; and the year books echo predictable arguments. Was the arrangement immune if the grant to the third party was not conditional but absolute, so that there was no legal protection for the heir? Was it necessary to defeat wardship that the heir should in fact be intended to take nothing?

The upshot seems to have been that only blatant transactions were in danger, in which not only was the land to come back to the heir, but also the heir could enforce the condition. This was in the spirit of the 1267 act; indeed it was as close as could be to the letter. It was also in accord with current notions of a lord's rights. The lord could not object to any grant that his tenant might make, except one designed to circumvent his wardship and still carry the land directly or indirectly to the heir. He could not attack a grant to a younger son, nor one to third parties to convey to a younger son, nor any other that disinherited the heir.

The question of the lord's rights was thus asked and answered in terms of grants: what mattered was whether the ultimate grantee was to be the heir or another. But as the grant for an immediate regrant slowly turned into a grant for regrant according to the grantor's will, as a transaction turned into a lasting relationship, these ceased to be the terms of the problem. It would then often happen that the death of the true tenant was bridged by third parties holding the legal title; and it might seem that the third parties were the lord's tenants and that it was to their deaths that he should look. There is little reason to suppose that anyone would have thought this a proper approach, just as today nobody would wish to levy estate duty on trust property when a trustee

dies. But it would any way have been unthinkable for a reason best understood in terms of the grant and regrant. In that transaction it was usual to interpose not a single third party but several, and this was not just to guard against simple betrayal. If the land was held by a single third party who died, it would pass to his heir, his widow in dower, the lord in wardship or escheat and so on; and these might seek to keep it. By granting to a plurality of third parties in joint tenancy, the grantor ensured that the land would stay in the hands he had chosen, because on the death of one his title would accrue to the others. This was in a sense therefore a conscious safeguard against claims by the lord or others; but it was not a cheat to which lords would object. The grant and regrant was a proper transaction which they themselves employed, and the need to interpose a third party at all probably seemed a technicality which must not be allowed to have undesired effects.

As the title of the third parties ceased to be a merely temporary thing, it thus developed into an unassailable mortmain to which lords could not have looked for their incidents. But there is no reason to think that they would have looked in that direction any way, would for example have thought it right to take incidents if by accident there was a single feoffee who died. Their attention was always concentrated upon the realities of the situation not its technicalities, and their concern continued to be with the death of their original tenant, the feoffor, and the succession of his heir. But because their defences were against the heir coming in by grant, they were still defeated when the matter ceased to be seen in terms of grants and regrants, when a transaction lengthened out into a lasting relationship.

USES AS AN INSTITUTION

That defeat provoked counter-measures which were to transform the common law of property. But before turning to them, or to the way in which the defeat itself came about, we must face a question so far evaded. When and how did a situation become

an institution? But events evaded that question too. The meaningful questions are two. The first is about the factual situations, and it will be answerable, if at all, only by assembling the evidence about actual dispositions in the fourteenth and fifteenth centuries. Even if this account is right in outline, we do not know when it became common for grants to be made with the intention that the land should remain in the hands of the third parties for some time. The landowner who wished to provide for persons other than his heir, and who began by intending an immediate regrant to himself with remainders over, did not turn himself into a testator in one imaginative leap. In between he probably went to the wars, and his feoffees were to regrant to him if he came back, to others if not.

The second question is when and how this situation or these situations generated a distinct legal concept. Both answers are to be sought in legal and official treatment, but the evidence is slippery. Statutes about situations, for example, tell us no more than the situations themselves. The earliest commonly cited is one of 1376, the first of a line about debtors who grant their property to others for their own benefit and then take refuge from personal process in certain liberties. Then comes the act of 1391, already mentioned, which subjected land held for the benefit of religious houses to the mortmain law. But there is no reason to think that the two draftsmen saw themselves as dealing with the same problem. A general act of 1398 about forfeiture for treason and a series of later acts about particular traitors show that the factual situation was becoming increasingly common among great landowners; but only a contemporary index listing these acts under "uses" as well as under "forfeiture" and "treason" would tell us what we want to know. Indeed if we accept such a linguistic test as valid, seeking the word "use" as a noun capable of going into the plural as in our modern "law of trusts", we may have to postpone the emergence of a clear concept until the sixteenth century.

But that test might well not be satisfied until there was a substantial body of learning to which lawyers would wish to make

compendious reference; and that learning must largely have grown up around the doings of the chancellor. About these we know as yet very little. We do not know at what date, or at what stage in the evolution of situations, he first intervened at all. Probably it was near the end of the fourteenth century, and when lawyers were still thinking in terms of grant and regrant. Certainly one must not imagine any chancellor ever able to ask himself, "Shall I protect uses?" The earliest intervention may not at the time have seemed important. For feoffees to concur in dishonesty would be rare, and so outrageous that its prevention would not be striking. The first initiative may even have come from feoffees themselves, perplexed when their instructions were frustrated by a death.

The decisive happening would not be intervention in blatant cases but the formulation of rules in cases in which the result required by justice was not obvious. And here the present difficulty merges into an earlier one. When can we think of the chancellor as formulating rules at all? The rise of the equitable jurisdiction and the rise of uses have been considered separately by historians, who have assumed the former as a necessary condition of the latter. But it is likely that uses were as much a cause as a product of regular chancery intervention, of an equitable jurisdiction which would evolve into a secondary system of law. Most other kinds of early case came to the chancellor because the normal legal machinery had given or would give an unacceptable answer. If the parties had behaved on the basis of any legal assumptions, it was the normal machinery that they had assumed. But it was otherwise with the kind of situation now being considered. Landowners were being advised to entrust their wealth to arrangements which, as their advisers knew and intended, were outside the reach of the common law courts. The chancellor's must soon have been thought of as the ordinary jurisdiction for such matters; and, if it is too much to say that he must have come under pressure to declare principles, lawyers must at least have wanted to know what he was likely to do in various circumstances.

All this is reflected in the year books. They tell us nothing of the earliest stages of chancery intervention. Their first notice, in the second half of the fifteenth century, is of morally neutral questions to which the chancellor is having to give "legal" answers. At first these questions seem almost always to arise out of a grant to feoffees to perform the feoffor's will. Instead of declaring his will and dying in an orderly manner, the feoffor has either died without declaring his will at all, or he has declared it twice. In either case the question is not whether the feoffees are bound, but to whom. When the feoffor had not declared his will at all it was easy to say that his heir should have the subpoena, but further sophistication was inevitably required: should it be the heir general or, which might not be the same, whoever would have inherited that particular piece of land? And suppose the feoffor had been hanged for felony so that at law the land would have escheated?

More fundamental to our eyes would be the problem raised by the feoffor who had declared his will twice, and in favour of different people. If the first beneficiary had acquired an interest, the second declaration must be ineffective; and if the question had been asked in those terms, a definite answer could hardly have been avoided. But it arose not in terms of present interests or subsisting relationships, but in the less exacting terms of conveyances. The intended function of the feoffees, and what the chancellor would compel them to do, was at first simply to make a conveyance as required by the feoffor. They were his agents for that purpose and any instructions he gave were revocable by him until they had been acted upon or until his death had made further change impossible. The expression of his will that came normally to matter was thus his last will. But to this there was from the beginning an exception, deriving no doubt from the common law condition in a grant and regrant: if at the time of the feoffment the feoffor gave directions to his feoffees, for example to regrant in tail, he could not change them. But not until well into the sixteenth century does it seem that any instruction given after the feoffment could without more confer an immediate

irrevocable right upon the beneficiary: not until then, perhaps, is anybody thinking primarily in terms of a subsisting relationship between feoffees and beneficiary.

If therefore the use seems to have come into being by stealth, this is probably because what was happening did not attract attention. Landowners and lords, lawyers and even chancellors were all thinking mainly in terms of conveyances. There was nothing occult about what was going on, but it was not seen as involving legal apparatus beyond the familiar learning of the conveyancer. The limited decisions of a legal nature that the chancellor was being compelled to make, so important to hindsight, probably seemed peripheral. In one sense the origin of the use was not a change in the world of fact but a shift of attention: men began to think in terms of a present relationship rather than a future transfer. To Littleton the whole practice deserved only one sustained mention. That was about a relationship, but a strictly legal one: what was the technical position of a feoffor who had conveyed to feoffees to perform his last will? Was he their tenant-at-will or what? And even this question arose out of an academic problem in conveyancing: could the feoffees pass the legal title back to their feoffor by a simple release? Yet Littleton, when he died in 1481, like all his substantial contemporaries left a will disposing of lands held by feoffees.

For Littleton as a lawyer, in short, there was nothing much to discuss; even had be been a commentator on social habits, there was nothing new about what landowners were doing. What seems to us his blindness—his inability to see with hindsight—is shown most clearly by his having missed what a little later would have been almost the point of his own discussion. The man who enfeoffed others to perform his last will remained on the land, looking and often behaving as though the legal title were still his. And if, without doing anything to get it back from his feoffees, he proceeded to make new dispositions, he was laying up trouble for his purchasers and their successors, "insomuch that no man that buyeth lands . . . be in perfect surety, nor without great trouble and doubt of the same". The words come from the

preamble of a statute passed in 1484, and described by modern writers as having conferred upon *cestui qe use* the power to convey a legal estate. That was the effect; but the spirit was rather that which today protects the second buyer of a chattel against the first when the vendor has stayed in possession after the first sale. The intention was not to help *cestui qe use* do as he pleased, but to safeguard those who dealt with him in the belief that he still owned the lands he still occupied.

This statute was of great importance at the time for what it did, and is of great importance for what it shows us. As to what it did, the feoffees were overridden only if at the time of the dealing in question they held solely to their feoffor's use. Over and above the factual disputes this was likely to generate, it gave new weight to the problems about the effect of a declaration of his will by the feoffor. Particular trouble arose if the feoffment had at the time been made for the feoffor himself in tail: the statute expressly exempted rights under the entail from its operation, and it became a question whether they could by any means be barred. But difficulty could arise in the ordinary case of a feoffment to perform the will of the feoffor. If he gave his feoffees a general direction in favour of one person, and then sold part of the land to a second, the second would be protected under the statute only if the direction to the feoffees had given no right to the first. The question which could hitherto arise only before the chancellor, and only in the terms of his choosing whether to decree a conveyance in accord with an earlier or a later declaration of will, would now arise in a common law court in an action to try title. The rapid crystallisation of rules was inevitable. The evolution of the use as an entity with known properties may well, therefore, owe more to the common law courts than to the chancery; and it is even possible that it was the shared jurisdiction over uses that truly started the process by which equity was to harden into a new system of law.

THE MISCHIEFS OF USES

What the statute of 1484 did, therefore, was to compel decisions which would settle the properties of the use as a relationship between feoffees and beneficiary. But its mere enactment shows how and why attention was beginning to focus on that relationship, on the existing state of affairs, instead of on the conveyance by the feoffees which would bring it to an end. The technical position as between *cestui qe use* and the land, as between feoffor and feoffees, had attracted the passing curiosity of Littleton. But the factual position was now producing the mischiefs inevitable whenever a legal title can be locked away, however innocently, without any change visible in the real world.

But purchasers and creditors were not the only victims: loss was suffered also by feudal lords. Their rights had been carefully defined: the lord was entitled to incidents out of what descended to the heir on the death of his tenant. The tenant could grant away what he liked in his lifetime, and equally grant it to feoffees to dispose of according to his will after his death; and the lord, though he might suffer a loss, had no complaint. When everybody was thinking of such arrangements in terms of conveyances, the only discernible mischief was the grant to feoffees to regrant to the heir; and if the grant to the feoffees was conditional upon their making such a regrant, the lord could attack it as collusive and still get his wardship.

From the lord's point of view this scheme, measuring his allocation by the heir's, was broken down when a feoffment to uses became an object in itself. There was no mischief so long as the tenant conveyed to his feoffees only such land as he actually left away from his heir. But if for example he conveyed all his land to feoffees to perform his will and died without declaring any will, the lord got nothing although the heir got all. The heir was as well protected by the chancellor as he would have been by any common law condition, would succeed to the land as certainly as if the feoffment had never been made; but the lord's incidents were lost between the two.

Once again we cannot be sure what happened until we know more about actual individual dispositions. But it is likely that this situation first arose by accident, the feoffor having conveyed to feoffees only such of his land as he intended to leave away from the heir, and having died before he could declare his will. The chancellor had no difficulty in deciding that the heir must have the land; and a year book note about the possibility of an escheat for felony is so emphatic in tone as to suggest that no claim by the lord would have been seriously entertained. Conscience required that the feoffees should convey to the heir, and if the lord thought he had a claim he could pursue his legal remedy: it was nothing to the chancellor that, since the conveyance had not been collusive, there was no legal remedy.

What the chancellor's attitude would have been to a feoffment made for the purpose of evading incidents we do not know. Nor do we know when or even whether feoffments came to be made with that as the primary purpose, and good evidence will be hard to come by. A statute of 1489 deals with the feoffor who "dieth his heir being within age, no will by him declared nor made in his life", and though it speaks of fraud, this seems to describe the effect rather than the intention. As with the Statute of Marlborough more than two centuries earlier, the remedy is to give the lord a writ of wardship. But this time his entitlement is automatic, and there is to be no inquiry into the state of mind of individual feoffors. In 1504 the principle was extended to socage tenure: "after the death of him to whose use any person or persons . . . be seised, and no will thereof declared", lords were to have their reliefs, heriots and other dues as if he had died seised. These statutes exactly subject the new situation created by the chancellor's decisions to the traditional rights of lords: equitable inheritance was equated with legal.

Like that of 1484, these statutes are important both for what they show us and for what they did, or, in this case, did not do. Although by this time other duties to convey, such as that arising from a bargain and sale, were also regarded as creating the immediate proprietary relationship of a use, the statutes show that

cestui qe use was still typically the man who had made a feoffment for the purpose of declaring his will. But what they did was in no way an attack on that practice. They accepted the feudal loss caused whenever land was left away from the heir, and sought to secure the most important feudal rights—wardship in chivalry and relief in socage—only in respect of what actually descended to him. Nor, although that of 1489 made special mention of the king, do the statutes protect only the royal interest. Feoffments for the purpose of making wills were causing genuine mischiefs, feudal and other, to subjects as well as to the crown. Those mischiefs were countered piecemeal, and the counter-move in each case inevitably took the form of allowing victims to proceed as though *cestui qe use* had been himself seised. But there was no sign of a radical attack on the situation as a whole.

THE STATUTE OF USES

Such an attack was made in 1536 by the great Statute of Uses, or, to give it its proper and more significant title "An Act concerning Uses and Wills"; and the solution adopted was precisely to enact that *cestui qe use* "shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession . . . to all intents constructions and purposes in the law". Before turning to the nightmare results elicited from this, something must be said of its aims. The preamble begins by recalling that at common law land was neither devisable nor transferable *inter vivos* without livery of seisin or the like, and then proceeds to catalogue the mischiefs resulting from the circumvention of this principle. Three deserve attention, two because they are familiar, the objects of the acts just considered: titles have been made insecure, and lords have lost their incidents. But the third is new. From the evils which could flow from the means by which wills of land had to be made, the attack is extended to the making of such wills as a thing in itself: the dying are influenced by those who scheme to gain by the unjust disherison of heirs.

This last probably reflects nothing but the financial aims of the

crown. The special concern of the king with the evasion of incidents needs little discussion. What a lay subject lost from his tenants would be balanced by what he saved from his lord on his own death. But there was no compensation for the king who was never tenant or, though this is not now relevant, for a religious house which never died. To the king, moreover, far more than to other lords, wardship was of particular value. On the death of a tenant-in-chief his prerogative brought him the wardship even of lands not held of him. It also brought him the wardship of the heir, the ordinary rule allotting the person of the heir to the lord of the oldest feoffment being displaced by the liege rights of the crown. For a long time the crown was content to secure these, which it could do by refusing to license an alienation by which the tenant parted with all the lands that he held in chief.

But the value of wardship and marriage was diminished by a will which left land away from the heir; and the crown had been attacking devises even before the Statute of Uses. The act of 1489 applied only when *cestui qe use* died without leaving a will: it did not even contemplate a devise to the heir. But a landowner might well require his feoffees to raise money out of certain lands for the payment of debts or like purposes, and when it was raised to convey to the heir. Such a disposition by a tenant-in-chief appears to have been the basis of a claim by the crown, in a great case in the very year of the Statute of Uses, that his will was collusive. Despite argument that fraud could not be imputed to a man facing death, the will was indeed held collusive. It has been suggested that the crown's claim was more broadly based than that, and that the attempt was to render any devise vulnerable; but even without taking so extreme a view, it is probable that an attack upon a devise as such was part of the campaign which culminated in their abolition by the statute.

To the political and institutional historian, therefore, the financial motive of the Statute of Uses seems uppermost. It is part of the astonishing fiscal feudalism of the Tudors, soon to be embodied in that most effective of anachronisms, the court of wards. But

the legal historian, contemplating the consequences of the statute, will do injustice to the royal advisers if he takes the whole affair as an accident in which the law happened to be involved. Whatever the special loss caused to the crown by devises, the general mischiefs of the machinery by which they were made are beyond doubt. The purchaser of any land had to reckon that his vendor might have conveyed it to feoffees; and if the statute of 1484 had given him a chance of winning the resulting law-suit, it had not reduced the chance that a law-suit would result, that a claim would be made by persons deriving title from the feoffees. Legislation suggested in 1529 would have disposed also of two other sources of uncertainty: uses would have been made void unless registered; conveyances would have required both registration and public proclamation; and entails, except for those of the nobility, would have been abolished and turned into fee simple. Neither in this nor in any other branch of the law was such radical reform considered again until the nineteenth century, and even today it is possible to regret that these proposals were not taken up.

THE STATUTE OF WILLS

The Statute of Uses itself attempted less, and within its narrower ambit proved to be too radical. One cannot take legal problems out by the root, when the root is so reasonable and so universal a wish as to be able to provide for persons other than the heir. The statute allowed a short period of grace during which the wills of those dying would continue to be effective; but thereafter the landowner could provide for his creditors, younger children and so on only by *inter vivos* grant. This was intolerable, and in 1540 there was passed the Statute of Wills restoring a power of devise. The preamble, dwelling mainly on the king's benevolence, explains the mischief in terms of a conflict between social obligations and capital structure: subjects who maintain their fitting standard of living and bring up their children properly are unable also "of their proper goods, chattels and other moveable sub-

stance, to discharge their debts, and after their degrees set forth and advance their children and posterities".

The statute is long and complicated, and three years later required long and complicated adjustment. In its concern with the financial details, for example, it used language which made it possible to argue that an entail could be broken by simple devise. The provisions came to this. Socage land was made freely devisable with no general saving of lords' rights; but the king's rights as lord were fully safeguarded, mainly by treating the devisee as though he were heir. Of land held in knight service only two-thirds could be devised. The king and all other lords would have their wardships of the remaining third part, and lords other than the king would have to be content with that; but the king, who could exact a payment when his tenant-in-chief alienated *inter vivos*, could do so equally upon a devise. The opportunity was also taken to exact this payment when a tenant-in-chief suffered a recovery, now seen as just a conveyance.

That a devise should operate as a direct conveyance, its validity questionable like that of any other conveyance only by a common law action to try title, was inevitable when testaments of personalty remained under ecclesiastical supervision. Not until the Land Transfer Act of 1897 did land pass through the hands of executors or other representatives. Not until the Wills Act of 1837 were wills of land and testaments of personalty subjected to the same formal requirements, though the Statute of Frauds in 1677 had imposed an unfortunately worded need for witnesses to wills of land. The Statute of Wills itself had required only writing. More striking still was what happened to land not devised. Not until 1925 was the heir put down, so that land and personal wealth were shared out similarly on the death of an owner intestate. But since 1660, with the abolition of the military tenures and therefore of any restriction on the power to devise, the heir had been no more than the person who succeeded to land when there was no will. Only "To A and his heirs" survives today, with the equally meaningless "fee simple", to remind us of the journey our land law has made.

To Henry VIII and his advisers in 1540 it probably seemed that the Statute of Wills was the end of a story. St Germain, writing his second Dialogue between Doctor and Student a few years before the Statute of Uses, makes his Doctor ask why people put their land into uses. The Student, ante-dating the institution as lawyers and historians have done ever since, first runs through the statute book: lands were put into uses to avoid mortmain, to defraud creditors and so on. But then he gives two principal reasons: for the making of wills, and for the "surity of divers covenants in indentures of marriage and other bargains". To the second of these we shall come back: the royal lawyers were conscious of it, though perhaps not conscious enough. But as to the first, even if they could not look back as we can and see that uses and devises had probably grown together, even if they thought that the devise was only one application of the use seen as a distinct entity, still they saw it as by far the most important application. The Statute of Uses, their "Act concerning Uses and Wills", had abolished both together. The Statute of Wills had revived the devise, but made it operate directly at law and not through the old mechanism. With a single and partial exception shortly to be considered, the use almost certainly seemed dead. But it was only cut in two, and it had two lives ahead of it.

USES AT LAW

One of these lives was a brilliant and disreputable career at common law. The Statute of Uses worked by "executing the use", transferring the legal title to *cestui qe use*. When persons were seised, "or at any time hereafter shall happen to be seised" to the use of others, those others were to "stand and be seised, deemed and adjudged in lawful seisin, estate and possession . . . of and in such like estates as they had or shall have in use, trust or confidence . . .". The draftsman spoke in the present and the future tenses. In using the present tense he must have been envisaging two principal situations. One was the living *cestui qe use* who had made a feoffment for the purpose of declaring his will but

neglected to die within the permitted time: the legal estate was simply to return to him in one piece. The other was the testator who had already declared his will and died, or who died within the time limit, but whose feoffees had not yet made the estates directed: these might be quite elaborate settlements, and it was for the beneficiaries of these that the reference to "such like estates as they had or shall have in use" was probably thought necessary. But this second situation could not arise in the future: one dying after the time limit would be deemed to die seised, and his will would be of no effect. Apart from the short transitional period, then, it is probable that when the draftsman used the future tense he had the first kind of situation in mind. The statute would have an essentially negative operation, merely nullifying any attempt to arrange that one's land should be held by others for one's own benefit, whether in order to declare a will or for more nefarious purposes like defrauding creditors. It is unlikely that he was thinking in terms of a positive operation, of the statute carrying the legal estate from a feoffee to a third party beneficiary, because he saw no point in making a feoffment for the benefit of a third party. Events and lawyers proved more imaginative. The execution of uses, so far from being a kind of sanction invalidating undesirable transactions, became a desirable end in itself. Conveyancers made grants to uses knowing that they could not have their expressed effect, but intending that the Statute of Uses should play upon them and produce results otherwise unattainable.

USES AND CONVEYANCING

These results still exist in many common law jurisdictions; and in England they existed recently enough to be still explained in books on real property. They will therefore be discussed only in outline. But first must come the least spectacular, because it is one that the draftsman probably did foresee; and it might have put him on his guard. This was the bargain and sale. The chancellor had long since decided that the duty to convey

arising out of a contract to sell land was one that he should enforce; and from this it was deduced, when the proposition became meaningful, that the vendor held to the use of the purchaser. St Germain, a year or two before the Statute of Uses, had mentioned bargains and agreements together with the making of wills as circumstances bringing uses into being. It has been assumed, probably rightly, that the draftsman anticipated the effect of the Statute of Uses on this, namely that the mere contract would convey a legal title without livery or the like, and so would work one of the very mischiefs the Statute was designed to frustrate.

This mischief was prevented by the Statute of Enrolments of the same year. It provided that no land "shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof" unless the bargain and sale was embodied in an indenture and registered. It is not quite certain that the draftsman saw this, as has been assumed since Bacon's time, as a sort of proviso to the Statute of Uses regulating one of its side effects. The two acts are separated by others "for the true making of cloth" and the like, and neither refers to the other. The Statute of Enrolments, moreover, has a partly independent ancestry. In 1529 the registration of all uses and of all conveyances had been suggested; and for conveyances there had since been another comprehensive scheme. It is therefore not impossible that the Statute of Enrolments was intended to establish affirmatively that a registered agreement should operate as a conveyance, in the hope, not at once fulfilled, that conveyancers would prefer registration to livery of seisin. And although the negative language makes it more likely that it was indeed in the nature of the proviso to the Statute of Uses, the separation from that Statute still suggests that there was an element of afterthought, and that this part of the registration scheme was saved or resurrected because somebody had realised the special need. That registration for its own sake had been considered earlier is not conclusive

evidence that the draftsman of the Statute of Uses foresaw what it would do to a bargain and sale.

As a safeguard for the public, the registration required by the statute eventually proved almost as useless as livery of seisin. It did not cover all uses raised by promises to convey. To return once more to St Germain, writing before the Statute, he had coupled with bargains "divers covenants in indentures of marriage". In later language, a covenant to stand seised in consideration of marriage or of natural love and affection also raised a use; and this was executed by the Statute of Uses although not caught by the Statute of Enrolments. Family settlements could thus be made to take effect at law, passing legal estates to the beneficiaries, although there was no means by which the world at large could know about them. Ingenuity later found a way of doing the same upon ordinary sales. The vendor bargained and sold not his freehold but a term of years. He thereby became seised to the buyer's use for the term, and this use was executed by the Statute of Uses to pass a legal term of years to the purchaser without his actually entering upon the land. But although within the Statute of Uses, the transaction was not caught by the Statute of Enrolments, which spoke only of "any estate of inheritance or freehold", so that no registration was necessary. Having got his purchaser metaphysically in as lessee, but without any movement in the real world, the vendor would then release his freehold reversion, which could be done by a deed at common law.

This was clearly established by 1620. But not until 1841 did the Conveyance by Release Act allow the magic of the bargain and sale of a lease to be omitted; not until 1845 did the Real Property Act recognise that land could be transferred by a deed of grant; and not until 1925 was the possibility of livery of seisin finally abolished. Livery of seisin had of course begun as something more fundamental than a mere formality designed to signal the invisible passage of an invisible title. But in this respect Henry VIII's advisers lived in our world: they rationalised the matter in this way, and suggested the better method of registration. Four hundred years later we have still not realised their vision.

LEGAL EXECUTORY INTERESTS

The story of the bargain and sale may thus point a dismal moral. But its main interest for us is in the fact that the draftsman of the Statute of Uses perhaps ought to have foreseen that he was supplying lawyers with a magical force which they could harness. The matter is usually put in this way. At common law settlements of land had to obey certain rules, especially those governing contingent remainders. A remainder had always to be supported by a prior estate, and had to take effect as soon as that prior estate came to an end; this was because there had always to be somebody seised. But equally a remainder could not intervene and cut short the prior estate; and this was to prevent conditions being used to create indestructible settlements. Then it is said that in equity before the Statute of Uses, with a fee simple continuously in the hands of the feoffees and continuously obeying the law, interests could be made to spring, that is to break the first of these rules, or to shift, to break the second. Then lastly it is said that when the Statute of Uses brought such interests into the law, it was decided after hesitation that they should retain the plastic quality they had enjoyed in equity and not in general be subjected to the rigid legal rules. The undoubted result was a new and distinct class of legal future interests, shifting and springing uses. They were brought into being by a conveyance expressed as granting the land to feoffees to uses; and the uses, being at once exposed like magic ink to the rays of the Statute, were transmuted into legal interests. For example a grant to feoffees to the use of one person in fee simple, but upon the happening of some event to the use of another in fee simple, produced a legal fee simple which the event would simply transfer from the one to the other. The feoffees were real people, but in the nature of a fiction: no real title ever lodged in them, although in order to explain events after the first vesting it became necessary to postulate a *scintilla juris* always existing in their persons. In the case of devises even this measure of intellectual satisfaction was denied to the audience. The Statute of Wills was understood by its language to have

enabled testators to produce these results even though the devise was expressed as conveying the land directly to the beneficiaries and not nominally to others to their use. Springing and shifting uses and executory devises, collectively known as legal executory interests, thus took their place beside entails and remainders to make the common law of future interests the most elaborate folly ever built by logic.

But it did not happen—one likes to believe that it could not have happened—quite in the simple stages represented. That representation assumes a starting-point at which there were visibly two sets of rules governing settlements, the legal and the equitable. But even the legal rules were by no means in their final form at the date of the Statute of Uses; and it is doubtful whether at that date equitable rules were seen to exist, whether it is real to imagine a settlor deciding to make a settlement in equity because he could not achieve what he wanted at law. St Germain's Student mentions no such reason why land should be put into use. Indeed, with the exception of bargains and agreements, his long enumeration considers only the case of one conveying to feoffees to his own use, including of course the one wishing to make a will; and his Doctor actually asks, "May not a use be assigned to a stranger as well as to be reserved to the feoffor, if the feoffor so appointed it upon his feoffment?" In that climate the only common approach to what we should call an equitable settlement *inter vivos* would raise no questions: it would be a grant for the purpose of resettling, when some accident intervened before the feoffees had made the intended conveyances.

The important case, here as elsewhere, was that of the testator; and it is improbable that even he was intending what we should call an equitable settlement. His will normally directed his feoffees to convey ordinary legal estates to his beneficiaries, and that in itself would equally raise no new questions. He might, however, and often did, require that the conveyance be postponed until the beneficiary reached a certain age, until money had been raised out of the land for another beneficiary, or until some other condition had been fulfilled or purpose achieved. To him,

thinking in terms of conveyances, these directions had no relation to the legal rules about future interests; but hindsight would say that he was creating interests in equity that could not be created at law.

The Statute of Uses and the Statute of Wills may be reconsidered in this light. The former did its damage by giving to beneficiaries "such like estates as they had or shall have in use . . .". But if equitable settlements *inter vivos* in our sense were unknown, and wills were to be abolished, the statute must have aimed these words, as already suggested, at the unexecuted wills of feoffors already dead or dying within the time limit. It provided that "all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease" before the time limit "shall be taken and accepted good and effectual in the law, after such fashion, manner and form as they were commonly taken and used at any time within forty years next afore the making of this Act . . .". This section, which had its own preamble, affirmed that such wills were valid; but it did not exempt their directions from the operation of the statute, and it is probably here if anywhere that the draftsman can be blamed for lack of foresight. But if he too was thinking in terms of directions to make legal estates, the one common situation for which he might have provided would be a direction to convey after a period in which the feoffees were to apply the income to some other purpose. And that situation may have been responsible for an important exception to the statute, unexpressed unless it can be read into this clause, namely that active uses were not executed. Apart from these expressly validated wills there is no reason to think that the draftsman could have foreseen the problem that arose, or asked himself whether or not uses executed by the statute were to obey the rules governing remainders. And the results which conveyancers were to abuse may first have been reached in connection with such wills.

Against that background the fate of the Statute of Wills was almost inevitable. The words which are usually taken to have done the damage occur in all its powers to devise: what the

testator may dispose of at all he may dispose of "at his will and pleasure". But again the conclusions reached were probably compelled by features of earlier wills about which the draftsman, mainly remembering wills before the Statute of Uses as directions to convey, was just not thinking. He saw himself as simply giving to the testator a power to do for himself what before he had to get others to do for him, and did not consider that one can tell others to do things in the future that cannot be done now.

No attempt will be made to trace the relationship between executory interests, once it was accepted that they were distinct, and legal remainders. The reports, especially for the critical early period, are fragmentary; and though the story probably can be reconstructed from the plea rolls, the obliqueness of litigation concerning land at this period will make this difficult. But, just as it looks as though testators before the statute were giving directions to their feoffees without much consciousness that they were controlling the devolution of their lands in a way that they could not have done by a settlement at law, so it looks as though the Statutes of Uses and Wills were allowed to operate on such directions still without regard to what could have been done by a direct legal settlement. The question whether the legal rules were applicable had thus been answered before being asked; and conveyancers were no doubt quick to take advantage of the freedom thus offered. As the sixteenth century advances, indeed, it becomes clear that the struggle is between conveyancers seeking to tie up their clients' land indefinitely, and courts allowing one expedient after another to defeat such arrangements. The final settlement of the rules concerning remainders themselves is part of this struggle; and so was an attempt at the end of the century to apply these rules to executory interests and thereby to make them destructible.

Dismal results followed. The danger of perpetuities was not removed, and great uncertainty was introduced. Bacon, lecturing on the Statute of Uses in 1600, described it as "a law whereupon the inheritances of this realm are tossed at this day, as upon a

sea"; and though he favoured the attempt to subject executory interests to the legal rules, he saw that it was adding to the uncertainty. The ultimate result of that attempt would have appalled him. This was the rule known by the name of *Purefoy* v. *Rogers*, a case of 1671. Expressed as a rule of construction, which might, especially in the case of devises, have made sense, it was an inexorable rule of law which for over two hundred years ordained a caprice. If the beneficial limitation could have existed as a legal remainder, it was to be treated as though it was one and therefore to fail if it had not vested when the prior estate fell in. In a gift to one for life, remainder to the first of his sons to marry, the remainder would fail if no son had married when the father died; and under the rule in *Purefoy* v. *Rogers* it was not saved by the whole settlement being made by devise or behind a grant to uses. But if the limitation would be simply void as a remainder, because incapable of obeying the rules, it was, if made by devise or behind a grant to uses, immune from them. A gift by will to one for life, and then to the first of his sons to marry after his death would therefore be good; and so, of course, would a gift by will in fee simple, to shift to the first son to marry at the time of his marriage. Results of real intellectual beauty and also of real injustice were produced, being mitigated only by the various statutes which in the nineteenth century made contingent remainders themselves indestructible. The process was all but completed by the Contingent Remainders Act in 1877, which in effect restored for the last half-century of the life of the Statute of Uses the freedom apparently enjoyed in its first half-century.

PERPETUITIES

But it was a freedom constrained by other rules, one of which still exists; that is the modern rule against perpetuities. For a long time the most likely means of tying up wealth indefinitely seemed to be the entail; and this was curbed by barring. Then there were attempts to set up entails which could not be barred, by providing that the interest of one trying to bar should go over to another;

and these played their part in the establishment of the rule that a remainder could not operate to cut short the prior estate, the rule against shifting. The rule preventing remainders from springing also had perpetuity implications. Not only was a settlor unable to limit an estate to arise in the future: he had also to reckon that unless his contingencies were satisfied and his remainders vested by the time the prior estate fell in, they would fail. It followed that limitations to unborn persons, necessarily contingent, were necessarily destructible. By the beginning of the seventeenth century there was no serious perpetuity danger in settlements at common law. A settlor who wished to reach beyond living persons had to use either an entail, which could be brought down by a recovery, or contingent remainders, which could fail naturally or be brought down by the holder of the prior estate destroying it artificially.

The belated attempt at the end of the sixteenth century to subject executory interests to the legal rules, in effect to abolish springing and shifting interests, was motivated by the perpetuity danger which they presented; and its failure, except to the half-hearted extent of *Purefoy* v. *Rogers*, left the danger standing. There then arose the connected question whether springing and shifting uses, admitting that they could be created, could not somehow be destroyed. There were three possibilities. Destructibility by artificial destruction of a prior interest was really ruled out by the logic of their immunity from the remainder rules. If an interest could spring up independently of any prior interest, it did not need the support of any prior interest; and it would not fail if a prior interest was destroyed. The analogy of contingent remainders was therefore no help.

A more likely possibility flowed from the logic of executory interests themselves or at least of some varieties. It would apply to shifting interests but was worked out with executory devises of terms. The most remarkable effect of the wording of the Statute of Wills was to allow something like estates to be created in terms of years. At common law a term could not be granted to one for life, remainder to another; and the result could not even be

achieved under the Statute of Uses because uses of personalty were not executed. But it could be achieved by devise. There was, however, a difference in analysis from freehold estates, because true estates in a chattel seemed to the lawyers against nature. The term was not thought of as divided between the holder for life and his successor: the whole term went to the holder for life, and after his death passed intact to the successor. The arrangement was seen not as a remainder but as a kind of shifting interest. But if the holder for life had the whole term, and the successor a mere possibility of getting it later, could not the holder for life destroy that possibility by disposing of the term in his lifetime? It appears that in the late sixteenth century the lawyers had accepted this outcome, presumably feeling compelled to it by logic, and that the chancellor had intervened to prevent it: he had compelled tenant for life to give security not to destroy the subsequent interest. In two cases early in the seventeenth century, perhaps following the chancellor's lead, such executory devises of terms were declared by common law courts to be indestructible. The earlier logic was simply stood on its head: "It lies not in the power of the first devisee to bar him who has the future devise, for he cannot transfer more to another than he has himself." Stout assertion by Coke worked many wonders.

The third possible means of destroying executory interests may be approached through these executory devises of terms. There was no perpetuity danger in a gift over after a life interest, and the courts refused to go further. If the devise of a term was expressed to be in tail, it operated as a devise of the whole term absolutely, and subsequent interests were simply void. This was indeed for fear of perpetuities. If there could be tenant in tail of a term he could not suffer a recovery: he could neither be seised himself, nor make anybody else be seised, of the freehold estate necessary to a real action. The ability to entail personalty was a treat reserved for the twentieth century. Within the sphere of executory devises of terms, therefore, the perpetuity danger was checked by the restriction to a life. But what about executory

limitations of freehold? If under a devise the whole term shifted from the holder for life to his successor, and still the latter's interest was indestructible by the former what about a shifting fee? It necessarily followed that a mere alienation by the first holder would not destroy the executory interest; but since this was freehold could he not conjure up the magic of a recovery? He could, but the spell proved not powerful enough. In *Pells* v. *Brown* in 1620 a father had devised freehold land to one son "and his heirs for ever", providing that if that son should die without issue in the lifetime of his brother it should go over to the brother. The first devisee, probably supposing his estate to be an entail though it was held to be fee simple, suffered a common recovery and died without issue devising the land elsewhere. His brother was nevertheless held entitled.

This was a momentous decision. Not only did it finally reject the argument that the legal remainder rules would apply and, in effect, prevent the existence of executory interests. It also finally held such interests to be indestructible by any means except by the act of their owners. There was of course no perpetuity danger in the case itself, because the gift over was to operate if at all upon the dropping of an existing life; but the mischief was pressed in argument, and subordinated to the hardship of allowing destructibility.

Perhaps this was the better choice. There had been much perversity in the results reached by reason over the entail and over contingent remainders, allowing the extravagant creation of settlements and countering the mischief by allowing their capricious destruction. The alternative mode of control, to which the courts were now driven, was to impose some initial limit upon the reach of settlors beyond which their dispositions would just be ineffective. Although undertaken by judges, this was an essentially legislative process motivated by policy rather than logic. But since courts cannot easily be explicit about such operations, individual decisions in the seventeenth century were justified by whatever line of argument lay nearest to hand. The result was that the nature of each limitation still seemed to matter,

for example whether the executory interests were in freehold or leasehold, whether the preceding interest was for life or something more. In the learned confusion only common factors could be discerned. Of these the most important came immediately from the executory devise of a term: if the fetter ended during the lifetime of a living person, there was a growing idea that this was innocuous.

Out of the welter the vision and strength of Lord Nottingham was able to extract a general rule. In the *Duke of Norfolk's Case* in 1681 he enunciated the basis of the modern rule against perpetuities. This took no account of the nature of the limitation as a whole, nor of the extent of the prior estate; nor did it concentrate, as some earlier decisions had done, on the moment of time at which the fee would become fully alienable. A contingent interest was good if the contingency had to be resolved within a certain period, so that the interest was incapable of vesting outside that period. The period that he set as clearly acceptable was that of a life in being, though he thought extension possible until experience disclosed some new mischief. The extension permitted in the eighteenth century was that of a minority, a throw-back to the idea that what mattered was the time at which the fee became alienable; and this in turn became the modern period of twenty-one years in gross.

Although the rule against perpetuities has produced its own complexities, unhappily doubled in England by recent legislation, Lord Nottingham's achievement in time reversed the process by which the law relating to settlements as a whole had been growing steadily more complicated. Because of the family settlement the entail and its barring had worked itself too deeply into society to be removed; and to our shame it survives in ghostly form today. But there was no reason to preserve the complications of contingent remainders and their destructibility; and they were by degrees equated with executory interests. The process reached its climax in 1925 when the varieties of future interests were reduced to one, controlled only by the rule against perpetuities.

RISE OF THE TRUST

That one was the future trust; and this chapter must end by returning to the Statute of Uses and asking how it is that we nevertheless have a law of trusts. It is a question easier to ask than to answer.

The traditional starting-point is the proposition that there were three kinds of use which the statute did not execute: the use of property other than freehold; the active use, in which the feoffees had positive duties to perform; and the use upon a use. The last of these is a great mystery, and will be deferred. The first is said to flow from the word "seised" in the statute; and the second, most obviously justified as a necessary exception, can be referred to the passive mood of the same phrase: "when any person or persons stand or be seised . . . to the use, confidence or trust of any other . . .".

For these two, however, it will be convenient to begin before the statute. Personal property, including leases, might well be devoted to charitable purposes or the like; but this would most often be by will and the immediate jurisdiction would be that over executors. Since such property could be freely disposed of by will, moreover, there was no need for a testator to grant it away in his lifetime, as he had to do to make a will of freehold. If the statute was really about wills of freehold, other property was outside its contemplation; and this is in a way confirmed by the preamble to the Statute of Wills which says that the power of devise is being restored because a man's "proper goods, chattels and other movable substance" is normally insufficient to provide for his creditors, younger children and so on. Nor is it just that uses of personal property were not and were not intended to be executed by the statute. The phrase itself would probably have seemed a contradiction in terms. Almost the only motive for an *inter vivos* arrangement which could be so described would be to defraud creditors; and an act of 1487, the latest of a series dealing with this, instead of speaking in terms of collusion as the others had, declared deeds of gift of chattels "of trust, to the use of" the

makers of those deeds to be simply void. Not until the middle of the sixteenth century does it seem to have been settled that this applied only to dispositions in fraud of creditors. And although it was clear, at any rate in the second half of the century, that the Statute of Uses did not execute uses of leaseholds, it appears also that chancellors were reluctant to intervene on the ground that long terms could be employed to defraud the revenue. It is therefore possible that there was no real continuity of equitable interests in personalty before and after the statute in the sense usually understood, and that the trust of personalty really began later. In the case of leaseholds a desire to evade the feudal dues of the crown may have played a part in this; and another part may have been played by the movement into chancery of testamentary trusts. What seems fairly certain, here as elsewhere, is that the draftsman of the Statute of Uses was not addressing himself to equitable interests as a general phenomenon: he was dealing with wills of land. To think of trusts of personalty as evidence that he did not intend to abolish uses, or as evidence that he did intend it but was incompetent, is to think in unreal terms.

Active uses of freehold, however, must have been within the contemplation of the draftsman. The commonest provisions by testators were those directing their feoffees to raise money out of their lands for the payment of debts, for marriage portions and the like, and for religious or other charitable works for the donor's soul. These last indeed, not within even the extended ambit of mortmain because not for the benefit of religious corporations, had attracted legislative attention just three years before the statute; and such arrangements had been made void if to last more than twenty years. Although that act had contemplated *inter vivos* creation, its main concern was with the common case in which such gifts were made by will: it had, for example, expressly saved local customs permitting devises into mortmain.

The draftsman of the Statute of Uses, therefore, who supposed himself to be abolishing wills of land, may have thought that for the future such uses would just not arise. What is surprising is that he was not explicit about provisions in the wills he was expressly

saving, the makers of which had already died or would do so before his closing date. What was to happen, for example, about a direction that the feoffees should raise money out of land for a daughter, and then convey it to a younger son? Such provisions were of the essence of wills before the statute, and of those permitted four years later by the Statute of Wills; and the only possible conclusion seems to be that both draftsmen intended what happened, and perhaps supposed themselves to be saying as much in allowing the wills to have any force at all, namely that the trustees should retain the legal title for the purpose of carrying out their directions. In the example given there could be no doubt about the raising of the money for the daughter, though there is no clear statement before the middle of the century; but the effect of the direction to convey to the son, at least when it came in a transaction *inter vivos*, was not so clear.

The direction to convey may be connected with the use upon a use. The substantive importance of the double use is uncertain: trusts of personalty and active trusts covered the whole field of the modern law of trusts; and the passive trust of freeholds, although sometimes used by conveyancers in the eighteenth and nineteenth centuries, was never common. Although the double use came to feature largely in conveyances, it is therefore possible that this was by way of charm to ward off the Statute of Uses even when it did not really threaten to strike, and that the whole mystery of the double use affected the language of settlements rather than the powers of settlors.

The form which came to be used by conveyancers wishing to create a trust was "unto and to the use of" the trustee "upon trust for" the beneficiary, and it must be asked whether there was any difference between "use" and "trust". Lord Nottingham said that they were and always had been different things; and he worked out a theory, intended to explain the rise of trusts, which would have equated uses with those arrangements caught by the statute of 1484. That was the statute protecting purchasers from feoffors against claims by or through feoffees holding only to their use. Nottingham's theory looks like *ex post facto* logic,

and will not be considered for its own sake; but it is interesting that the greatest of all chancellors thought it reasonable to suppose that uses and trusts had always been different. In this, however, he is almost alone. The Statute of Uses itself spoke of "use, confidence or trust"; and the likeliest view is that "trust" came to be employed for clarity to describe an arrangement not caught by the statute.

Was it by design or by accident that grants came to be made "unto and to the use of" one in trust for another? The oldest view was that it was by design, a deliberate attempt to evade the Statute of Uses. This has generally been rejected on the ground that the statute was central to the revenue, and that no chancellor would connive in its evasion. The case for accident rested largely upon the existence of a trap which made accident likely; and it certainly caught the settlor in the earliest clear case of a double use. The bargain and sale enrolled had come to be regarded as the equivalent of a feoffment, and it was easy to forget that it worked only because the bargain and sale raised an implied use. If then a grant to uses was intended, and the land was conveyed to the feoffee by this method instead of by feoffment, a use upon a use necessarily resulted. In *Tyrrel's Case* in 1557 a tenant in fee simple desired to settle land upon herself for life, remainder to her son in tail, remainder to her own right heirs. She bargained and sold to the son to those uses, presumably intending that the statute should execute them. But they were held void as repugnant to the implied use. It has been suggested that the accident repeated itself, that chancellors were asked to intervene against the party unconscientiously seeking to retain the benefit for himself, that the redress he came to give was to decree a conveyance or put that party on terms, and finally that after the abolition of the feudal incidents this decree could be for a subsisting relationship, a trust. But we now know that in the case in which he is first supposed to have intervened, *Sambach* v. *Dalston* in 1634, the original conveyance was not a bargain and sale: the first use was express. Nor was the expressed beneficiary of the first use seeking to retain the property for himself: the plaintiff, immediate

beneficiary of the second use, was claiming a conveyance to herself which would have enabled her to destroy the expectations of another beneficiary, and it was on behalf of the last that the claim was resisted. And although the decree in that case was for a conveyance on terms, there are indications in other cases that by this time chancellors were indeed willing to decree that a trustee should simply hold for a beneficiary.

Is it possible after all that the double use was a matter of design? A doubt has recently been raised about the proposition, hitherto regarded as axiomatic, that the Statute of Uses underlay an important revenue interest until the abolition of military tenures, and therefore that the passive trust of freeholds cannot have arisen until the Restoration. The suggestion is that the revenue interest depended rather upon the Statute of Wills, which regulated *inter vivos* grants as well as wills. The tenant in chief by knight service was permitted to dispose freely of two-thirds of his land; and whether he did so by grant or devise, the king was entitled to a payment for the alienation. From the third to be retained he got his wardship and marriage. And in reckoning that third, he could include lands which the tenant had granted away in his lifetime, though it came later to be held that only grants for certain purposes could be so included. Not until this last point was established would there be any revenue danger in allowing trusts, and even then the crown's powers in the case of suspect transactions were so wide that chancellors may have regarded them as a sufficient protection. The passive trust may therefore not have been unthinkable at the beginning of the seventeenth century. But then, as later, there would have been little demand for it; and what would certainly have been unthinkable is any evasion of the revenue by so transparent a dodge as the double use. The word "trust", at any rate when used of freehold, seems most often to refer to an active trust. And active trusts, in particular trusts to convey, may provide an entirely innocent explanation of the double use.

Suppose once more a tenant in fee simple who wishes to settle upon himself in tail with remainders over. He will still employ a

third party. When the potency of the Statute of Uses is recognised and relied upon, the third party can be a passive conjuror's assistant, holding the property only for a moment while the spell is cast and uses executed in favour of the settlor and remaindermen. But the settlor who is scared of magic and desires an old-fashioned grant and regrant must give his third party a firmer grasp of the legal title. It must not flash through him to the beneficiaries, and equally it must not rebound intact upon the settlor by the instant execution of a resulting use. There was some discussion of this situation about 1575; and the conclusion reached was that the third party must hold to his own use. A conveyance "unto and to the use of" the third party upon trust to execute the settlement would be the natural result; and the phrase would equally naturally spread to any active trust, to any trust which was not intended to be executed by the statute.

The oldest explanation of the double use may after all be closest to the truth. It was deliberately employed, but to prevent the statute from upsetting innocent arrangements. *Sambach* v. *Dalston* itself was a case of a settlor wishing to include himself in his own settlement. He appears to have meant his third party to keep the legal title indefinitely instead of making the settlement at law; but his motive was to safeguard a later beneficiary against defeat by an earlier, who would otherwise get a legal title and suffer a recovery. Whether or not it was still felt that passive trusts were objectionable is of relatively small importance. The double use looks deliberate, a conveyancers' precaution to give the third party a secure legal title; but it was not a trick aimed either at the revenue or at the revival of passive equitable interests for their own sake. If the use itself came from the grant and regrant, the double use may be a trivial memento from the same source.

III. OBLIGATIONS

10 *Old Personal Actions*

THE BEGINNINGS

To turn from property to obligations is to turn from one modern concept to another. The modern law of obligations, roughly that concerning contract, tort and personal chattels, is the result of a continuing interplay between two simple ideas from which the common law started. It, and the earlier jurisdictions from which it sprang, knew two kinds of legal claim: the demand for a right and the complaint of a wrong. The complaint of a wrong split into two, the criminal law being the result of the administrative changes needed to enable public authority to take the initiative with wrongdoers, instead of leaving it to their victims to bring them to book. Proceedings begun by the victims themselves then became increasingly preoccupied with compensation rather than punishment or repression, and hence the law of tort. The beginnings of this are traced in the next chapter; and it will be seen that when the king's courts begin to concern themselves at all with essentially private wrongs, they issue writs of appropriate form: the sheriff is to summon the defendant *ostensurus quare* (prepared to show why) he did whatever he did.

But these writs are relatively late comers. The king's courts first interested themselves in the other kind of claim, the claim for a right. For this the form of writ is known as the *praecipe*. The sheriff was first to order the defendant to satisfy the plaintiff's claim; and only in default was the defendant to be summoned

to court. There are other explanations of these forms of writ, not necessarily contradictory. One writer for example sees the whole development as one of increasing judicialisation: the king begins by issuing purely executive orders on behalf of claimants whom he believes without inquiry, then orders inquiry if the claim is contested (*praecipe*), then orders it any way (*ostensurus quare*). But it remains the case that in *praecipe* situations the defendant can put matters right by a definite render, whereas in most *ostensurus quare* situations he has done an irreparable wrong for which compensation must be assessed.

It has already been shown that the *praecipe* writs concerning land were ultimately replaced by an *ostensurus quare* action: the point of the story of ejectment was that even property in land came to be decided by an action of trespass, an action formally in tort. The same happened with the *praecipe* writs concerning things other than land, the old personal actions of debt, detinue, covenant and account; and they have two separate lives. Their own lives were in the middle ages, and are our immediate concern. But the processes by which they were circumvented, replaced by *ostensurus quare* actions, left traces in our law which are with us yet.

These actions were all purely private, no concern of the king; and as such they were common pleas and within the monopoly jurisdiction of the court of common pleas. To begin with, indeed, it is clear that the king's courts would entertain such purely private claims only as a special and expensive favour. But the Statute of Gloucester in 1278, reaffirming older custom, established a clear jurisdictional boundary. Claims over forty shillings were for the king's courts, under that sum for local courts; and it was of the order of a year's pay.

This matters in two ways. Since the primary home of these actions was in local jurisdictions, they started with modes of proof suitable for local jurisdictions. Wager of law, for example, made sense in the court of a community in which the standing of all concerned was at stake. It did not make much sense in Westminster, where one's lawyer probably hired oath-helpers; but,

for reasons to be discussed later, it had to be retained. And this was one cause which led to the eventual replacement of these actions by actions which had always had jury trial. Another cause is related. The parties could exclude difficulties of proof by providing the incontrovertible evidence of a document under seal. And in certain situations the king's courts came to insist upon this, notably in covenant. There was no harm in this so long as only very large transactions were affected, so long as forty shillings was a large sum. But as it sank to a level which daily transactions might reach, daily transactions were brought not only into the king's courts but into the ambit of unsuitable law. And this was another cause, too large ever to be seen by contemporaries, which led to the replacement of the old actions.

COVENANT

The action of covenant will be considered first, not because it is the oldest in the king's courts or probably in local courts, but because its logic is most easily accessible to the modern mind. The word covenant, Latin *conventio*, means just agreement; and we are wrong to use the definite article and write of "the" action of covenant. Actions of covenant were simply actions to enforce agreements, and the basic concept is of the same order as our contract; though covenant was rather less wide and much less vague than contract is.

Nobody has yet worked out the nature of the "substantive" law of contract in local courts; and of course it would vary from place to place. But to contemporaries the question did not appear as one of substantive law but as one of proof. The question was not: "When is an agreement legally enforceable?", but "What kind of proof must the plaintiff tender in order to put the defendant to his answer?" It might be witnesses, earnest, part payment, a document under seal, and so on; and in the community situation such guarantees of good faith probably ensured that only honest claims were pressed as well as that only honest denials were carried to wager of law and the like.

But neither side could bring the neighbours across England; and in the king's courts these proofs to be tendered by the plaintiff lost their bite as much as wager itself. The plaintiff's *secta* remained, but as an empty formality. "And thereof he produces suit" says the plea roll, and goes on saying it through the centuries. But the defendant could not in fact demand that the suit should be examined, could not therefore require the plaintiff to produce any real guarantee of good faith. The obvious solution was to impose jury trial, so that the issue between the parties was ultimately put to neighbours; and when in 1284 instructions were sent to guide the application of English law in Wales, this was the solution given. But in any action on a contract there are always at least two possible questions. Was the agreement made in the terms alleged by the plaintiff? And then was it carried out or broken or what? And the two are connected: the defendant says he has built the promised twenty feet of wall; the plaintiff says the agreement was for thirty. The general question between the parties must not therefore be put to a jury unless the jurors know about both ends of the story; and since agreements are often publicly made and privately discharged, and are sometimes made in one county and discharged in another, jury trial would in fact be unworkable. The initial stand of the king's courts that private agreements were not for them depended upon a view of what was the king's business: but it proved to be justified by practical considerations also. There could be no turning back now, but questions of proof had as far as possible to be excluded. Early in the fourteenth century the king's courts finally decided that they could not entertain any ordinary action of covenant unless the plaintiff produced a deed under seal.

This was to have large consequences, and it is important not to be deceived by them. Centuries later covenant lost its original sense altogether. It became the name of a "form of action", and the underlying concept was supposed to be that of a formal contract analogous to the Roman *stipulatio:* you go through the appropriate magical steps and you are magically bound. This was seen as something archaic, from which the shining *assumpsit*

rescued us; and the idea of agreement being a cause of action in its own right is attributed to the seventeenth century. The linguistic reflection of all this, since the word covenant was disabled from its original function, was that the word contract was eventually recruited in its place; and since that word also had its own different sense in the middle ages, confusion for historians grew. Nor, of course, was there a moment of time at which lawyers changed from the word covenant to the word contract to express the same idea. The idea itself became lost, and there was an interregnum in which the best that legal vocabulary could do was to use the name of another "form of action", *assumpsit.* And since that was formally an action in trespass, in what we call tort, the whole development would have been impossible if all lawyers had thought consistently in terms of principle. The way in which it actually came about will be explained later. What matters now is that the medieval covenant did reflect principle, an elementary legal idea; and there was nothing archaic or magical about it.

This must be emphasised because the idea of covenant is much more important for our understanding of these developments than is the action. In the king's courts the action of covenant was never common; and in order to understand the reasons for this it is necessary to consider certain aspects of the action of debt. The first proposition is that if a specific sum of money was claimed, whether or not the claim was one that we should today call contractual, the claim was made in the action of debt rather than that of covenant. The action of debt did not have to be supported by a document under seal, as covenant did in the king's courts. But it could be so based, and for convenience this use of it will be taken first.

DEBT ON AN OBLIGATION

In "debt on an obligation", when the plaintiff had a sealed deed, questions of proof were effectively excluded as they were in covenant. The defendant could deny the deed, "*non est factum*";

and this plea was eventually extended from a simple allegation of forgery to cover certain kinds of duress, and also to the case of the illiterate to whom the deed had been read wrongly. It was put to a jury; but if they found that the deed was in fact the defendant's, he was committed to prison for making the plea. For the same reason, the great convenience of avoiding effective litigation altogether, the defendant could not plead that he had paid the amount due, unless he could produce an acquittance under seal. If he had in fact paid without either getting an acquittance or having his bond returned to him, he would have to pay again, not, as the Student explained to the Doctor because this result was in itself desired, but because "the general grounds of the law of England heed more what is good for many than what is good for one singular person only". This singular person naturally became a common supplicant to the chancellor.

The straightforward use of the simple bond was of course to secure the payment of debts. The borrower of money or the buyer of land or goods would often give a bond for the amount due. But bonds could also be used to secure obligations different in kind. The buyer and seller of land for example might execute bonds, the former for the price, the latter for some appropriate penal sum, and deposit them with a stakeholder. If the conveyance was made as agreed, the bonds would both be delivered to the seller, if not, to the buyer. But the same result could be achieved without the intervention of a third party by making bonds not simple but conditional. The seller of land would execute a deed promising to pay his buyer a large round sum unless the condition written on the back of the bond was satisfied; and the bond would be endorsed with some such words as these: "The condition of this obligation is that the seller will by such a date make estates good and acceptable in the law in such and such lands."

If the conveyance was not made, the buyer would not sue the seller in covenant for failing to convey: he would sue him in debt for the penalty. Since the bond was conditional, it was of course open to the defendant to plead satisfaction of the condition, and

that would be the normal issue for the jury. This was the form in which most important transactions were made and sued upon until the sixteenth century, and it accounts for a considerable proportion of the business of the court of common pleas. Since the records of this court seem not to have been much used by economic historians, it may be added that the conditions were pleaded and enrolled verbatim: the exact terms of every kind of dealing are therefore preserved in the rolls.

COVENANT AND CONDITIONAL BONDS

The question is, why were agreements almost universally made in this form, and not by direct promises under seal of the performance desired? Why did the man who wanted a house built, instead of getting the builder to execute a deed promising to do it, get him to execute a deed promising a penal sum if he did not do it? It ceases to be a matter of preference showing up in statistics. The action of covenant as a genuine remedy is almost unknown in the king's courts after the middle of the fourteenth century; and the rare examples mostly arise out of apprenticeship articles. The formalities of apprenticeship were deeply entrenched in civic customs, and change was no doubt unthinkable. But it is evident that whenever they could lawyers were advising their clients to set up their dealings in a way which would bring up any litigation in debt rather than in covenant.

After 1352 there is a simple explanation. In that year a statute extended to other personal actions the rigorous process hitherto confined mainly to trespass *vi et armis*. In that action, as will be seen later, the king's interest had carried with it the possibility of *capias*, of arresting or outlawing the defendant; and the statute made this available in debt and other personal actions. There was the obvious convenience of being able to reach more quickly a defendant who could any way be reached ultimately, and the less obvious advantage that defendants who could not be reached at all could be outlawed and treated as dead; and in the case of joint obligations this enabled proceedings to continue against their

co-defendants. But this statute did not benefit the action of covenant, which therefore became slower and less convenient than debt. The omission is probably explained by the use of the writ of covenant as a vehicle for the levying of fines. Conveyancers have always liked to take their time, and would not have welcomed the idea that impatient clients could hurry things along by having each other arrested.

But the general contractual use of covenant was already rare before the statute, so there must be some older reason for its disuse. Human nature may be a sufficient explanation. Most people are optimistic about the performance of their own obligations under an agreement, pessimistic about that of the other side; and until the chancery began to interfere with the enforcement of penalties, the conditional bond both provided an effective sanction and prevented argument about damages. But the matter of sanctions and damages suggests a more fundamental reason for the disuse of covenant.

In other *praecipe* writs, since performance was primarily commanded, the defendant could avoid damages or other consequences by tendering performance. In debt, for example, he could tender payment. In the case of covenant, this might be very undesirable for the plaintiff. Suppose he had low-lying land, and had got the defendant to promise under seal to strengthen the river wall; and suppose that the defendant had not done it so that the land was flooded and a harvest lost. The plaintiff does not want just the failure made good: he wants compensation for the consequential damage. His lawyer may therefore have had a sound practical motive for advising him to take a conditional bond in the first place rather than a direct promise of the desired performance.

If this is right, there is a question why the writ of covenant was in *praecipe* form. At the time only covenants concerning grants or leases of land would be important enough to come to the king's courts, and for them performance would indeed be desired. It may therefore be that the *praecipe* form, being the one in current use, was adopted without thought: no harm could be done. But

it is also possible that the concept behind covenant was indeed the literal enforcement of agreements, and that the gettting of compensation for actual harm was seen as to do with the law about wrongs. In connection with covenant itself, the question is of no practical importance. But when the rise of *assumpsit* is discussed, what may be very practical reflections will be seen. A seemingly critical case for example will be that of the defendant who, having agreed to convey his land to the plaintiff, instead conveys it to a third party: *assumpsit* was allowed against him, although it would not have been available if he had merely kept the land, just refusing to carry out his agreement. In 1284 the draftsman of the Statute of Wales had felt it necessary to say that on those facts the plaintiff could bring covenant but had to content himself with damages. It is at least interesting that this hesitation about the availability of the remedy in what we should call contract was matched nearly two centuries later by the anomalous provision of a remedy in what we should call tort.

DEBT AND DETINUE

Although it was by no means coincident with modern contract, therefore, the idea underlying covenant was that of agreement. The idea underlying the use of debt and detinue to enforce the obligations arising out of transactions in which there is no question of a document under seal was different; but it is equally comprised—or lost—within our contract. The borrower's duty to repay the money or return the book he has borrowed, the buyer's duty to pay for the goods he has bought, the seller's duty to deliver the goods he has sold—such duties we usually treat as arising out of agreement, though in the case of specific goods we sometimes speak instead about property. Only when our law of contract fails us, because of an infancy for example or because statute has declared a transaction void, do we fall back on another idea that we attribute to the archaic mysteries of debt or of bailment.

That idea is indeed very old, and in England it was never

discussed as a living thing so that its nature has been considered only by legal historians. But it resembles the idea behind the Roman contracts *re*, and the likelihood is that something of the kind is common in developing systems, is very simple, and is difficult for us only because it cuts across more modern ideas which we cannot get out of our minds. Those are the ideas of property and obligation, whose convenience and Roman clarity have so blinded us that even today an effort is needed to see how artificial they are.

To us, as to the Romans, the loan of money is very different from the loan of a book. There is the factual difference that the money is not specific and the book is, the difference in legal consequence that accidental loss can matter in the case of the book but not in the case of the money, and the difference in legal analysis that property in the money passes to the borrower while property in the book remains with the lender.

But even the factual difference did not at first much matter. The obligation may be older than money; and in a society in which the main chattels were beasts and grain, the distinction between specific and unascertained goods, though not unintelligible, would not be important. The earliest form of the writ seems to have been the same whatever was claimed, and it was not unlike a *praecipe* for land. The sheriff was to tell the defendant to hand over the fifty shillings, the five quarters of barley, or the horse of which he "deforced" the plaintiff, and if not, to come to court. In court the plaintiff would recite the transaction on which he relied; the defendant, unless he conceded the claim, would deny that he was bound, *non tenetur*; and this denial would be tested, usually by wager of law.

The first sign of differentiation comes in the writ, in which *deforciat* is replaced by *debet* and *detinet*. It became settled that *debet et detinet* was the appropriate phrase when money was demanded and when the law-suit was between the parties to the original transaction. In all other cases, *detinet* alone was appropriate. The difference later spread to the denial: *non tenetur* was replaced by *non debet* if the writ had *debet*, *non detinet* if

not. We do not know what provoked this change, and therefore cannot claim to understand the meaning of the new words. *Debet* suggests obligation, but it was confined to a money obligation: the seller of unascertained barley, even the man who executed a deed obliging himself to a payment in barley, would not owe but only detain. And *detinet* suggests property, but could apply to money: one who executed a bond obliging himself to pay money would himself owe; but if he died, his executor would only detain. This last case, discussed in terms of a bond because that is the simplest case in which the executor could be sued, is worth carrying one step further. Although money is demanded, the executor's liability is normally confined to his testator's assets; and the use of *detinet* and not *debet* must here exclude the truly personal obligation. But the promisor of barley was under a personal and unlimited liability, so that no single principle seems to explain all cases. *Debet* does not exactly reflect obligation, even the personal obligation of one who has bound himself; and *detinet* does not exactly reflect property, let alone a claim for specific objects.

This differentiation, moreover, is merely in the words of the writ. Later there was a further development: the action of detinue came to be seen as something different from the action of debt. But this was a far less distinct development than has been supposed because it happened only in lawyers' heads and they were never obliged to formalise it or to define the result. So far as the formalities of the action went, there was no further development beyond the usage of *debet* and *detinet* that we have just discussed. The buyer of barley would have to claim it by a writ in the *detinet*. Later analysis would call his action detinue if what he had bought was a specific parcel of barley, "debt in the *detinet*" if it was so much of such a quality. But there is no sign of a distinction in the records; and although actions with *debet* can always confidently be called "debt", there is no necessary correlation between *detinet* and "detinue".

The distinction, then, was merely in the name given to the action. But even so it depends upon who was speaking. Glanvill

had used the word debt for the whole range of these actions, and so far as the formalities of litigation went this remained the name for the whole range. To our loss enrolling clerks did not often have occasion to give an action a name: they transcribed the writ. But they identified the action less cumbrously when recording such formal steps as a respite or the appointment of an attorney, and it is usually possible though often laborious to match entries and find the name by which they identified any particular action. In this case the result is interestingly negative. *De placito detencionis* appears normally to identify replevin actions: debt and detinue appear alike as *de placito debiti*, and the year books twice show clerks telling the court that this is so.

The printed *Register of Writs* tells the same story. Except for detinue of charters there is no heading of detinue. The writs are all *de debito* as they were for Glanvill. But the greatest of commentaries on the *Register*, Fitzherbert's *Natura Brevium*, has two headings as though there were two separate actions. A distinction evidently grew in the minds of lawyers after the formalities had become settled, so that for them there were two actions although for the clerks in court and the clerks in chancery there was still only one.

This development is one of the most striking examples of law being generated by the introduction of rational trial and the concomitant possibility of some answer other than the ancient general denial. Early law classifies claims only; and its classification does not go beyond what is necessary. It was not necessary to distinguish between the loan of money and the loan of a book so long as there was only the general denial and wager. But when the defendant could put forward his own facts, all sorts of matters would be forced upon the attention of lawyers. Only one will be considered, that the loan was of a specific object which was accidentally destroyed. Bracton's Roman learning had taught him that this possibility was the great difference between the loan for consumption and the loan for use. But when Britton tried to follow him in this, he missed the point, supposing that accidental loss could in suitable circumstances excuse the money debtor.

English law-suits were only just reaching the stage when such questions could be discussed. Whether Roman learning played an important part over this point we shall probably never know. Nor does it much matter. Once there is some rational being to whom the borrower can explain about the accidental loss, he is likely to try it, whether or not he knows that other borrowers in another civilisation and another age had done the same.

The novelty of course was not in the facts. It was in their being forced on the attention of lawyers because they were raised in a law-suit and must somehow be dealt with. From this and other pleas, there began a new process of rationalisation beyond that which had produced the claim; and in this case the result was to divide the claim into two. Lawyers arguing in court had to separate detinue from debt, although the clerks' formalities preserved the old unity. But we must not forget that the starting-point had been a unitary concept or, worse, suppose that lawyers were stupid because they did not separate what we separate. For them the borrower of a book owed the book as much as the borrower of money owed the money; and this had consequences which are still reflected in our law. But we must not deduce that for them the borrower of the book owned the book as, for us, the borrower of the money owns the money. Legal questions have to be asked before they are answered. The borrower had the book and had the money, and the lender wanted them, and lawyers had to deal with the situation. They did not have to ask what abstract word to apply to the relationship between the borrower and what he had borrowed: he had neither ownership nor possession, only the money and the book.

DEBT ON A CONTRACT

Debt based upon a transaction in which there was no sealed deed was sometimes known as "debt on a contract", and the name is convenient. The plaintiff could not rely upon a mere promise to pay. And if, for example, the defendant after a series of transactions formally undertook to pay the agreed balance, his liability at common law, though not in some local jurisdictions,

rested upon the transactions and not upon the later undertaking. Each transaction raised its own separate debt; and though a series of debts could be claimed in one action, the basis of each had to be set out. The plaintiff could say that he had sold the defendant material for fifteen shillings, made it up into a coat for eleven shillings, and lent him fourteen shillings, and so claim the sum of forty. The writ was single but there were, in effect, separate counts which could be separately answered. Such combinations were in fact by no means uncommon, adding up exactly to forty shillings, a fictitious loan of the necessary amount being apparently put in to bring the case within the jurisdiction of the king's courts; and the counterpart in local courts is the action for thirty-nine and elevenpence halfpenny.

Each debt was raised by its own transaction, not by the agreement but by the defendant receiving the benefit coming to him, the *quid pro quo*. The borrower of five pounds owed that amount because he had got the five pounds, and the buyer of a book for five pounds owed it because he had got the book. The point is oddly reflected in actions against religious houses for the price of goods bought. The actual buyer was of course an individual member of the house, and the house itself did not owe unless the goods had in fact come to its use. It is not clear how completely debt retained this "real" character throughout the middle ages. The only undoubted exception was the sale of goods, which became "consensual" in that the seller could recover not only if he had actually delivered the goods but also if he was willing to deliver. But the development is obscure, and will not be pursued here.

The plaintiff's count, then, admitted of some variety. But there were common forms to be found in the precedent books, first *Novae Narrationes* or the like, later one of the books of entries; and there is little innovation after the early fourteenth century, though of course it does not follow that new situations are not featuring under old disguises. It looks, for example, as though claims for money paid on a consideration which failed just disappeared; but it is not impossible that the claim was expressed as

a loan. The defendant's answer would not often even need to be looked up. Nearly always he makes his general denial, first *non tenetur*, later *nil debet*, and on this he either claims a jury or wages his law. Jury trial becomes in time a little the commoner of the two; but even when it is chosen the verdict entered on the plea roll is a blank *debet* or *non debet*, so that we know no more than when law was waged.

This blankness is important. First, it conceals the facts of disputes from us. Was the defendant always denying that he had ever entered into the transaction? From the plea rolls one might suppose this, and conclude that in all actions one side or the other was merely dishonest. But the year books indicate a more life-like picture. Genuine disputes arose out of all sorts of facts, but they were nearly all forced into the mould of the old denial. Argument is about a special plea that the defendant wishes to make; but eventually he is forced to *nil debet*, and this is generally all that will appear on the plea roll.

The rule that the general issue must be pleaded unless there is a clear possibility of injustice was pushed to surprising lengths. Suppose that the defendant had indeed incurred the debt, but had paid it. He could not plead the payment specially: it was subsumed within *nil debet*. The furthest he could sometimes get was a plea "paid and so *nil debet*"; but this "conclusion to the *debet*" made it a plea of the general issue, and the concession was in letting him draw the jury's attention to the possibility of payment. Now suppose that the defendant had incurred the debt in Kent and paid it in Essex. Either a plain "*nil debet*" or a "paid and so *nil debet*" would go to a Kentish jury, who could have no means of knowing about the payment. Surely, therefore, the defendant could make a true special plea, confessing the transaction in Kent and saying just "paid in Essex" to an Essex jury? But no: if he chose he could wage his law and avoid any jury; there was therefore no hardship in keeping him to the general rule. There were, however, a few ways in which debts could be incurred without any deed but upon which wager was not permissible. Most prominent were the lease of land and the taking of an

account before auditors: if the action was for the rent, or for the balance found due on the account, the defendant could not wage his law. He could, however, unlike the defendant in debt on an obligation, plead the general issue; and normally he put just "*nil debet*" to a jury. But here we have at last found a situation in which he could sometimes insist upon a true special plea. Suppose that the action was for rent upon a lease of land in Kent, and that the defendant had paid in Essex. He had to have a jury, and it was clearly unjust to force him to a Kentish jury. But that would inevitably happen if he pleaded the general issue or "concluded to the *debet*", because the transaction itself was put in question. He must, in this extremely special case, be allowed to confess the lease and simply plead his "paid in Essex".

What really matters about all this is its consequence in inhibiting legal development. Term after term and century after century disputes of every kind were hidden under *nil debet*. And it is not only that the facts are hidden from us today. The legal questions that they might have raised were hidden from legal examination at the time. Take the rule in *Pinnel's Case*, that acceptance of a smaller sum in full satisfaction does not discharge the balance of a debt. We may think the answer given unfortunate: but the question is an obvious one and some answer is necessary. And yet the rule is not much older than the case, decided in 1602, because the question was not asked. How could it be, if the defendant is just to plead *nil debet*? A jury might possibly have asked for directions, but nobody at *nisi prius* would have been much interested if they had. A particularly scrupulous litigant might have asked whether he would perjure his soul in waging his law. Or a court might have elicited the facts in examining him before admitting him to make his oath; and this in fact happened, but only some fifteen years earlier than *Pinnel's Case* itself. In debt on a contract, the matter could only have been raised formally by plea in some such case as that just considered, namely a lease in one county and an acceptance of part of the rent in another. In *Pinnel's Case* itself the action was for the penalty in a conditional bond, and the question was whether a condition to pay so much

could be satisfied by the acceptance of less. The question—not quite the same question, perhaps, but taken to be so—was at last raised squarely, because raised in a context in which the general issue was excluded.

If therefore somebody had sat down about 1500 to write an account of "the law" behind the action of debt, there would not have been a great deal to write about. There would not have been much more than could be found in the early books of entries: a series of formulae. That is how "the law" still existed; and that, of course, is why nobody did try to write a substantive account. But Littleton had written a largely substantive account of land law; and though there were other reasons for more rapid development there, it seems that wager of law, usually taken as a symptom of backwardness in contractual matters, was really a cause. It was the availability of wager that enabled the courts to insist upon the general issue in such situations as the payment in another county; and without it special pleas and new legal questions would have been more frequent, and substantive law would have been generated more quickly. Of course at the time nobody saw the matter in this way, and if they had they would have thought it a merit in wager rather than the reverse: lawyers have never welcomed new problems. But the factual desirability of wager was considered early in the fourteenth century. It was argued, for example, that if a loan was made through an intermediary, so that somebody other than the parties must know about it, wager should be excluded and a jury insisted upon. This was answered by the possibility of a private payment; and when we consider the difficulties the law later got into over the geography of jury trial, it is hard to criticise either the preservation of wager, or the use made of the document under seal.

DETINUE FOR GOODS BOUGHT

In discussing debt on a contract, the lender's claim for the amount of his loan and the seller's claim for his price could be treated together. To begin with there was equally no distinction

between those two on the one hand and on the other the lender's claim for the object lent or the buyer's claim for the goods bought, and therefore, of course, no distinction between these last two themselves. The claim of the lender or other bailor is the more important, but the buyer's claim will be taken first because it provides a natural transition. To us all debt is obviously a matter of obligation, whereas detinue has a varying proprietary element. Indeed it will become a slogan that detinue supposes property in the plaintiff, and we cannot dismiss this even if that "property" seems elusive. On this point, the buyer's claim is instructive. If he had bought unascertained goods there was nothing in which he could have a property, and so his claim is labelled "debt in the *detinet*". But the enrolment of this will be indistinguishable from that in which he had bought, say, a specific parcel of barley; and in this case the action comes to be labelled "detinue", and the common law comes by its remarkable rule that "property" normally passes on a sale of specific goods. This obscure development cannot be traced here; but it appears to be accompanied by actions in which buyers expressly allege in their counts that they left the goods with the seller for safe keeping, so that the passing of property was first attributed to a kind of constructive delivery. Nor, of course, has the artificiality disappeared from our law today. The seller's lien and other special provisions survive to ensure, as they always have, that in fact the buyer's rights against the seller, however described, are in substance a matter of obligation.

DETINUE ON A BAILMENT

Detinue by a bailor against his bailee of course always claimed specific goods, and goods which the bailor had necessarily had. Does it follow that the claim was a matter of property rather than of contractual obligation? The point of that question is that it is ours: it did not arise at the time. We can ask only to which of our modern ideas the original claim was closer, and note that the lender of specific goods, like the buyer or the lender of money,

had an action which was first called debt. The question was brought to the surface through the making of pleas other than the old general denial. Suppose the borrower of specific goods pleads contractual incapacity. The borrowing did not bind him, but what of the proprietary claim: is he not keeping the plaintiff's goods from him? Suppose he pleads that the goods have accidentally perished. He is not keeping the goods, so this answers the proprietary claim; but what of the contractual?

Only the accidental destruction will be considered, because this was the practically important situation. The earliest form of the general denial, *non tenetur*, is even less definite than the later *non detinet*; but it suggests obligation and fits with the original classification of the action as debt. The first indication of any question about liability comes in Glanvill, who knew the Roman difference between *mutuum* and *commodatum*. But, perhaps because there was only one writ, he gave the answer that the bailee was strictly liable as a money debtor. Bracton gave the Roman answer, that accident might excuse; and Britton, knowing no Roman law and misunderstanding Bracton's point, sought to apply the excuse to a money debtor. The question could not be avoided by anyone knowing the language of Roman law. But in England it had not arisen, unless it was in the consciences of defendants who pleaded *non tenetur* and waged their law.

Not long after Britton, at the very end of the thirteenth century, we first find a defendant putting forward the special plea. Cases are rare in both year books and plea rolls, probably because defendants in fact continued to plead the general issue and wage their law. But the cases that do occur in the fourteenth century suggest that the question, once asked, was given a liberal answer. Any loss genuinely without fault, including theft, appears to be an acceptable plea. In the fifteenth century, however, liability was tightened up. The main evidence for this is the year book discussion in a case which was not one of detinue at all. If a debtor was committed to prison in execution of a judgment, the jailor was responsible for his safe keeping to the judgment creditor, and was himself obliged to meet the debt if the prisoner escaped.

Doubts have been raised, but it seems that the jailor was indeed thought of as bailee of the prisoner, and that his liability was thought to be the same as that of any other bailee. There was, however, a relevant procedural difference. The jailor, whose receipt of the prisoner was a matter of record, could not wage his law, or indeed plead the general issue at all. Although there is no reason to think that his liability was theoretically different from that of the bailee, therefore, there was the practical difference that the bailee could and the jailor could not dodge. This question was inexorably raised, as a different question was inexorably raised for a different reason in *Pinnel's Case*.

The jailor had lost the prisoner because the prison was broken open by a mob. The analogy with an ordinary bailment would be loss by robbery, and in the fourteenth century mere theft seems to have been sufficient. But now superior force was rejected, unless it was by the king's enemies; and the point appears to be that the bailee is to be excused only if he has, even in theory, no remedy over because there is no party responsible within the jurisdiction. This linkage between the bailee's liability and his rights against a third party wrongdoer eventually became a kind of chicken-and-egg problem: was the liability deduced from the right of action, or the converse? It was settled in the early years of this century as a matter of law—and, in so far as a court has jurisdiction over the past, also as a matter of history—that the bailee's right of action was the primary thing. It is true that he could always sue the third party, and that the bailor himself could not until the fourteenth century was nearly over. But to ask whether this or the liability was primary is to think in terms of our analysis of a bailment; it is to assume "ownership" in the bailor. A bailment began, not as a delivery of possession without ownership, but as a delivery of the thing. The bailee had the thing and could sue third parties, and the bailor had not and could not. The bailee owed the thing as he might have owed money, and his liability was therefore in principle unaffected by the fate of the thing.

The stiffening of liability in the fifteenth century was con-

solidated in *Southcote's Case* in 1601. Robbery was no plea because the bailee could in theory sue the robber. The only mitigation of this strictness was that the bailee could accept the goods in the first place on special conditions, and these could then be pleaded in detinue. This remained the position as ordered by detinue, but it became unimportant because detinue fell out of use. Bailees came to be sued in actions on the case, and their liability came to be rested either upon what we should call contract or upon what we should call the tort of negligence. There was therefore a break with the past and a fresh beginning; and the later history of the bailee's liability involves different ideas. What matters here is the nature of the break. In negligence the bailee's fault was a necessary part of the bailor's case: the bailee was charged as a wrongdoer. In detinue his innocence was a matter of defence: he was under a *prima facie* liability arising from the transaction by which he got the object. As against him, detinue was still close kin of debt, and the nature of the liability had not changed much from that implied by his earliest denial: *non tenetur*.

DETINUE AGAINST PERSONS OTHER THAN BAILEES

Detinue was also used against mere possessors, persons against whom the claim made can only be what we should call proprietary because there was no contract, no element of obligation. An earmarked chattel belonging to the plaintiff has come, no matter how, into the possession of the defendant. The claim rests not upon any transaction but upon the ear-mark.

The essential difference from the claim against the bailee can most easily be seen in terms of the general issue. For the bailee the early *non tenetur* was more appropriate than the later *non detinet*. The borrower of a book who swore to his *non detinet* was in one sense telling the truth if in fact he had sold it before the lender sued. But equally he was perjuring himself, and there would not have been even a verbal excuse for *non tenetur*. He was bound by the transaction, and though accidental loss might excuse him from that liability, the bare fact that he was out of possession

when sued was irrelevant. This was the necessary basis of the bailee's liability. But there was no "finder's liability" or the like. The mere possessor of the ear-marked chattel was liable in detinue to "the owner", but only for keeping it from him. *Non detinet* could here be understood literally. If he did not have it when sued, he could truthfully swear to his *non detinet*, even if he had had it, even if he had knowingly and dishonestly sold it to a third party. The claim of the owner in detinue was then against the third party. Against the former possessor who had wrongfully disposed of it, his claim was in what we should call tort, the beginning of our tort of conversion. As will be seen, the tort of conversion has muddled up the two liabilities, but in detinue they had become clearly distinct. Detinue on a bailment never lost its affinity with debt: in detinue against a mere possessor there was no contractual element at all.

It may indeed be an accident that this liability came to be enforced by the same writ. In local courts it was enforced, not by any congener of debt, but by an action which has come to be known as *de re adirata*. This applied to goods of all kinds, but the standard case was that of the strayed beast found by the owner in another's possession. The plaintiff described it with some particularity in his count, and the likely issue was of course on its identity. In the local process if the defendant or his vouchee claimed property, which would be a denial of identity, the plaintiff could add words of felony and turn the action into an appeal of larceny.

In the king's courts this action apparently had no separate existence: few animals would be worth so large a sum as forty shillings, and the situation would not often arise with jewels and books. When it did arise, however, the chancery apparently responded by issuing, not a new writ *de re adirata*, but the standard form alleging that the defendant wrongfully detained the thing—we speak circumspectly, because it is probably too early to think of detinue as a distinct action. This was an economical course, but deeply confusing to historians and probably confusing to lawyers at the time. The liabilities *re* which have been discussed

under the headings of debt on a contract, detinue for goods bought and detinue on a bailment represented a true conceptual entity, even if more modern ideas have obscured its simplicity for us. But there was nothing in common between that entity and the claim now being considered, except that the words of the writ were so general that they would cover both.

Changes in the working of the action form a curious story, the key to which once again seems to be the difficulty of proof. How is the identity of the object to be established? A year book note of 1294 says that if the claim is denied the plaintiff must wage his law that the thing had gone from his possession; and the point of this was presumably to establish its identity. In a situation like that of the strayed beast, there was nothing for it but assertion. But often the plaintiff would be able to make a better *prima facie* case. Although he could not rely on a bailment to the defendant, he could still relate a series of events by which the thing had gone from his hand and come to the defendant's: a bailment to one who had bailed to another who had died leaving the defendant his executor, and so on. And it was probably because such a narrative disposed of the question of identity that the plaintiff would normally count in this way. It is known as the *devenit ad manus*, which was not at first a bald assertion that the thing had come to the defendant's hands but an explanation of how it had so come.

Inherent in this, however, there was a new peril. Was it open to the defendant to take up some detail of that narrative? Suppose the plaintiff counted that he had lent to one who had died and whose executor had given the object to the defendant: could the defendant escape liability because he had got it from the borrower's widow rather than from his executor? This would be absurd; and the major year book discussion was in a case of 1355 in which the principal defendant was a woman called Halyday. Almost exactly a century later a new form of count was under discussion in the common pleas. The plaintiff makes no attempt to trace the actual steps by which the thing went from himself to the defendant: he says that he lost it and the defendant found it. This is the famous

count in trover, which became standard for plaintiffs in detinue who could not rely upon bailment. And this early appearance was greeted by a whisper which unluckily reached the ears of the reporter and has been a mystery ever since: it was described as a "new found haliday".

It is not improbable that the speaker was referring to the earlier case. There is a substantial amount of citation in the year books, not of course for the sake of authority in our sense but because cases became known as illustrating a particular line of thought. The 1355 report is the principal discussion of the proposition, apparently decided earlier, that the defendant to a *devenit ad manus* count could not go off on the details: he had to answer the allegation that he detained the plaintiff's property. The point of any narrative in the count, that it established the identity of the thing, was therefore lost, and some pleaders seem indeed to have used *devenit ad manus* as a bare assertion on its own. But most continued to tell a story, and the count in trover was a convenient standard story and proof against legal objection. If, for example, the defendant had actually come to the thing as executor of a former possessor, and the plaintiff said this in his count, it might be objected that the defendant should have been named as executor in the writ. There was no such trap in the story of a loss and finding.

But the count in trover may not have been just a happy invention; and if it was, coincidence led the inventor to think of something curiously like the starting-point in *de re adirata*. Establishing identity by following foot-prints, as it were, had quickly proved unworkable, and there was only assertion to fall back on. In 1294, if the year book is to be believed, the assertion had to come from the plaintiff. The end of the matter was to cast the burden, or the benefit, where it usually fell, upon the defendant's denial. He says that he does not detain the plaintiff's thing. But the content of that denial, to return to our own starting-point, was not the same as the misleading *non detinet* of the bailee. The bailor's claim, springing from the same root as that of the money creditor, had an element of obligation; and

there was more to *non detinet* than not keeping the plaintiff's thing from him. But there was no more to it when said in answer to the purely proprietary count in trover. The difference is what we know as the bailee's liability. The result of the difference is our tort of trover for conversion.

ACCOUNT

The last of the old personal actions to be discussed is the action of account. For the purpose of seeking out the elementary ideas on which the common law was built, it is also the least important. But account was of great practical importance in the middle ages, and the idea behind it deserved a better future than it had. The loss, however, is ours, and has been more nearly made good in other common law jurisdictions than in England. Our shifts have not done much to get round the dogma that a monetary relationship between two people must be that of creditor and debtor. The hypothesis behind account was that one could have something like a property right in money in another's hands.

The ordinary form of the writ was a *praecipe* ordering the sheriff to tell the defendant to render rightful account of the plaintiff's money that he had had in a certain capacity. The plaintiff's count set out the relationship upon which he relied, and then followed the writ in demanding just an account. The defendant would generally either deny the relationship or assert that he had already accounted; and if the defendant then failed in his proof, judgment for the plaintiff would order just an account.

The judgment thus ordered the performance that the defendant should have rendered willingly, just as a judgment in debt ordered the payment of the debt. The process of accounting was gone through before two auditors. These were appointed by the court if the account had to be ordered by judgment, but were appointed by the claimant himself if the accountant was accounting willingly. It follows that the relationships themselves and the process of accounting were established social institutions; and an

account before auditors appointed by the claimant was no less "official" than one taken before auditors appointed by the court. Nor was the process a mere authentication of arithmetic. Factual disputes might have to be settled, for example by ordering wager of law on a disputed payment. And the auditors had powers of allowance and disallowance analogous to those of a district auditor today, or of the tax inspector with a claim for expenses; but their discretion was even wider, and in the fourteenth century the word "equity" was used to describe it.

But it was only the actual process of accounting which could be so described. Whether or not an accountable relationship existed was a question of strict law; and the result of the accounting was equally strict. The balance found due by the auditors was a debt. Although the underlying idea was that the accountant had been handling money "belonging" to the claimant, there were of course no actual coins that he owned, so that this was the only possible outcome. The account raised a debt, and was itself a sufficient foundation for an action of debt. But at first the claimant hardly ever had to bring one. In 1285 statute conferred upon auditors appointed by the claimant a power which was no doubt inherent in auditors appointed by the court. They could commit the accountant to the king's prison until the amount found due was paid. An accountant so committed had a right of appeal to the court of exchequer by a process called *ex parte talis*; but the power of committal shows the accepted status of accounting and of auditors.

The loss of this status in the course of the fourteenth century is reflected in actions of debt based upon accounts. The only early examples are in the rare situation in which the auditors have found the accountant to be in credit with the claimant. They could not commit the claimant to prison, and so the accountant was obliged to sue for the balance owing to him. But in the later fourteenth century actions begin to appear in which the claimant sues the accountant in debt; and this must mean that the process of committal was failing. The accountable relationships were becoming less clear-cut at this time; and this dilution was evidently accom-

panied by a loss of status in auditors. The 1285 statute assumed that they would be persons of such standing that royal jailors could identify them and know that they had to accept prisoners at their hands. The resort to actions of debt must show that this had ceased to be true: anybody might be an auditor and almost anybody might appoint him.

This is strikingly confirmed by a statute of 1404. It has already been mentioned that the action of debt based upon an account was one of the exceptional cases in which wager of law was not available. The accounting before auditors was a matter of record. From the statute, it is clear that tradesmen wishing to claim the amount of their bills were going or affecting to go through some accounting process, naming their servants or apprentices as "auditors", and then suing upon this so-called account instead of on the individual items in their bills. This was suggested by a legitimate custom in the city of London and elsewhere giving independent force to a formal acknowledgment of indebtedness; but in the common law it was of course a mere abuse designed to oust the defendant from the wager of law with which he was entitled to answer an action on the original debts themselves.

From all this two things emerge. The first is that auditors of a true account lost their status as "judges of record" in the sense that their power to commit the accountant to prison was more or less lost. The claimant had to sue in debt to get his money. But they retained that status to the extent that when so sued in debt the accountant could not wage his law. This disability, however, was confined to the accountant. If the auditors found him in credit, he could sue the original claimant in debt. But the auditors were not judges of record over the claimant because they could not commit him to prison; and he could therefore wage his law. Another argument sometimes raised in that situation, although deservedly unsuccessful, illuminates the nature of accountability. If the accountant was in credit, it was argued, he must have spent his own money; and since the accounting was concerned only with the claimant's money, this surplus did not lie in account at all.

The common law has never had anything like an *actio negotiorum gestorum*, so that if the claimant in such a case had not insisted on an account, the accountant would have been remediless unless he could call it a loan. The argument shows that even an account was not a truly bilateral affair: credits and debits might be made both ways in the actual accounting; but the relationship of accountability was that between an "owner" of money and one handling it.

That an account was not just a matter of dealings between the parties is the second point illustrated by the 1404 statute. The tradesmen were not conjuring up merely an account and auditors: they were supposing a situation to which an account and auditors would be relevant. Their customers had not been handling their money and were not accountable to them. The relationship was not one of accountability but of debtor and creditor, and the two things were mutually exclusive. An accountant became debtor, or sometimes creditor, when the account was taken; but he was not so before. The money he was handling was in some sense not his, and there was no contract between the parties in the medieval sense of that word.

The earliest accountable relationship was that of lord and bailiff, and it is difficult for us today to understand how important the bailiff was. He might be a man of very various social levels and of very various areas of responsibility, depending upon the wealth of his master, the administrative methods chosen, and the agrarian structure of the district. But his were the hands in which most of the annual surplus of England first materialised, and his the mind that took many of the decisions producing it. Just as the ultimate control of government as well as revenue was at first in the exchequer, so the bailiff's account checked on more than arithmetic: it controlled the proper and honest use of managerial discretion. The difficulty of ensuring that the equity of an undertaking is enjoyed by its owners rather than by its managers is notorious in any age, and no doubt reflects economic artificiality. In the middle ages, it may have been one cause of the rise of the husbandry lease. Bailiffs tended to be replaced by farmers, or to

become farmers in fact if not in name, rendering a fixed sum whether as rent or as conventional "balance". But the bailiff's account remained an important institution, and it was around this that the legal ideas of account first grew.

The status and functions of the auditors are wholly intelligible in this context. The identity of a lord's auditors would be as well known as the identity of his bailiff for this manor or that group of manors. And the element of "equity" lay in their power of judging the bailiff's decisions. Should he have sown corn of his own growing, instead of paying so much to get seed from elsewhere as was normally the best practice? Should he have insisted upon the customary dues when the men were so desperate that they fled? Equally intelligible is the underlying assumption that the money and property handled by the bailiff were not his own. He was not the lord's debtor for the price of the corn he had sold: it was the lord's money, out of which the bailiff had authority to pay for mending the mill. Of course he did not keep two purses. If therefore we argue that the money cannot have been the lord's unless specific coins were, we are pushing the logic that argued against the bailiff found in credit: he must have spent his own money, so his credit balance could not lie in account. Ideas like that of property in a fund are not without difficulty when analysed, but they are a practical need.

The second relationship to be considered, perhaps out of place but characterised by an equal conceptual clarity, is the case of the guardian in socage. The property of infants was dealt with by various kinds of fiduciary arrangement. The testamentary jurisdiction of the church might supervise their personal wealth. Many towns had special arrangements for urban land. Land held by military tenure went beneficially to the lord, subject to an obligation of maintenance and to liability for waste impairing the capital value of the inheritance. And socage land went usually to relations who could not inherit, but not beneficially: they were to administer it on behalf of the infant. In 1267 statute provided a special writ of account to enforce this duty. It was in form unlike the writ against the bailiff or against the receiver to which

we shall next turn: instead of being in *praecipe* form it was an *ostensurus quare*. But the action appears to have worked in much the same way as that against a bailiff except, of course, that the doings of many years might come under scrutiny. In particular, it covered all aspects of the relationship. Unlike the guardian in chivalry, for example, the guardian in socage could not be sued in waste. Nor could the bailiff. In both cases the liability was enforced in the account. Their powers of management were wide; but it was clearly not their property that they were managing and not their money that they were handling.

The third kind of person who was accountable was the "receiver of the plaintiff's money"; and it was he, less clear even to start with, who was mainly responsible for the loss of distinctness in account. After the early fourteenth century the bailiff was never charged just as bailiff but always as bailiff and receiver. We do not know whether this was to cater for payments made to the bailiff which might be outside his capacity as such, or whether any receipt of money, even for example of manorial rents, made one a receiver. Nor, to look at the converse question, did lawyers know for certain what made a bailiff. Any management of land did, even of a town house. Some thought that any agricultural dealing was enough: the seller of cows would be a bailiff, of silks a receiver. Others thought that any dealing was enough: the seller of silks would be a bailiff; the man sent to collect the price due on a sale by the master would be a receiver. But the early actions against a bailiff do charge him as bailiff only, and it looks as though the receiver is of independent origin and that confusion arose because the two things grew together rather than because they failed to separate.

If so, the origin of the receiver is probably, though not certainly, mercantile. The other possibility is the mere collector of money rents, ecclesiastical dues and so on. But the mercantile receiver seems to come first, mere agents being quickly followed by partners. In the early cases these arrangements look like relationships lasting for some time. But, as with mercantile agents in more modern times, the difficulty of drawing a line led to the

result that a status might have to be postulated for a single transaction. And this in turn led to an artificiality in the use to which account was put. If a hundred payments to a merchant's agent lie in account, why not a single payment to one to pay over to another? That other did not of course authorise the receipt, but nor did the merchant authorise any particular receipt. In so far as such situations were not easily accessible in debt, the result was also convenient, utilising the idea of property to give a remedy where there was no contract between the parties. But it had nothing to do with accounting; and yet presumably, against an obdurate defendant, the action establishing the receipt, the relationship, had to be followed by a formal accounting to establish that the money had not already been paid over to the plaintiff or the like.

This leads to the last aspect of account to be considered, more for the light it throws on the other actions than for its own sake. The defendant could not plead "Not accountable", a general denial like *nil debet*, perhaps because the duty to account was distinct from the duty to pay the balance. Suppose that a receiver had received the plaintiff's money, and had in fact paid it to the plaintiff. His receipt raised a duty to account which had not been discharged, even though when auditors heard the account they would find that there was no balance due to the plaintiff. But in such a case the accountant would, if the possibility was open to him, inevitably and understandably plead a general "Not accountable", and so by-pass the professional accounting which, especially in the case of the bailiff, was the necessary aim of the action.

Whether or not this was the reason, there was in effect no general issue in account. Unless there were special circumstances such as a deed saying that he was not to be accountable, the defendant had either to deny that an accountable relationship had ever existed, or to admit that it had and plead that he had accounted. The latter plea had always to go to a jury, and the same seems to have become true of a denial by one charged as bailiff that he had been so. There was reluctance to allow any

rights over land to be subjected to wager: one example already noted was in the action of debt brought for rent, and another was the action of detinue for charters. In principle, however, one charged as receiver could wage his law upon his denial that he had been receiver. The receipt might have been in private, and so not within a jury's knowledge. But if it had not been in private he could be ousted from his wager; and it became settled that if the plaintiff alleged receipt by the hand of somebody other than himself, and this became a conventional form, he could insist that a denial should be tried by jury.

This reasoning, however, depended upon the singleness of the issue: had he received or not? It was not applicable to debt on a contract or to detinue: however publicly a loan had been made, it might have been discharged by private payment. These actions were therefore poised upon one horn of the dilemma of proof: the availability of wager and the generality of the general issue probably caused injustice, and certainly retarded legal development. Debt on an obligation and covenant were caught on the other horn: the general issue was excluded and precision ensured at the cost of the opposite injustice, too much strictness, and at the cost of a formality which became increasingly oppressive as forty thirteenth-century shillings dwindled to their sixteenth-century value.

By the early seventeenth century these actions were effectively dead, for better and for worse. The most obvious survivor, in England though not in the United States, is the contract under seal; and the ability to make a gratuitous promise enforceable without artificiality seems a useful relic. But the seal did some harm on the way. There was a general rule that a new action could not be used where an old one was available. If therefore a contract had in fact been made under seal, it had to be sued upon in covenant or in debt on an obligation instead of in the newer forms; and these actions kept to their old course of pleading. Incorporated companies, which had to contract under seal, therefore found themselves at a curious disadvantage with their unincorporated rivals: they could not plead the general issue, and

had to procure legislation allowing them to do so. More serious and more lasting was the conceptual damage done. The proprietary idea behind account and the distinction between the proprietary and the contractual aspects of detinue were sensible and useful, and we have suffered by their loss.

11 *The Rise of Trespass and Case*

THE BEGINNINGS

No attempt will be made to see through the shadow in which the early part of this story lies. The Anglo-Saxon tariff system, visiting wrongs with monetary penalties and monetary compensation, was modified by many factors: perhaps by the influence of the church; perhaps by ideas from Roman law; certainly by an extension of the royal interest; perhaps, as will be seen when considering crime, by a back-handed effect of feudal ideas introducing a new concept of felony; and certainly by the introduction of trial by battle, at first for Normans, which again perhaps became connected with the rise of this new concept of felony.

The starting-point, about the end of the twelfth century, is that a wrong was either a felony or not, and either a plea of the crown or not; and that proceedings might be instituted either by public authority or by or on behalf of the victim. A wrong was also a trespass. That is all that the word trespass meant. But convenience came to exclude felonies, so that our first dilemma could be restated: a wrong was either a felony or a trespass. The criminal law, to be learned until modern times from books entitled "Pleas of the Crown", grew from proceedings for felonies and trespasses undertaken not by the victim but by public authority, in this case indictment at the instance of the crown. And here, because linguistic confusion became intolerable, trespass, the Latin *transgressio*, came to be translated as "misdemeanour".

But our present concern is with proceedings undertaken by or for the victim. For felonies these were known as the appeal of felony. The word appeal could at first be used of any proceedings

undertaken by the victim of a wrong, a trespass; so that the appeal of felony, if not the ancestor of actions of trespass as was once thought, is in a sense its twin. Civil liability grows from such proceedings undertaken by the victim of a wrong, a trespass, which was not a felony. Where would they take place? That depended upon whether or not the trespass was a plea of the crown. Although "pleas of the crown" became almost synonymous with the criminal law, that was a result of the events to be described in this chapter and was not true at the beginning. A trespass might be a plea of the crown although not a felony; and if so proceedings begun by the victim had to be in a royal court just as much as proceedings begun by indictment. But if the trespass was not a plea of the crown, and most trespasses were not, then proceedings begun by the victim, or indeed by public authority, would be before a local court. This jurisdictional distinction, reaffirmed by the Great Charter in its provision that sheriffs should not hear pleas of the crown, is the prime fact in the history of the law of torts; and although it began to break down six hundred years ago, its effects make senile mischief today.

TRESPASS *VI ET ARMIS* AND ITS EXTENSION

Trespasses which came to royal courts because they were pleas of the crown will be taken first, but with the warning that they were exceptional: the great bulk of trespasses was long dealt with in local courts. Because a misunderstanding has worked itself not just into history but into the law itself, a further warning must be given at the outset: there is no other unity among the exceptional trespasses that came into royal courts than the jurisdictional. A common factor made them all pleas of the crown; but they did not make up any closer conceptual entity.

Among the list of pleas of the crown was the king's peace broken, for Glanvill a more serious matter than mere theft which was for the sheriff. This king's peace was, of course, at first something special, the king's own protection, the king's own personal law. He might give his peace to his servants, his

favourites, those who might pay for the privilege. It might be widened at the great feasts of the church, or extended to all persons in certain places, wherever the king was, the king's highway. Further extension may be seen as a matter of policy, extending, in our terms, the royal criminal law. But at first the king's peace was a personal thing and not a governmental abstraction; and, for example, it died with the king.

It follows that what made a breach of the king's peace was not the intrinsic quality of the act, but the person, the place, even the season. The same act, or one more outrageous, might in other circumstances be a breach only of the sheriff's peace; and proceedings by the victim would then be in the county court. It follows also that we cannot generally tell what lies behind that *contra pacem regis*. There comes a time when it was inserted not because it said anything meaningful about what had actually happened, but because the plaintiff desired the jurisdictional consequence of having his grievance heard by a royal court. In the printed *Register of Writs* there are two kinds of trespass writ. The first set of precedents is captioned *De transgressione in comitatu*; and the first writ in it is a writ of battery not alleging breach of the king's peace, and followed by a warning that neither *vi et armis* nor *contra pacem nostram* must be mentioned "because the sheriff cannot deal with those". The second set of precedents is captioned *De transgressione in banco*; and the first writ in it is another writ of battery, this time alleging that the act was done *vi et armis* and *contra pacem nostram*.

That the plaintiff in such a case could, as it were, choose his court is clear at any rate from the early years of the fourteenth century. But we do not know when it became true. An increase in trespass actions in the king's courts in the third quarter of the thirteenth century may reflect this, or it may reflect merely an increasing number of plaintiffs who for one reason or another desired royal rather than local justice. The death of Henry III was followed by a flow of actions for wrongs of a kind clearly appropriate to local rather than royal justice, and this may have been due to confusion caused by the death of his peace: even if a

wrong could properly have been called *contra pacem* while he was still alive, an action brought after his death would not have even this distinguishing mark. In 1278 the Statute of Gloucester provided that sheriffs should hear pleas of trespass in their counties as the custom was; and this looks like an attempt to restore a jurisdictional principle that was being forgotten or ignored. But it went on to talk about the forty shilling limit, and throws no light on the scope of the established exception for trespasses committed *contra pacem*. The only apparent consequence of that statute upon those trespasses is that by the turn of the century the phrase *vi et armis*, previously sporadic, is almost invariable in trespass writs. It had been most common in cases involving some invasion of land, and seems to have come from novel disseisin: assizes which found that there had been disseisin were then asked whether it had been *vi et armis*; if yes, the defendant was imprisoned until he bought off the king's anger. In novel disseisin, of course, jurisdiction belonged to the king any way; but a disseisin *vi et armis* was a wrong specially affecting him in the same way as a *contra pacem* trespass. *Vi et armis* probably therefore came to be put in all trespass writs to emphasise *contra pacem*. But the emphasis seems to have been for the sake of propriety after the Statute of Gloucester rather than for the sake of truth.

The growing artificiality can be seen in various ways. Process is particularly illuminating. Because breach of the king's peace had been a serious offence against the king, it had always carried arrest and outlawry. Even though the proceedings were being taken by the victim, *capias* would if necessary issue to secure the presence of the defendant. And if he was convicted, he would be imprisoned, as was a disseisor *vi et armis*, until he bought his freedom from the king. But the fine to the king slowly became standardised, and the *capias* and the possibility of outlawry were seen simply as efficient process in the interest of the plaintiff. When in 1304, for example, a jury found the defendants guilty but awkwardly added that the wrong had not been done *vi et armis*, their rider was ignored: the defendants were still imprisoned. Whether or not the defendants had made this point to

the jury we have no means of knowing; but the case shows how inevitable the whole artificial development was. The defendant could only plead Not Guilty, and no jury would deprive the plaintiff of his damages for a genuine loss on the ground that it was not genuinely *contra pacem*. The artificiality in the matter of process became embarrassingly obvious over a demise of the crown. In the first year of Edward III there was scandal over a defendant who had committed a trespass in the previous reign: process by *capias* was no longer available against him because Edward II was dead and his peace with him. This result evidently came as a surprise to the profession, and seemed a mere injustice to the injured plaintiff. In 1328 a statute remedied it, providing that process for trespasses committed under Edward II should not be affected by his death.

Artificiality over the nature of the act, made explicit in the 1304 verdict finding that the deed was done but not *vi et armis*, is implicit in the conventional expansion of that phrase in trespass counts. Although knives and sticks and stones sometimes feature in the king's bench, almost all trespasses in the more conventional common pleas turn out to have been committed "with force and arms, to wit with swords and bows and arrows". Sometimes, moreover, it is obvious not only that weapons played no part but also that the wrong complained of did not accord with later notions of trespass *vi et armis*. In 1317 a plaintiff counted that he had bought a tun of wine from the defendants, and had left it with them until he could arrange for its transportation; the defendants however, with force and arms to wit with swords and bows and arrows, drew off much of the wine and replaced it with salt water, so that the wine was wholly spoilt, to the plaintiff's great damage and against the king's peace. Those defendants had committed a wrong, a trespass, for which the plaintiff could certainly have got a local remedy. But Glanvill's breach of the peace has sunk to a pair of incantations put in to get the dispute into a royal court.

Blatant cases like that are rare for the next half century, not, it seems, because plaintiffs were not bringing such actions in

royal courts but because their lawyers were being discreet. As with the universal adoption of the *vi et armis* allegation, moreover, it seems that their discretion was in the interest of propriety rather than because the actions were themselves objectionable. The evidence comes from cases of varying facts, but the point can most easily be made in terms of an action against a smith for professional negligence: he injured the plaintiff's horse in shoeing it, and the horse died. In a local court the plaintiff would have a straightforward remedy. But he could not be entirely straightforward if he wanted to come to a royal court, because he had to allege breach of the peace. If he simply added the allegations to the plaint he would make in a local court, his writ would run something like this: why with force and arms the defendant in shoeing the horse drove his nails into the quick of its hoof so that it died, to the plaintiff's damage and against the king's peace. This is the equivalent of the writ obtained by the buyer of the tun of wine; and an objection actually made in that case but not pressed came to be fatal. The complaint was in the technical sense repugnant within itself. It showed that the horse was lawfully handed to the defendant, or the wine lawfully left in his possession; and whatever he then did to it, however wrongful, could not be in breach of the king's peace or of any peace. If a document is bad because self-contradictory, it can be cured only by excising one allegation or the other. To excise the *vi et armis* and *contra pacem* left the perfectly good complaint from which the plaintiff had started: but it was not even technically a plea of the crown, and so was not within the jurisdiction of a royal court. To bring the matter to a royal court, therefore, he had to excise the other allegation, that which showed that the object was lawfully in the defendant's possession. Instead of complaining that the smith did his work so badly that the horse died, his writ would run something like this: why with force and arms the defendant killed the plaintiff's horse, to his damage and against the king's peace. The count would follow the writ, the defendant would plead Not Guilty, the jury would find him guilty or not guilty, and the record would look like that of an action for malicious injury by

a stranger. Knowledge of what happened in later times might make us suspect that it was really a road accident or the like. But were it not for the chinks of a few unusual cases, there would be nothing to make us suspect the truth, except this: the defendants in many such actions for killing horses are named or described as smiths.

About 1370 the story of the smith's liability reached its happy ending. The chancery sealed and the court upheld a writ in the form of the old local court plaint, without any allegation of breach of the peace: why the smith drove his nails into the quick of the horse's hoof so that it died, or so that it was injured and unable to work. A decision had evidently been taken that the king's courts would hear wrongs, trespasses, even though they were not pleas of the crown. This decision was the "origin" of actions on the case in the king's courts. But the history behind the smith—the case of the nails is the *Farrier's Case* of 1372, known as one of the earliest actions on the case—shows that in some situations at any rate the change was a formal one. Neither the liability nor its substantive enforcement in royal courts was new. What was new was the honest and straightforward way in which the case was put. Lawyers have never much minded about obliqueness so long as it produced the desired results, and the question arises why this change was made. A possible explanation is that the smith brought in on a *contra pacem* writ was subject to *capias*, and that this seemed unjust. But it is more likely that plaintiffs desired to bring to royal courts wrongs which no ingenuity could describe as *contra pacem*. To the buyer of a diseased horse deceitfully warranted sound, it must have seemed merely capricious that he could not get to a royal court when the smith's ill-used customer could. They were equally victims of private wrongs to which the king's peace was irrelevant.

The story has been taken up to the beginnings of the action on the case in order to show that the legal task actually done by trespass *vi et armis* became more sophisticated than it looks. But since the true facts are nearly always hidden behind formal pleadings and a blank general verdict, we can neither trace the steps by

which Glanvill's breach of the peace became a mere password to royal justice, nor be sure what liabilities in fact came to be enforced in this way. But of the latter some idea may be gained from a series of examples. To start with an action that survives today, cattle-trespass is still recognisable as an action of trespass *vi et armis*, and the result still follows that the defendant is liable without affirmative allegation and evidence of fault. A proposal in 1953 to throw the liability into the tort of negligence, in historical terms to make it into an action on the case, was rejected on the ground that allegations of fault cause bad blood between neighbours. But that proposal would have righted an oversight now just six centuries old. The *vi et armis* writ had first been used for acts which were indeed deliberate, sometimes violent, cattle being driven in by way of asserting or trying to usurp rights of common. But it had been extended to the case of straying beasts when wrongs could still not come into royal courts unless *contra pacem* was alleged; and in that case the writ was never modified as the smith's was. For another wrong concerning animals, a modified and straightforward writ was promptly devised: the *scienter* action, which will be examined in another context, appears as one of the earliest actions on the case. But the same liability had at least once been earlier imposed under cover of a *vi et armis* writ alleging that the defendant had set his dogs on to do the damage.

Equally illuminating, if not of daily practical importance, are writs concerning abductions. The husband's action on the case for enticement of his wife appears as a new tort in 1745. Before that date, so far as the legal records go, Englishmen had kept austerely to kidnapping. The Statute of Labourers provided an action for the master whose servant was enticed away, but it covered only servants. In the printed *Register of Writs* there is a precedent about an apprentice abducted *vi et armis*, and an apologetic note explains that it is necessary because the statute does not cover apprentices. Another special situation is that of fire. An early action on the case was that for the careless keeping of a fire in the defendant's house, so that the neighbouring house of the plaintiff was burnt;

but a case of 1368, also to be mentioned later for another reason, suggests that the same liability had been enforced in the king's courts by the writ appropriate for arson. This writ was used also in another misleading situation, a pair to that of the kidnapped apprentice. If tenant for life or for years carelessly burned a house down, he was made liable by action of waste. But there was no writ of waste for use against tenant at will, and resort was had to the writ of trespass *vi et armis*.

These are all situations in which some accident has disarranged the formalities enough for us to catch a glimpse of the true underlying facts. Of more lasting importance is the general lesson: throughout the middle ages we can hardly ever be sure what had really happened, what the true complaint was. No doubt most actions of battery were the result of genuine attacks or brawls; and perhaps most defendants who pleaded Not Guilty really meant "It was not me". But in view of the history of the smith, it would not be wholly surprising if one or two actions for battery turned out to be patients suing their surgeons, another early kind of action on the case. Artificiality of this degree no doubt mostly disappeared after the admission of actions on the case, of trespass actions in which breach of the peace did not have to be alleged. But a lesser degree of artificiality remained, and has persisted until our own day. Not until modern times, and then only because trespass *vi et armis* became a definite legal concept, did actions on the case become available for ordinary physical accidents; and even then, they were in a sense alternative. If the defendant on his horse had run the plaintiff down, the plaintiff sued in battery. But there would be nothing on the plea roll to distinguish the case from the brawl: the defendant is to answer why with force and arms he assaulted, beat and ill-used the plaintiff, to his great damage and against the king's peace; the defendant comes and says that he is not guilty; the jury say that he is guilty, damages so much. When one has realised how various are the facts which may lie behind those standard entries, the plea rolls become very tantalising. But, unless the defendant made or tried a special plea, the year books are no better.

LIABILITY IN TRESPASS *VI ET ARMIS*

The special pleas found in actions of trespass *vi et armis* seem to follow the usual principle: they are permitted when the blank denial would be in some way misleading. The statements in the plaintiff's count were true; the general issue might seem to deny them; the defendant may therefore plead in confession and avoidance. Pleadings designed to raise proprietary questions became complex and disingenuous; but the ordinary pleas in justification are much what one would expect. Jailors and peace officers plead that they were acting in the course of their duty. Defendants who say they are the plaintiff's kin admit that they shut him up and beat him: he was having a fit, and this was the treatment. One sued for knocking the plaintiff's house down had knocked it down: fire had engulfed neighbouring houses, and he and others were trying to make a fire-break to stop it spreading. Such pleas in justification normally ended with words like "as well he might", an assertion that the act done was lawful. Similar, but not quite a plea of justification, was *son assault demesne:* the defendant in battery could say that the plaintiff had started the trouble and he had only defended himself, so that any harm that came to the plaintiff was his own doing. Any such plea could be answered in one of two ways. If the plaintiff denied the defendant's facts, he made the replication *de injuria*. If for example the alleged epileptic was not having a fit, he would say that the defendant had acted of his own wrong and without any such cause. If he admitted the facts but thought that they did not constitute a valid excuse in law, he would demur. The epileptic who was having a fit, but thought it wrong to drive out the devils by beating him, would say that the plea was insufficient in law to disable him from his action. This last, however, is rarely found, because discussion before the plea was formally made and entered would indicate the general opinion of its legal validity. If a defendant thought his proposed plea might fail on demurrer, he would not risk making it; and the case would then go off on the general issue.

We may never know what could lie behind the general issue

in the middle ages, or for long after. Sometimes, perhaps generally as in criminal trials today, the defendant who pleaded Not Guilty really meant "It was not me". But the important question is whether and when and in what sense he might mean "It was not my fault". If he could not put that to the jury on the general issue, he could not put it at all. In the whole of the year books there is no special plea of accident in trespass, and this has led most historians to think that liability was strict or absolute, that if the defendant had done the harm he was liable. Whether English society would have found such a state of things tolerable is the hardest kind of question to answer: it may be that it only became intolerable with the invention of gun-powder and other forms of stored power, so that harm can be done out of all proportion to what ordinary people regard as the degree of fault involved. Medieval man could more easily foresee what his own strength might do, or that of his horse. But speculation should be based upon the procedural possibilities. The defendant did knock the plaintiff down, and the plaintiff is suing him for battery: how, if at all, can the defendant say that his horse bolted or that the plaintiff suddenly ran across the road?

So far as they have been explored—and it is probably enough for confidence—the plea rolls bear out the year books: there was no special plea. To this there is one enlightening exception. In 1290 a *contra pacem* writ is brought against two defendants for burning the plaintiff's house down. But as in the case of the tun of wine a quarter of a century later, the count does not show a genuinely *contra pacem* wrong. The plaintiff says that the defendants were guests in his house, and caused the harm by foolishness with an unwatched candle. The defendants expressly plead accident, and that special plea is put to a jury. The jury find that when the second of the two defendants went to bed on the night in question, a third guest would not let him put the candle out and then himself went away leaving it burning. They also assessed damages in case the defendants should be held liable on these facts, but judgment is not recorded. Not until modern times could one find a pair to that modern-looking entry; but this is

probably because such cases are hidden behind forms rather than because civilisation went backwards.

To take first the matter of the count, it has been noted in connection with the smith that writ and count came to be adjusted so that *contra pacem* looked sensible, and was not repugnant to the facts as stated. In the case of the smith the facts as stated then looked like malicious injury by a stranger, in the case of the fire, like arson. But in neither case was this anything more than a misleading concession to propriety. Our immediate concern, however, is with the plea. Why do we find no special pleas of accident after 1290? There is year book evidence that at about that time teachers were saying in connection with waste and replevin —there is no direct evidence about trespass *contra pacem*—that accident should not be raised specially: the general issue should be pleaded and the matter left to the jury. We do not know the reason for this advice. It may have been human rather than technical, and based on a belief that a jury was more likely to be lenient. It may show a literal understanding of *In nullo est inde culpabilis*. Or it may have sprung from perception of a point to be made explicit centuries later: "Not my fault" is hard to distinguish from "Not me"; the defendant's case is that he did not cause the harm and therefore he should not confess the fact at all, as he would if pleading a justification.

It therefore seems likely that accident was not irrelevant in the year book period, but had been pushed back into the general denial in trespass. It would then be discussed before the jury at *nisi prius*, and was of no interest to pleaders or their reporters. Occasional glimpses seem to show this. The 1290 case may be compared with a *vi et armis* action in 1374 for burning the plaintiff's house. The defendant pleads Not Guilty, and the jury find that she did it by negligence but not by malice. But she was a tenant in the house, and the question was whether she was tenant for years, in which case the plaintiff should have sued in waste, or tenant at will in which case this action was proper. Six years earlier to a bill for burning the plaintiff's house *vi et armis* the defendant also pleaded Not Guilty. The jury found that the fire

had started in the defendant's house by accident and had spread to the plaintiff's, and judgment was given for the defendant. Both cases have already been mentioned as showing the artificial use of *vi et armis* writs: both suggest also that the question of fault was considered by the jury on the general issue.

The later year books do not throw even such fitful light. There are two discussions of accident, both raised incidentally by pleas concerning deliberate acts. Both are amateurish, and this confirms what we already know: the matter is not a subject of professional discussion. But this also is consistent with the proposition that juries were left to struggle with the question as best they could; and late as it is, the same is suggested by a case of 1695. In an action for battery the defendant pleaded specially that he was riding on his horse, the horse bolted, he shouted a warning but the plaintiff failed to jump clear, and so he ran him down by accident. He was held liable, because this was no justification. But all the reports note an observation by the court that he should have pleaded the general issue and given these facts in evidence. If they were true, he had not committed a battery.

Fault in trespass *vi et armis*, so obvious a question to us, seems therefore to be another of those areas which were long protected from systematic legal thought by the primacy of the general issue. But, although this may seem a more acceptable conclusion than its only realistic alternative, which is to believe in an almost absolute liability, we must not assume that juries were easily moved by stories of hard luck. The late year book discussions and the seventeenth-century reports all suggest that the defendant had to be so free of fault that in some sense he did not do the harm. A horse could bolt because of a stranger's act, a clap of thunder, or its own fancy; and it was easier to find its rider not guilty than the man who was holding the gun when it went off.

ACTIONS ON THE CASE

If a trespass, a wrong, was not a plea of the crown, proceedings against the wrongdoer, whether undertaken by public authority

or by the victim, were matter for a local court. The formal relaxation of this principle in the third quarter of the fourteenth century is the "origin" of the action on the case; and the immediate progenitor of that action is therefore trespass in local courts. But an enumeration of the kinds of act remedied as trespasses in local courts would of course include acts which, if breach of the king's peace was alleged, would also be remediable in royal courts. It has already been noted, for example, that the printed *Register* has two writs of battery, one *vi et armis* and *contra pacem* and returnable in the common pleas, the other omitting these allegations so that, as the *Register* says, the sheriff can hear the case in the county court. But even after the jurisdictional principle was relaxed, batteries and the like never appeared in the king's courts unless they were properly clothed in their *vi et armis* and *contra pacem*, possibly because the king wanted his fine, however formal, possibly because the plaintiff would never forego the stringent process by *capias* which *contra pacem* entailed.

Our concern therefore is with those trespasses which had been in principle remediable only in local courts, because *contra pacem* could not colourably be alleged. That there was no conceptual unity among them is even more obvious than in the case of the trespasses *vi et armis*: they were a miscellaneous residue, whatever local custom classed as a wrong but could not be brought or smuggled into a royal court. And so long as the jurisdictional frontier mattered, wrongs as peaceful as that of the smith could be smuggled in as *contra pacem regis*.

But even at that time occasional trespass actions came to the king's courts in which *contra pacem* was not and could not sensibly be alleged. In so far as there was a formal frontier, it limited the jurisdiction of local courts: they could not hear pleas of the crown. The king's own jurisdiction was not formally limited; and his courts did not hear ordinary trespass actions only because, as a matter of policy, the chancery would not normally seal trespass writs returnable there. Sometimes, however, they did so; and the two most striking examples will be mentioned for the light they throw on trespass litigation generally.

The repair of river or sea walls was a duty commonly cast upon the riparian owners. It was enforced in various ways, sometimes by indictment; and this may possibly explain why a royal interest was seen. In several cases, the earliest known dating from the early years of Edward I, actions were brought against such riparian owners by neighbours whose land had been flooded in consequence of their failure to repair. These actions are called trespass, though of course there was no question of a breach of the king's peace; and they seem to have been well established, if not common, throughout the century preceding the relaxation of the jurisdictional principle. At the time of that relaxation, however, an odd thing happened. For a year or so about 1370 these and some other writs were issued with an incongruous *contra pacem* although they had never had it before. This suggests a school of thought in the chancery that proposed to achieve the relaxation by putting *contra pacem* indiscriminately into any trespass writ required to be made returnable in a royal court. The result would have looked funny, as did the case of the tun of wine in 1317; but we shall find reason to regret that this plan was not adopted, or that the more radical step was not taken of excising *contra pacem* from its established home in writs of battery and the like. Its survival was responsible for the damaging distinction between trespass and case; but that is to look ahead. Writs against riparian owners soon lost their *contra pacem* again, looking much as they had in their earliest days; and they came to be classified as actions on the case.

Also known as actions on the case in later times, as trespass in their early appearances, are actions by the owners of fairs and markets against persons defrauding them of their tolls by selling secretly in their own houses, instead of in the market. The earliest example known was in 1241. It seems likely that the king's courts heard such cases because the plaintiff's franchise was at least in theory his by royal grant; and actions for nuisance by operating a rival market also had special treatment in the matter of jurisdiction. The offence and the damage were purely economic, and perhaps even more remote from later ideas of trespass than the

mere nonfeasance of the riparian owner with his wall, where at least the resulting damage was physical. To those brought up in the old belief that trespass in the king's courts had always had its eighteenth-century meaning, this was the most remarkable feature of these cases; but they probably did not seem remarkable in their own day. Trespasses no less sophisticated, though with less at stake, were of daily occurrence in local courts.

They will, however, serve to introduce the subject of the forms taken by trespass writs. They were all *ostensurus quare*, and it has already been suggested that this was at least congruous with the complaint of a wrong. The simplest physical wrongs do not take much explaining; and standard phrases soon emerge for assault and battery, false imprisonment, the taking of goods and so on. But these phrases are ingredients rather than writs in themselves, appearing in any particular writ singly or in the relevant combinations: the defendant invaded the plaintiff's land, took his cattle, beat his servant, and usually committed *alia enormia* for good measure. The actual facts covered by any formula, moreover, were very various, so that the composition of even a simple writ required some skill: only a lawyer would realise that "with force and arms assaulted, beat and ill-used" was a suitable account of a road accident. But a lawyer could point to the phrases he needed, so that the writ was, if not common form, at least made of prefabricated parts.

But outside the area of the simplest physical wrongs, of those wrongs which could be described as *contra pacem* and so easily come into the king's courts in the thirteenth and early fourteenth centuries, the writ had to be drafted. There were no precedents except, perhaps, common forms of plaints in local courts. And the drafting problem might be real because the wrong might need some explanation. Consider the case of the market. In the earliest example in 1241 the complaint is put in terms like these: why the defendants sold their wares in their own houses during the plaintiff's fair contrary to the liberties granted him by such-and-such kings. This would have been very unwieldy if the franchise had been described in any detail; and in later examples it is more

elegantly recited in a preamble: why, whereas the plaintiff has such a right under such a title, so that no sales during the market should take place outside its precinct, the defendants sold their wares in their own houses.

The device of the preamble became very generally used. In the case of the river walls, for example, the writ might run: why, whereas by the custom of the district each man who has land on the banks of the Ouse should keep such of the banks as lie within his land in proper repair, so that by his default or negligence his neighbours come to no harm, this defendant failed to repair his stretch of bank in due season, so that the plaintiff's land was flooded and his crops lost. This was the form usually, though not always, adopted for the trespass writs which had to be composed when the jurisdictional barrier was relaxed. Most actions on the case have writs in the form *ostensurus quare cum*; and the *cum* clause, the preamble, sets out the source of the duty where that is not obvious, such as the custom of the realm in the case of the innkeeper or fire, the transaction in the case of the bailee or the buyer of defective goods warranted sound.

But there was no magic about this formulation. It has been seen, for example, that the writ of account against guardians in socage was an *ostensurus quare cum*. The preamble was no more than a convenient device when a good deal of matter had to be set out; and the salient feature of those trespass actions which first came, or first came openly, to the king's courts in the third quarter of the fourteenth century, was indeed that writs had to be composed specially setting out the circumstances. And this is how actions on the case came by their name. Phrases like "on the case" are found in the thirteenth century, generally making the obvious point that a writ must be appropriate to the facts. By a natural shift they came more and more to be used of writs which had to have special matter inserted as opposed to the "general" form, or which had altogether to be specially drafted as opposed to the "common" writs in the formularies. And although many writs "on the case" became standard, they preserved as their generic name the description of their earliest striking feature.

This account of the beginnings of the action on the case must close with a factual point. The matter is important because this action was to lie at the heart of so much legal development. But a lawyer in the fourteenth or fifteenth, or even the early sixteenth, century could have had no suspicion of this. Perhaps because process was slow, perhaps because small sums were at stake, actions on the case were infrequent. By the middle of the sixteenth century all varieties occur in the king's bench at the same order of frequency as actions of debt brought by Bill of Middlesex. In the common pleas in a single term in 1564 there are some 35 actions on the case in which something happens beyond a formal appearance by one only of the parties, some 950 actions of debt. If the "origin" of case was the sporadic appearance in the king's court of kinds of action common in local courts, its great flowering represents the later transfer of actual litigation.

THE RELATIONSHIP BETWEEN TRESPASS AND CASE

Had some lawyer in the late fourteenth century undertaken to write a book about what we should call tort, about actions brought by the victims of wrongs, he would have called his book "Trespass". Of actions for trespass in the king's court, he would have said that most were started by writ, and perhaps that writs could be classified in two different ways. Either they had *contra pacem* or not. And either they were "general", "common", or they were "special", "on the case". But both classifications were formal. They did not reflect substantive concepts. There was no equation of trespass with *contra pacem* and no contrast between trespass and case. Indeed, there was no entity of "case"or "trespass on the case" or "special trespass" as opposed to "common trespass". The only substantive concept was "trespass" as "wrong". There were general or special writs of trespass, and writs with and without *contra pacem*; but that is all. Moreover, the two classifications of writs were not coincident or even parallel: they cut across each other.

This last point can most clearly be made in terms of wrongs to

markets. The owner of a market normally had such fixtures as a toll-booth and a pillory. If a defendant broke these up, the plaintiff could use an ordinary general *vi et armis* writ: his franchise was not relevant to the physical damage. But usually he would get a special writ reciting his franchise, perhaps because the likely defendant was a rival franchise-owner, perhaps because he wanted to recover consequential damages in lost tolls and so on. But this special writ would still be *vi et armis* and *contra pacem*. Or the defendant, again probably a rival franchise-owner, might picket the market, preventing merchants from coming so that their tolls and other dues were lost. The writ would be *vi et armis* and *contra pacem*, and these phrases would be as truthful as they ever were in describing what had happened to the diverted merchants. But unless the writ was special, reciting the plaintiff's franchise in a preamble, it would disclose no wrong to him. And even with the preamble, of course, the wrong that it did disclose was the causing of damage which was both economic and indirect so far as the plaintiff was concerned, though it might have been assault and battery to the merchants.

A last and slightly more subtle example may be taken from another kind of franchise. The franchises of estray and wreck of the sea gave to a landowner, under the appropriate conditions, beasts found straying within his lordship or goods washed up there. Suppose that one with a franchise of estray took possession of a straying horse, and the defendant took it from him: he could have either a general writ *de bonis asportatis* or a special writ reciting his franchise. But suppose the defendant had got to the horse first: without his franchise the plaintiff would have no right, so he must have a special writ. That writ, however, still said *vi et armis* and *contra pacem* although the horse had not in any ordinary sense been taken from the plaintiff.

This last was among the cases which were to pose a problem to writers in the sixteenth century. Then there were two categories of "trespass" and "case", and they could not tell which was appropriate. Did the *contra pacem*, unreal as it truly was, make the action trespass? Or did the special matter make it case? But

our hypothetical writer in the fourteenth century, to whom such writs were very familiar, would have had no difficulty. The categories had not come into existence. If he had discussed the significance of the two ways of classifying writs, he would not have attached much importance to the distinction between common writs and writs on the case. Little followed from it. But he would have stressed the consequences of *contra pacem*. Artificial as it was in substance, *contra pacem* carried *capias* and outlawry, and these were not available in trespass writs without it. This was an accident of chronology. It has been noted that in 1352 statute had extended *capias* to the important personal actions like debt. But it would have been otiose to mention trespass, since at that date only *contra pacem* trespasses came to royal courts regularly. When other trespasses began to come in some twenty years later, therefore, they were encumbered with dilatory process; and this was not formally put right until 1504.

Contra pacem had once been meaningful, and had had the jurisdictional consequence that such trespasses came to royal courts. Then cause and effect became reversed, so that the plaintiff who desired royal jurisdiction would allege *contra pacem* if it was at all possible; and the stretching of possibilities led to artificial results. It may have been these that led in turn to the relaxation of the jurisdictional principle, and *contra pacem* should then have ceased to play any part. Because of the accident about *capias*, however, it continued to matter; and this accident was probably responsible for the lasting division of trespass actions into two categories.

We do not know in detail how these categories took shape in lawyers' minds, but the outline seems clear. All "common" writs had *contra pacem*, being the core of trespass actions in royal courts when in general only *contra pacem* actions could come there. Equally, all actions only admitted after the relaxation of that principle had writs that were "special" or "on the case". Although the converse of neither proposition was true, and although special writs having *contra pacem* would come to look particularly anomalous, it was therefore natural that the two ways of classifying

writs should be aligned. Writs "on the case" contributed their name to a category of which the important characteristic, because of process, was the absence of *contra pacem*. The name slowly became a term of art, so that by the sixteenth century even plea roll clerks, specially anxious not to recite a lengthy writ for the sake of recording a jury respite or the like, began to use *transgressio super casum*. This separation from plain trespass is naturally reflected in the books of entries and in works like Fitzherbert's *Natura Brevium*. But it does not reach, as the separation of detinue from debt did not reach, to the printed *Register of Writs:* many writs on the case, including even some in *assumpsit* for the mere failure to carry out a promise, are mixed up with battery and the like under *De Transgressione*.

The separation is recorded with ironical clarity in the statute of 1504 which removed the last reason for it. This provided "that like process be had hereafter in actions upon the case . . . as in actions of trespass or debt". But although "trespass on the case" and the like becomes unambiguous, it is still important to keep an open mind on the sense of "trespass" except when the contrast is being expressly made. For Coke "trespasser" means just wrong-doer, and ' trespass" itself, sometimes explicitly equated with trespass *vi et armis*, can sometimes still have what he knew to be its old sense of just "wrong". Consider for example the way in which he wrestles with the nature of *assumpsit*, the subject-matter of the next chapter: "it is termed *trespass*, in respect that the breach of promise is alledged to be mixed with fraud and deceit to the special prejudice of the plaintiff, and for that reason it is called trespass on the case . . .". The argument hinges upon the relationship between concepts like our tort and contract, and cannot be expressed without using some general word for wrong. Coke is conscious of the difficulty over using his italicised *trespass*, as the awkward reference to trespass on the case shows. But there was no other word available to him. Towards the end of the seventeenth century "tort" could be used as a heading in a book on pleading, but it referred the reader to what we have noted as the standard answer to a plea in justification: the replication *de injuria*

was known in French as *de son tort demesne*. Our sense of tort does not begin to appear until the eighteenth century; and Coke's italics for "trespass" are matched by Blackstone's for "tort", which he feels he has to explain: "*torts* or wrongs". In 1720 there was published a book called *The Law of Actions on the Case for Torts and Wrongs;* and the two earliest treatises on tort as a whole have similar titles: Hilliard's *Law of Torts or Private Wrongs* published in 1859 in the United States was followed a year later in England by Addison's *Wrongs and their Remedies, being the Law of Torts*. As late as 1873 Underhill still thought some explanation desirable: his title was *Law of Torts, or Wrongs independent of Contract*. Pollock in 1887 seems to have been the earliest to use *Law of Torts* as simply as our hypothetical fourteenth-century writer, most nearly incarnate in those who compiled registers of writs, would have used "trespass".

Trespass, then, lost its original sense by being identified with trespass *vi et armis* and distinguished from case. It was of course from that distinction that the modern sense of trespass grew; and to hindsight the process seems unnecessary and perverse. When *contra pacem* lost its jurisdictional importance about 1370, its importance in the matter of process unhappily survived; and a chance of reuniting the law of wrongs was thereby missed. A second chance came in 1504, when the same process was extended to all trespass actions. *Contra pacem* was thereafter without consequence in the real world except for a nominal fine to the king lost among court fees. But it was too late. The two categories existed in lawyers' heads, as the statute itself shows. It was certain that there was a distinction even if nobody knew what it was; and a distinction is never without consequence in a law court.

Its nature can best be seen by considering the effect on legal argument of the loss by "trespass" of its original meaning. In the middle ages a discussion about the classification of a case as trespass or covenant was about the analysis of its facts. As those two words slowly became the names of actions, the question came to look like one merely between two actions. Lawyers began to think in

terms of "the forms of action". The law itself was seen as based, not upon elementary ideas, but upon the common law writs, as consisting in a range of remedies which had as it were come down from the skies. If a case fell within the scope of no writ, then in general there was no law. If it fell within the scope of one writ, then in general no other writ could be proper. A defendant could therefore argue that on the facts put by the plaintiff there was a good case against him, but on some writ other than that chosen by the plaintiff. That argument was at the heart of great legal changes; and it continued to be made even when much litigation was started without any writ. The form of action was still identifiable, and its identity was that of the notional writ upon which it was supposed to rest. "We must keep up the boundaries of actions", said Chief Justice Raymond in a case of 1725, "otherwise we shall introduce the utmost confusion".

That was in the course of argument about the distinction between trespass and case. There must, in that climate of thought, be something in the facts signalling which category was appropriate. The only common factor ever possessed by actions on the case was formal, the "special" nature of the writs. Legal mythology had endowed them with a common origin, but even that did not suggest any factual unity. It made them the creatures of a supposed statutory power to frame new writs by analogy to established remedies; and the whole development was seen as extension in various directions from the central analogy of trespass. Trespass then was the entity, the one with identifiable factual properties. And it was natural to assume that those properties must somehow depend upon *contra pacem*, the only common factor.

On facts outside the usual run, therefore, the plaintiff's lawyer was confronted with a problem in these terms. From the situations in which *contra pacem* had in the past been alleged he must deduce the principle determining whether or not his client should allege it now; and if he got it wrong the form of action would be wrong. But, though he could not know it, there was no principle. In the formative period *contra pacem* had been alleged by those who wished to sue in royal courts. The facts had

played a part only at the limits of absurdity, when *contra pacem* would make nonsense; and the resulting artificiality had by no means disappeared when the jurisdictional principle was relaxed. The problem was made real by its very unreality.

An instructive example of this difficulty is the *scienter* action. This ended up as an undoubted action on the case. The writ called upon the defendant to answer "why he knowingly kept a dog in the habit of biting sheep, which dog bit sheep of the plaintiff's so badly that they died, to his damage of so much". The vice and the animal might be different, for example a horse kicking people. Writs in that form, without *contra pacem*, appeared at least as early as 1373; but the liability seems earlier to have been capable of enforcement in a royal court under cover of a *vi et armis* writ for setting dogs on to bite the plaintiff's sheep. This writ for incitement sounds artificial, and the incitement to bite can hardly ever have been genuine. But the action had a more or less genuine use: the right to have the sheep of others folded on one's land for their manure was not uncommon, and in disputes about this it would often happen that one man was using his sheep-dogs to handle somebody else's sheep.

That is the background to *scienter*. But there was evidently a persistent puzzle about its classification. That the earliest known example, in 1367, had *contra pacem* is not surprising. It has been suggested that some may have thought an indiscriminate use of *contra pacem* the easiest way of bringing about a jurisdictional relaxation. The writ of 1373 does not have the phrase. But in the sixteenth century the leading formulary classifies the action as trespass rather than case, and it seems as often as not to have *vi et armis* as well as *contra pacem*, a form which appears in at least one formulary of the seventeenth century.

This looks odd to hindsight. But seen through the eyes of the plaintiff's lawyer there was a genuine difficulty. The dog had bitten the sheep. Of course the defendant had not intended this, but nor had he intended it in in the usual incitement situation where his intention was only to use the sheep-dogs as such, and the biting was outside the course of their employment. Nor had

the defendant intended anything at all in cattle trespass; but again his beasts had done the damage. If the mere quality of the event determined whether a wrong was *contra pacem*, was trespass rather than case, and if the necessary quality was to be deduced from the precedents, the final answer for *scienter* was by no means immediately obvious.

The incongruity that we see in a *scienter* writ formulated with *vi et armis* and *contra pacem* is reminiscent of fourteenth-century incongruities. The allegations do not go with the "knowingly kept". Why not then adopt a fourteenth-century solution and cut out the "*scienter*" allegation itself, producing a general writ strictly analogous to that for cattle trespass? The substantive answer, of course, is that *scienter* was relevant: the owner was not *prima facie* liable for his dog's first bite. But it is the procedural reflection of that answer that may throw light where we need it. The defendant would plead Not Guilty, and that whether it was the dog's first bite or its twentieth. And he might point to a case already mentioned. In 1695 a defendant sued for battery pleaded specially that he was riding and the horse bolted and so knocked the plaintiff down. This plea failed, but the court said that he should have pleaded the general issue and put the facts to the jury: if true, he had not committed a battery. The man with the vicious dog could equally say he had not done the harm, and the vice would become irrelevant.

Similar considerations might affect the bolting horse. Consider the case of the plaintiff of 1676 also knocked down by a horse out of control. His lawyer probably foresaw that if he sued in battery, he might well lose on Not Guilty; and in the ordinary case of a simple accident that would no doubt be the right result. But this was not a simple accident: the defendant had chosen the busy Lincoln's Inn Fields as a suitable place to break in untrained horses. As with *scienter*, the true complaint rested upon a state of affairs that the defendant knew or ought to know was dangerous. The plaintiff therefore sued him in case, making explicit this basis of the action as fully as the *scienter* writ made explicit the fault in keeping a vicious animal. It is one of the sources of the modern

tort of negligence, to be discussed later. But it also shows the emerging conceptual distinction between trespass and case.

Considered in isolation the bite of the vicious dog or the impact of the wild horse was as much *contra pacem* as many of the events remedied by *contra pacem* writs. But if the plaintiff put his case that way, the defendant might persuade a jury on Not Guilty that he did not do the harm; and in a sense he did not. His responsibility rested, not just upon the physical event, but upon the state of affairs preceding it. The distinction between trespass and case is going to be that between the bare event and the state of affairs from which damage flows, between direct and consequential injury. This test, and therefore the modern sense of trespass, were finally settled in 1773 in the great case of *Scott* v. *Shepherd*, though even then the court differed about its application to the facts. The defendant had thrown a firework into a crowded place. It was twice picked up and thrown on, while still smouldering, by persons acting more or less instinctively in self-protection; and on the second occasion it hit the plaintiff and exploded in his face. The plaintiff passed over the intermediate hands and sued the defendant in battery. A majority of the court held that this was the proper form of action.

The consequences in general of the settlement of this test will be noted later. But the effect on a matter discussed in this chapter must be noted here: fault in trespass *vi et armis*, once apparently a matter of discretion for the jury, has been brought into the legal arena. If the harm was direct, what could Not Guilty now mean? Unless trespass was appropriated exclusively to wilful harm, a course which had some appeal and which could have made legal sense but historical nonsense, Not Guilty was more than ever likely to be equated with "It was not me". The idea that there was either a strict or a *prima facie* liability in trespass survived until our own day. The jurisdictional artificialities of the middle ages had been harmless: their rationalisation in the eighteenth century and after did grave damage.

But this particular consequence, associating fault with the forms of action, is not a matter of chance. The emergence of case as a

remedy for physical accidents distinct from trespass, and the emergence into the open of the problem of fault in trespass, are not altogether separate stories. The former has been discussed in terms of a dilemma for the plaintiff's lawyer: is he to frame his action in trespass or case? He will choose to frame it in case, as with the unbroken horse, when he may be defeated on the facts in trespass by a simple Not Guilty. But he can only be defeated on the point of law when the defendant can bring the facts to the attention of the court and argue that the form of action is inappropriate. The early artificial use of trespass *vi et armis* depended, like so much else, upon the blank finality of the general issue. Only when the facts emerging at the trial could, as it were, be brought back for legal discussion, could the defendant consider such an argument. In *Scott* v. *Shepherd* itself, the defendant had pleaded not guilty to battery, and a verdict had been found for the plaintiff. In the middle ages that would have been the end of the matter. There was no mechanism by which the defendant could have made the point that on the facts that had emerged the form of action was wrong; and that is why he could not know that there was a point to make, why the distinction had not emerged. But now there were several mechanisms. The verdict in *Scott* v. *Shepherd* was taken subject to a special case, the facts being put to the court *in banc* for them to decide whether the form of action was appropriate. Substantive law was not just being altered, nor just being refined: it was being made.

12 *Growth of the Modern Law of Contract*

Jurisdiction may govern concepts. The last chapter showed how the common law of torts was permanently disfigured by coming to the king's courts in two instalments. Much the same happened to contracts. The old personal actions came in early, met the difficulties of proof already considered, and were in consequence subjected to restrictive rules. But whereas trespass *vi et armis* did not by any means cover the whole field of torts, the old personal actions did cover most of the field of contracts. Covenant, for example, was appropriate for the breach of any promise except a promise to pay money or to deliver goods; and the rule which restricted its actual availability, the need for a document under seal, therefore affected a large proportion of the contractual field. This did not much matter so long as forty shillings was a large sum; but it was to become serious when daily transactions were brought within the range of the formality.

ASSUMPSIT FOR MISFEASANCE

The second movement from local to royal courts of work which we should call contractual, the "origin" of *assumpsit,* was no more than a part of the movement of trespass. In 1348 a ferryman on the river Humber accepted a mare for carriage, but overloaded his boat with other animals so that the mare was lost. Such mishaps were no doubt frequent causes of litigation in county and other local courts, but this one is known to us because the king's bench happened to be at York and the owner of the mare brought a bill against the ferryman there. The argument as

reported in the year books, obscured in the black-letter text by a small but damaging error, is one that was to be repeated in various forms for more than two hundred years. In our language it comes to this: tort or contract? The bill was a bill of trespass, and defendant's counsel argued that this was misconceived: the plaintiff's proper remedy was by writ of covenant. "It seems", said a judge, "that you did him a trespass when you overloaded the boat so that his mare perished". The defendant pleaded Not Guilty, and the verdict went against him.

Why was the year book reporter interested in this argument? If the only unusual thing about the case was that it happened to be brought before a royal court, so that we know about it, are we to suppose that such arguments were of everyday occurrence in local courts? Surely not. In a local court the classification of the dispute as trespass or covenant would be without consequence. If the facts were as stated by the plaintiff, he was entitled to a remedy; and it would be as unimportant as it is today whether the remedy was regarded as sounding in tort or contract, because in local courts, as in today's law, contract was not encumbered with any formality. But in the king's bench the ferryman's lawyer was bound to take the point. First, the king's bench could hear a trespass by bill, but a covenant had to go by writ to the common pleas. Secondly—and this was the point of general application—if the case was one of covenant, the plaintiff could not in any common law court get his action on its feet without a document under seal. Truly elementary questions like this do not often arise in court, and when they do it is perhaps usually through some jurisdictional change. In modern times exactly the same question was raised by a statute fixing the proper jurisdiction of inferior courts in terms of a monetary limit, and then fixing different limits for contract and tort.

Do such questions have a "right" answer? If they did, legal development would come to a stop. But the judge who said that the ferryman had committed a trespass was probably clearer in his mind than any judge would be if asked today whether the action rested upon the tort of negligence or upon breach of

contract. Covenant was about the enforcement of promises in an almost literal sense: it was aimed at people who did not do what they had promised to do. The ferryman had of course failed to carry the mare over the river. But he was sued, not because it was left on the bank, but because it was dead. He was not naturally liable in covenant, any more than the borrower who damaged what he had borrowed was liable in detinue. The complaint was not of failure to carry out the "contractual" obligation, but of damage actually caused.

Turning to the positive classification of the case as trespass, wrong, there may have been a special reason for this on the facts. Ferrymen were under a public duty, being obliged to provide a reasonable service at fixed rates. Even a failure to act might be an offence, a trespass, punishable on presentment; and improper action, even if proceedings were taken by the injured party, would naturally appear in the same light. Nor were such reasons for the classification necessarily exceptional. Consider again the smith, whose fortunes were traced in the last chapter. He was reached by a straightforward writ on the case as soon as trespass actions could come in without *contra pacem*. But he had before that been reached by an ordinary *contra pacem* writ. He had "done" the harm in a more obvious sense than the ferryman; and if the action against the ferryman had been: why with force and arms and against the king's peace, did he kill my mare, the jury would perhaps have said Not Guilty. But so far as the dilemma between tort and contract is concerned, there is little to choose between the two situations. Yet the ill performance by the smith was so obviously a trespass that the covenant objection was not even raised.

A later time would describe both the smith and the ferryman as belonging to "common callings". But in the middle ages, and particularly in towns where life so largely revolved around the crafts, bad workmanship and false dealing at every level were commonly regarded as offences against public authority as well as private wrongs to those damaged. Authority would have mechanisms for detecting these and initiating what we should call

prosecutions; and if proceedings were taken by the victim of a particular incident, they were still proceedings for a wrong, a trespass, and could still lead to the punishment of the wrongdoer as well as to compensation for the victim himself. In London, for example, the surgical profession was controlled. Master surgeons were publicly admitted and swore an oath to do their work well, to charge reasonably, and to present to the authorities the defaults of others who undertook cures. Our earliest evidence of this is from 1369; but consider an episode as early as 1300. A surgeon entered into a recognisance in a city court with a patient, cryptically said to "arise" out of a covenant between them for the effecting of a cure. The cure must have gone wrong, and the sum in the recognisance must have been compensation offered by the surgeon for a liability he admitted. But the interesting thing is the attitude of the city: both parties were amerced for settling the matter privately; and all the city surgeons were summoned to say whether this one was fit to practise. Although the affair had started with a "covenant" between the parties, there would against that background be no reason for surprise if any action had been classified as "trespass". In 1377 one who botched a cure, and who may have been an unlicensed practitioner, was sued in a city court by his victim, who was awarded damages. But in addition the defendant's handiwork was viewed by master surgeons, and he was imprisoned for it.

In the king's courts the ferryman had been an early harbinger of such litigation. But it forms a substantial proportion of actions on the case, of trespass actions admitted without *contra pacem*, when the flow begins about twenty years later. The surgeon himself first appears in the plea rolls in 1364, in year books in 1374; and we cannot exclude the possibility that he had earlier been sued in an ordinary writ of battery. The earliest year book report notes that the writ was not *vi et armis* or *contra pacem* in terms which suggest that it might have been. And yet the contractual bearings of the case are perfectly well understood: issue is tendered on the undertaking to cure; and one judge even refers to the action as "covenant". The ferryman's argument had

been neither obviously absurd nor obviously right. When a horse doctor was sued in 1369 for a negligent cure so that the horse had died, his counsel argued first that the action should have been in covenant, and then that it should have been by a general writ of trespass *vi et armis*. Neither argument was successful. That the two could be advanced together illustrates both the artificiality from which trespass litigation was emerging and the real doubt which the classification of such actions caused when once the question arose.

It inevitably and repeatedly arose in royal courts, because of their special rule about covenant; but they never wavered from the answer first given to the ferryman. Convenience may have played some part in this, but they were following what seems to have been a majority opinion in local courts. Although nothing there turned upon the classification, the question could still arise for one man: the enrolling clerk might have to give the action a name. Sometimes he called it covenant, more often trespass. Probably this was due to what we can only call the criminal element common in such cases in local jurisdictions. But that element remained in those jurisdictions and ultimately perished, perhaps to our loss. The city of London might punish the surgeon for his wrong, but in the king's court there was only the injured plaintiff and the purely civil action. In the common law, therefore, the classification of such cases as trespass would come to seem anomalous; and lawyers, as well as legal historians centuries later, would begin to think of *assumpsit* in contractual terms, and to see it as subject to an irrational limit. Misfeasance, the ill performance of an undertaking, was remediable: nonfeasance was not.

ACTIONS ON WARRANTIES

But before turning to nonfeasance, to attempts to get a remedy in *assumpsit* for the mere failure to perform a promise, it will be useful to mention another situation which belongs with ill performance. That is the action on a warranty. The buyer who bought in reliance upon a false statement about the quality of his

purchase, or more rarely about its size or value or the state of the title, was as clearly entitled to a remedy as the owner of the mare lost from the ferry. But there could equally be argument about its basis; and this at least should be no surprise to today's lawyer, inured to the prodigality which allows such a statement to operate as a warranty within the contract or as a representation outside it and, if the latter, allows it to ground a claim for rescission in equity or an action in tort at common law.

All these elements can be found from early times in local jurisdictions. The earliest remedy of which we know, stated in Glanvill, was rescission; and although the common law came generally to restrict itself to damages in the personal actions, apparently for practical reasons of enforcement, it may yet turn out that the equitable remedy of rescission was directly taken from local courts. In local courts the buyer's action was sometimes called covenant, but more often trespass; and not infrequently the word deceit is used. The background to this classification is the same as that for the misfeasance actions. The false seller was not seen just as the breaker of a private contract: he was a malefactor commonly liable to punishment at the instance of authority as well as to a suit for compensation. Consumer protection is neither a modern invention nor an exclusively modern need. It was a part of the "criminal" law of local jurisdictions, offences being seen as wrongs, trespasses, to the city or whatever it might be as well as to the party. But these local criminal laws perished, and with them the criminal sanctions against dishonest dealing. The false seller was a trespasser, a wrongdoer, to the city of London, but not to the king.

In the king's courts, however, there was never any hesitation about classifying the action of the party as "trespass" rather than "covenant". In the earliest reported action in common form alleging a breach of warranty of quality the defendant naturally tried the objection that it sounded in covenant, but he was unsuccessful; and the printed *Register* puts its precedents under *De transgressione*. The nature of the *transgressio* appears from an alternative label that came into use among plea roll clerks, *De*

deceptione. It appears also from the writ: the defendant is alleged to have sold the goods *falso et fraudulenter*, knowing them to be defective and warranting them to be sound. But the fate of these allegations is important. Deceit on the part of the seller was invariably alleged. In the case of food sold by retail to the actual consumer it may have lost all significance very early: an express warranty did not have to be alleged, and the seller's knowledge soon became immaterial. In the case of other commodities, an express warranty had to be alleged and the allegation could be put in issue. But it seems that the seller's knowledge again ceased to matter, so that while the buyer had to be deceived in one sense of that word, the allegation that the seller had acted deceitfully in the other sense became immaterial. If the seller had given the warranty and if the goods fell short he was liable.

That liability, however, is effectively a liability in contract. In the king's courts there was no "criminal" element to anchor the action to its analysis as an offence, a wrong; and although in form it continued to be an action for a wrong done to the buyer by the seller, in substance the element of wrong, of fault, became irrelevant and the liability became absolute. Two things followed. The truly fraudulent seller was no more liable than the one who was mistaken; and deceit was left without specific effect at common law until the eighteenth century "invented" the tort of deceit. And the warranty itself, which had started precisely on the basis of the modern tort of deceit, as a representation inducing the contract but operating outside it, had begun the journey which ended in its modern home inside the contract. The warranty became a term, the statement a promise, as belief in the truth of the statement ceased to matter.

In the fifteenth-century common law, then, trespass actions, actions for wrongs, were doing a fair range of work which we should call contractual and which lawyers at the time recognised as having affinities with covenant. The ill performance of a promise was remedied, not as a breach of it but as a negligent wrong. The false warranty, eventually to be treated as a promise in itself, was remedied as a deceit inducing the purchase. But there

was in origin nothing artificial about either. In local jurisdictions the analysis as between the parties did not matter; and it was the public interest that made it more natural to treat cases as trespass. In the king's courts this was inevitably followed, because otherwise they would be caught by the rule requiring a seal in covenant. But, since in the king's courts there was no public interest but only the rights of the parties to consider, the contractual element began to come uppermost in lawyers' minds. The process was to end with most contract litigation drawn into the forms of tort.

ASSUMPSIT FOR NONFEASANCE

The most important part of this development, and the least intelligible, is the process by which an action based upon trespass, an action for a wrong, came to be available to a plaintiff whose case was only that the defendant had not kept his covenant, his agreement. But the importance is visible only in retrospect. To lawyers at the time, the dominant thing was not the cases now to be considered: they could not know, as we do, that a new law of contract was in the making for new worlds. What mattered to them was the background against which those cases were enacted, an established law of contract ordered in the king's courts by covenant and the conditional bond. In these courts, therefore, we are to think of occasional plaintiffs who have neglected to comply with the necessary formalities, and who are seeking some legal back door. But their apparent foolishness must be assessed against another background, a law of contract in local courts which was not so encumbered with formalities. The plaintiff having his house built was perhaps stepping beyond the forty shilling limit for the only time in his life, and never realised his peril. The failure of the carpenter who was to mend the mill for thirty shillings may have been responsible for a loss of tolls amounting to ten times that sum. It is from accidents like this that great changes begin.

The facts are these. Such actions begin to appear on the records of royal courts as soon as trespass actions are regularly admitted

without *contra pacem*. *Assumpsit* for nonfeasance, like *assumpsit* for misfeasance, is found in the plea rolls among the earliest actions on the case. The earliest entry known is in 1370, though no entry has yet been found of a case actually fought out earlier than 1400, when there is a year book report. After some hesitation in the first decades of the fifteenth century, it seems to have been settled that the action did not lie. Towards the middle of the century, however, it became acceptable when the defendant had not only failed to keep his promise but had also put it out of his power to do so, for example by granting to another the land promised to the plaintiff. This added element was required until about 1500, when it was held that the action would after all lie for a mere failure to perform, but only when the plaintiff had himself carried out his side of the bargain. Not until some time in the sixteenth century did merely mutual promises become actionable. *Assumpsit*, which had started as an action in trespass, tort, had then come to support a law of consensual contract; and our problem is to interpret this development in terms of lawyers' thinking. We shall not altogether succeed.

THE EARLY NONFEASANCE CASES

The earliest cases are the most difficult to understand. In local courts there were good reasons for the classification of many misfeasances as trespass. But what prompted the plaintiff's lawyer in the earliest reported case of nonfeasance to frame a writ as he did? It is typical of many others: why, whereas the defendant had undertaken to erect certain houses for the plaintiff well and truly within a certain time, he failed to do it. The defendant at once and successfully made the obvious objection: this is a case of covenant. How did the plaintiff ever think otherwise?

The kind of case may possibly have been relevant. The earliest actions seem all to be for failures to perform services such as to build, repair or roof houses or mills, or to sow, mow or carry. This may reflect no more than that such agreements were otherwise unfairly treated in the king's courts. The employee who

performed could always sue for his pay in debt, but since his own liability would be in covenant he was sheltered from any claim over forty shillings by the requirement of a deed. The same was true of sales of land: the seller who conveyed could get his money, but the buyer could not at common law get the land. Agreements to convey appear in *assumpsit* actions only a generation after agreements for services; and the two precedents for nonfeasance in the printed *Register of Writs*, both placed under *De Transgressione*, are respectively against a craftsman and against the seller of a house who refuses to deliver seisin. But hardship is a motive rather than an argument: it explains why plaintiffs in these situations may have been driven to try a trespass action, but it does not make that action appropriate.

In the case of services, though not of sales of land, it is possible that the Statutes of Labourers had created confusion. They made it an actionable offence for an employee in certain circumstances to leave his employment or, a constructive departure, to refuse to act. This is mentioned in both the earliest nonfeasance cases, where it is suggested that the action could have been based on the statutes. It is therefore possible that the plaintiffs' lawyers intended the action to be so based, but drew the writs wrongly. Alternatively it is possible that the circumstances of the employment were not within the letter of the statutes, but that the lawyers hoped for their cases to be accepted as within their spirit. But if that argument was expressly made, the reporters missed it.

It is more likely that these factors—the unfair treatment of such agreements in the king's courts and the climate of thought of the Statutes of Labourers—conspired to exaggerate a genuine legal difficulty. If we think away our own ideas, and remember that much of the mist surrounding the year books is a morning mist, that lawyers were seeing problems for the first time, then it becomes possible to think that some of them would have drawn the line between trespass and covenant differently from ourselves. Covenant with its *praecipe* writ may have seemed to be about performance, and the writ appropriate only for securing either actual performance or its value, but not for the redress of other

losses. This has already been put forward as at least congruous with the almost universal use of conditional bonds: the promisor whose small failure to act had caused large consequential damage would be prevented from escaping liability by tender of the original small performance. It would also accommodate the misfeasance actions: although their original classification was probably explained by their treatment as local offences, the absence of any "criminal" element in royal courts emphasised their contractual aspect and may have prompted rationalisation of their relationship with covenant. More important still, it would make the use of trespass actions for consequential loss plausible even when the promisor had done nothing.

Consider a report of 1425. The defendant undertook to build a mill by a certain date and did not do so. The plaintiff brings a writ of trespass, and the defendant's counsel does not even object to this. His argument, largely contractual in bearing, is that the plaintiff had failed to say what the defendant was to be paid. The cause of action, he says, is the covenant; and if a covenant does not settle what the employee is to be paid, it is void. It is one of the judges who raises the point that an action of trespass does not lie when the sole complaint is of failure to carry out a covenant. He is doubted by his brethren and by the reporter; and counsel for the defendant refuses to demur to the claim, and takes issue on a point of fact. The majority opinion, therefore, seems to be in favour of the action; and since it was not followed for many decades, we can only suppose that an observation by the dissentient was taken to heart. "If this action can be upheld on these facts, then for every broken covenant in the world one shall have an action of trespass." History was later to prove him a prophet; but immediately he may have missed the argument against him. Two cases are put; one about a roofing contract, the other about an agreement for the repair of ditches. The damage suffered in the first is the rotting of the timbers of the house; in the second it is a flood which destroys a harvest. In neither case would covenant be an adequate remedy if it was indeed confined to securing the promised performance or its

value. That damages in covenant were in fact awarded on this basis is unlikely: juries would not be so mean. That the defendant could avoid damages by at once tendering the promised performance is possible: and the possibility may explain the disuse of the action. That there was a theoretical restriction to the performance or its value is suggested by the argument itself; and the want of mutuality in the king's courts between the remedies of employer and employee may have disposed lawyers and judges alike to seize upon it. But it is hardly more than a talking-point. The action for the flooded land and the lost harvest would have to be expressed as a wrong like the action for failure to repair a river wall mentioned in the last chapter. But there the duty on the riparian owner was of independent origin, sometimes at least enforced by indictment. If the only source of the duty is an agreement, it is hard to deny that any action for damages caused by failure to carry out the duty must be governed by the law about agreements. Some of the participants in these early cases, indeed, seem to have been willing to accept the trespassory form of action if only the plaintiff had had a deed to witness the covenant: perhaps they thought that consequential damage sounded in trespass, but they still saw that the covenant was the basis of the action, and in the king's courts it must be proved in the normal way.

DISABLEMENT AND DECEIT

The second phase of the development is more intelligible for the same reason that it was more fruitful: the case was rested upon a wrong which was at least not identical with the mere failure to perform what had been promised. It will be convenient to begin with the most famous example, *Doige's Case* in 1442; and it is famous for the best of reasons. The defendant, sued in what we should call tort, raised the point of principle squarely: she demurred to the claim on the ground that the plaintiff's action, if any, ought to be in covenant. The dispute arose, not out of an agreement for services but out of the second kind of case causing

obvious hardship, an agreement to convey; and the want of mutuality in the common law courts between a buyer and a seller of land is repeatedly emphasised in the argument. The action was commenced by Bill of Middlesex in the king's bench, the bill being described by the reporter as a bill of deceit. It may be paraphrased as follows: that, whereas the plaintiff had agreed to buy certain land from the defendant for a certain sum paid in cash, and the defendant had agreed to enfeoff the plaintiff within a certain time, she had not done so but instead, *callide machinans defraudare* the plaintiff, had sold the land to a third party and *falso et fraudulenter* enfeoffed him. The defendant's demurrer was adjourned for argument in the exchequer chamber, and judgment was eventually given for the plaintiff. From then on it seems that such actions were assured of success when the land had indeed been conveyed to a third party; but if the defendant simply kept the land, refusing to convey to the plaintiff, although the plaintiff could hope for a remedy in chancery, his only action at common law was in covenant.

Historians, looking backwards from the end of the development, have taken this as a conscious step forward on the path leading to a general contractual remedy in *assumpsit*. But lawyers at the time could not see the path they were treading, and the novelty may have been not in the way in which the plaintiff's case was put but in the determination with which the defendant pressed the objection that it sounded in covenant. In 1401 a steward agreed to arrange a customary tenancy of certain land for the plaintiff, and took money from him; and then he caused the lord to convey the land to a third party. He was sued in deceit, and objected only that the action should be laid, not in the place where he had made the arrangement with the plaintiff, but in the place where he had procured the conveyance to the third party. The report does not even hint at an objection that covenant was appropriate. Twenty years earlier in the city of London, on facts like those in *Doige's Case*, the seller who conveyed to another was sued in an action called deceit. Since the city of London did not require an action in covenant to be supported by a deed, the

plaintiff had not been driven to the back door of deceit because the front door of covenant was barred against him; and deceit must have been the natural analysis. The reason is suggested by the remedy: the defendant was imprisoned until he should repay the money he had been paid on the sale. The case is to be compared with another in the same city court just ten years earlier. A defendant was sued in deceit for having sold as fee simple land that was in truth entailed: rescission was ordered, and the defendant was imprisoned until he restored the cash and a bond he had taken by way of price.

The background to *Doige's Case*, in which the agreement was actually made in the city of London, seems therefore to be a well established idea of deceit in the city and probably in other local jurisdictions. The facts giving rise to such a claim generally involved a covenant, an agreement; and in the nature of things deceit is most common in a contractual context. But in London, at any rate, the two claims were regarded as distinct, deceit being seen as a wrong against the city and carrying imprisonment; and this was used as a sanction for an order of restitution. As in later equity, and as with the sale on a false warranty which was of course only a common case of the general principle, the proper remedy in the city was to undo the transaction. The claim of the plaintiff was therefore formally to get back what he had parted with, not to get compensation for what we should identify as the true contractual damage; and this was at the heart of the distinction between the claim in deceit and the claim in covenant. Exactly what constituted deceit in London or other local jurisdictions, what facts added to a covenant allowed the plaintiff to seek to undo the transaction on this ground, is a matter that needs investigation. But it looks as though two conditions had to be satisfied: that the plaintiff had done his part or made a substantial payment, and not merely given earnest; and that the defendant had disabled himself from doing his part, as by granting the land away.

Doige's Case, therefore, seems not to reflect some inspiration by a lawyer trying to get a remedy in tort for the failure to perform

a promise. It should be seen rather as analogous to the misfeasance cases. A claim familiar in local courts, where its validity as between the parties in no way turned on its treatment as a wrong rather than as a matter of covenant, is brought into a jurisdiction in which covenant is subject to the requirement of a deed. Its classification now becomes decisive of the validity of the claim, and the defendant inevitably argues that it sounds in covenant. The debate in the exchequer chamber was not whether to take one more step in a conscious liberalisation of contract law; it was about a genuine and elementary difficulty. An attempt to establish a clear boundary, and one again suggesting that covenant was about actual performance, is this: "To what purpose would he have a writ of covenant, even if he had a deed, when the defendant cannot keep his covenant? (as if to say, to no purpose)." More promising is an argument that admits that the claims can coincide: suppose that the defendant, after granting to the third party, had re-entered the land and had then enfeoffed the plaintiff; the covenant to enfeoff would in the end have been kept, but the plaintiff, likely to be ousted by the third party, would still need his remedy in deceit.

What was not emphasised in the argument, except in connection with the want of mutuality between the parties in the king's courts, was the fact that the plaintiff had paid; though report and record both make it clear that he had. In London the point of the remedy was in getting restitution of what had been paid on the faith of the promise; but since in the king's courts an action for deceit, like any other action based upon wrong, now led only to damages, and since damages were always a matter for the jury, this basic point was inevitably blurred. The jury would in fact award damages based upon the whole transaction, including damages for the failure to keep the covenant. And lawyers, accustomed to think of damages as an inscrutable award, would therefore have to distinguish between the actions in the king's courts with no reminder of the very point upon which in London the distinction turned.

This blurring may have been largely responsible for the further

development by which *assumpsit* became a general contractual remedy. Even in London the facts of a situation like that in *Doige's Case* could not be analysed as a deceit in modern terms. The plaintiff had paid over his money on the faith of a promise which at that time was presumably intended to be kept. The defendant's conveyance to a third party turned the transaction into a deceit in some wider sense of sharp practice; and the consequence of calling it a deceit was precisely to make available the remedy of restitution appropriate to deceit. When the action was transplanted into the royal courts therefore, where the distinct nature of the remedy was lost, there was no distinction left. The facts did not reflect an obviously different concept; and there was just a rule of thumb that conveyance to a third party enabled the plaintiff to recover. Considering the legal situation of the parties as a whole, this happened to make sense: so long as the seller still had the land, the buyer might reach him in equity. But considering the common law as a self-contained system, it looked merely capricious. The buyer had paid his money and not got his land; and it made no difference whether the seller still had the land or had granted it away. Common sense would be on the side of the plaintiff who wanted a remedy even though the defendant had not positively disabled himself from performance. Legal principle, resisting the extension on the ground that the facts sounded in covenant, could not convincingly deny that they equally sounded in covenant when there was the element of disability. Deceit was just a word.

PURE NONFEASANCE

The third phase in the rise of *assumpsit* for nonfeasance is the victory of common sense. A remedy came to be given, apparently about 1500, even when there had been no positive disablement. But facts and reasoning are both obscure. The year books tell us the result, but casually and indirectly. Whatever was going on, no reporter thought it of any moment. And the reason for this is the only fact to emerge clearly from such examination of the plea

rolls as has yet been undertaken: cases are hardly more frequent than they had been a century earlier. The rolls of the common pleas for two Trinity terms, in 1404 and 1501, each contain nearly five hundred membranes of pleas. The total entries of *assumpsit* for nonfeasance, including purely formal entries of appearance, number five in the former, six in the latter. For debt the comparable entries would run into four figures in each case, and actions of debt actually pleaded run into three figures. Indeed, in that same Trinity term of 1501, nearly a hundred actions of debt are entered in which the pleadings proceed far enough to show that the plaintiff is relying on a conditional bond. Plaintiffs in *assumpsit* are still seeking a back door. Not until after the middle of the sixteenth century do such actions for nonfeasance begin to become numerous in either of the two main courts; and it is the king's bench that leads the way. In one term of 1564 a common pleas roll of nearly a thousand membranes has nearly a thousand actions of debt of which the entries are not merely formal, and the total of nonfeasance entries, formal and other, is a little over twenty. A king's bench roll of 1557, with just over two hundred membranes has forty-five nonfeasance entries.

It follows that our evidence for this most critical of developments is so scanty that we cannot, so to speak, go into court and listen for the argument. In particular, we cannot tell what part was played by the idea of deceit. The plea rolls show that express allegations of an intent to deceive such as were made in *Doige's Case* are in the first quarter of the sixteenth century infrequent outside the disablement situation, but not unknown. After the middle of the century they are made more often than not, and eventually they become common form. The increasing use of the remedy is therefore matched by an increase in the proportion of cases in which there is a verbal reliance on deceit. But neither its absence nor its presence tells us much.

Even on facts like those in *Doige's Case*, although their classification as deceit in London was intelligible, it could be little more than a name in a royal court. The distinct remedy of restitution was there lost in general damages; and the facts themselves showed

a disregard of the plaintiff's contractual right rather than fraud in our sense. But, whether or not he could be said to have been tricked out of his money, the plaintiff had in fact parted with it on the basis of the undertaking; and to that extent the name of deceit was meaningful. When the further step was taken of giving a remedy even where there had been no disablement, this element remained. In the first two or three decades of the sixteenth century the plaintiff seems always to allege payment; and cases in which he does not do so seem ironically first to appear as the verbal allegation of deceit begins to become more common. It is therefore possible that the early cases of pure nonfeasance were understood to rest upon the specific notion that the plaintiff had been deceived into parting with his money, and that the writs, generally not mentioning deceit and in much the same form as their unsuccessful predecessors a century earlier, were simply taken from old precedents. It is almost certain that the payment was seen as the basis of the action. "If I covenant with a carpenter to make me a house", said a judge in 1505, "and pay him £20 to make it by a certain day, and he does not make it by that day, now I have a good action on my case because of the payment of my money, and yet it sounds only in covenant; and without payment of money in this case, no remedy."

But as the allegations of deceit become relatively more frequent, and as the absolute number of actions begins to rise so that *assumpsit*, if not relied upon when contracts were made, must have established itself as a way of getting a remedy if need be, it becomes increasingly clear that the deceit alleged is not generally that the plaintiff was tricked out of his money. The action is not, even formally, one for restitution. Had it been so, of course, the plaintiff could never have got a remedy when he had not paid, and mutual promises would never have become actionable. Sometimes he is indeed said to have been tricked out of his payment, more often he is said to have been tricked out of what he should have had from the defendant, or out of his bargain, or he is said just to have been tricked. The more regularly deceit is alleged, in short, the more various do its particular

manifestations become, and the more vague; and the pleadings descend into that solemn abuse supposed, wrongly, to be characteristic of the middle ages. The common law lacks a convincing argument and is beginning to shout.

Related with the shouts about deceit, moreover, are shouts of another kind. The increase of allegations of deceit, though more rapid in the king's bench than in the common pleas, is well marked in both courts. To some extent in the common pleas, and very generally in the king's bench, it is accompanied by an increase of cases in which special damage is asserted, and asserted in detail. There is some variety, legal costs and the like appearing from time to time, but two kinds predominate. One is the loss of profit which the plaintiff would have made had the agreement been kept, and this needs no discussion. The other is a variety of defamation, now becoming a common cause of action in the king's courts. An action for breach of promise of marriage in 1549 is reminiscent of slander as much as of contract. The defendant is said to have acted at the instigation of the devil, scheming craftily to deceive and defraud the plaintiff. The plaintiff is said to have suffered not only in her goods by reason of the gifts she had made him, but also in the good name, fame and opinion she had previously enjoyed among her neighbours and others, by reason of the long familiarity between herself and the defendant.

In actions for breach of promise, of course, the injury to reputation may be genuine; and it has played a part in the matter of damages down to our own time. But analogous harm was alleged in actions based upon market dealings. The plaintiff is said to have suffered in his credit towards divers subjects of the monarch, and in particular towards some named third person to whom he had resold the goods that the defendant failed to deliver, or to whom he had made some other promise on the strength of that made and broken by the defendant. This third person is important enough to become a fiction. Most often he is a member of the Smith or the Jones family; sometimes he is a Man. Almost always it becomes evident that he owes his name to the plaintiff's

attorney. The clients of John Williams of London, for example, had made all kinds of agreements with all kinds of people, but the various breaches of their various defendants had compelled them all to dishonour some obligation towards John Denne and Richard Fenne; and it was of the injury to their credit with this indignant pair that they all particularly complained.

At this point some recapitulation may be suggestive. The first phase of *assumpsit* for nonfeasance, the early and unsuccessful attempts to get a remedy, seemed to make play with the idea that consequential damage was distinct from the performance or its value which covenant secured. The second phase, the giving of a remedy when the defendant had disabled himself from performance, grew from a process for rescission on the ground of deceit; and, although the point was lost in the common law's devotion to damages, this remedy was in origin equally distinct from one claiming the promised performance or its value. In respect of what was formally claimed, the two approaches fell on either side of covenant. The former claimed not the value of the performance but the loss arising from its failure; the latter claimed not the value of the performance but the return of what had been given by way of price.

What seems to happen after the middle of the century, about the time when nonfeasance actions begin to be numerous, is a confluence of these two elements. The claim has to be presented as one for a wrong, a trespass, and different in nature from covenant; and deceit and consequential damage, the two earlier elements of difference, are increasingly pressed into service. What we cannot yet tell is how far this service was real, how far these elements ever truly persuaded a court that their presence caused the matter to sound in trespass rather than in covenant. If they did, the argument does not seem to be reflected in the reports. Before the middle of the century, however, the reports are scanty and capricious, and they do not reflect many other matters which must have been before the courts, and which would be of great importance to us. But they were not necessarily important at the time, and this is the pervasive point. So long as

assumpsit was a back door, not a known legal category but a kind of situation in which, as with estoppel centuries later, contractors who were not within the contract rules might on certain constellations of fact get some remedy, cases would seem curious rather than important.

In the second half of the century, when *assumpsit* is common enough in the plea rolls to show us that it had become a legal entity, and when it is common enough in the reports to show us that the properties of that entity were being worked out, deceit and consequential damage are not among the properties attracting discussion. They are not even real: the wicked machinations of the defendant are as much a fiction as the Joneses and Denne and Fenne. But fictions are more important than mere facts: they are facts which seem indispensable to the way the claim is being formally put. Of these two, the allegation of deceit is like many others in the common law: it becomes common form. But even in the second half of the sixteenth century, although increasingly frequent, it was not universal. The allegation of loss of credit is never as general as deceit, and instead of becoming common form it ultimately fades away; but the fact remains that many attorneys in the later sixteenth century, especially in the king's bench, thought fit to equip their plaintiffs with a disappointed third party who was not going to trust them again. There can be no other background to such a state of things than a time at which the courts, however willing they may have been to stretch their ideas of wrong, still required to be persuaded that the matter could be represented as a wrong; and among the various kinds of fact which were urged, it is more likely than not that there were genuine Fennes and Dennes.

That is to say that what in the second half of the century have become pleading formalities were probably at some earlier time the subject matter of genuine argument, argument lost to us by the inadequacy of the reports. There were two levels of legal reasoning. There was the clerk's level, represented by the pleadings, in one sense the intellectual basis of the action but not the subject of current attention. Upon this foundation there had been

erected the newer level of reasoning, and to all intents and purposes this ignored the older basis and treated the matter in terms which we should identify as contractual. At this upper and active level, the talk is mostly about consideration; and that will be discussed later. But, although whatever detailed argumentation had once gone into the lower level seems never to appear in the reports, the fundamental proposition occasionally does. A remark of Coke has already been quoted: "... it is termed *trespass* in respect that the breach of promise is alledged to be mixed with fraud and deceit ...". A sentence from a report of 1574 makes a similar point, and introduces a new problem: "For here no debt is to be recovered but onely damages for the debt; and this default of payment is a wrong ...".

ASSUMPSIT FOR MONEY: THE BACKGROUND

In the nature of things, most contracts leave outstanding an obligation to pay money. The bill is presented after the goods have been supplied, the services rendered or whatever it may be; and at any period the commonest breach is default in payment. The fall in the value of forty shillings in the sixteenth century therefore did two things. It diverted actions about services and conveyances and the like from a relatively informal law of covenant in local courts into the waste land of covenant in the king's courts; and the hardship here was that transactions made with no thought of sealing-wax were caught by the requirement of a deed. But it also diverted a large number of actions for money from local to royal law; and the hardship of this needs more explanation.

There was first the procedural hardship. In the common pleas, wager of law was always open to the defendant in debt, and his oath-helpers came either from the streets or from the menial staff of the courts. His own conscience was the only safeguard, and the court may have taken new steps to work upon it: not until the last quarter of the century do we know that a defendant proposing to wage his law was somehow examined and

admonished. In local courts the community situation allowed two important differences. The defendant who was not believed would not so easily get his oath-helpers. And the *secta* or witnesses tendered by the plaintiff could be real; so that local rules could and did allow a range of situations, less exigent than the document under seal, in which the plaintiff's case was at the outset well enough supported to exclude wager. In the king's courts the only such situations were the action for rent on a lease and that for the sum found due by auditors on an account.

There was also what appears to modern eyes as a substantive hardship, though contemporaries would probably have identified it as another manifestation of the point just made. Debt in the king's courts was more restricted than its counterpart in local jurisdictions. The *quid pro quo* probably embalmed an ancient idea of "real" obligation, but it also served an evidential purpose; and the conservatism of the royal judges may not have been merely blind when they excluded some kinds of claim certainly acceptable in London and probably in many other places. To take first what may prove to be more than just an example, there was the *concessit solvere* claim. In London and elsewhere, persons who had dealt with each other could reckon up the position between them and agree upon the balance due; and the mere acknowledgment of this was in itself a cause of action. Nor was it necessary that there should have been a series of dealings: an acknowledgment of indebtedness on a single bargain could similarly ground an action. In the common law, a series of dealings might raise a series of debts; but the need for *quid pro quo* anchored the resulting claim to one based upon the transactions themselves. An acknowledgment was in theory ineffective, though it might be smuggled in by stretching the distinct *insimul computassent*, in which the relationship between the parties was properly one of accountability rather than of indebtedness. If lord and bailiff or the like wished to account privately without auditors, they could do so, and the agreed balance was recoverable in debt; though since there was no element of "record" the debtor could wage his law. But however close this came in practice to the London

custom, the theory was distinct. The acknowledgment or promise in London created the debt: in the common law, apart from the magical deed, only a *quid pro quo* could do that.

The same difference in basis excluded other kinds of claim from the scope of debt at common law. Related with the acknowledgment is the orally promised penalty for non-performance of some other obligation. Even when a promise of money was clearly not gratuitous, the *quid pro quo* might cause trouble if it consisted in the payment of a smaller sum or in a mere promise. The winner of a bet may not have seemed particularly meritorious, but he carried with him the merchant who had insured his lost cargo. And many entirely meritorious claims involving third-party transactions came to grief because no direct *quid pro quo* had come to the defendant. Prominent among these were the creditor's claim against an informal surety, and the same surety's claim to be reimbursed by his principal.

Nor was the *quid pro quo* the only cause of constriction. A promise in the alternative, for example to pay money or provide a benefice, even if not conceived in penalty terms, raised an obvious difficulty. And the need to claim a fixed sum excluded any *quantum meruit.* Consider the various obstacles in the way of the plaintiff who gave board and lodging to a third party at the request of the defendant, and who did not stipulate a rate but was to send in his bill at the end. If the third party had been the defendant's wife or child, and if a rate had been fixed, the claim would be one in debt which is not uncommon on the rolls. Even if a rate had been fixed, the *quid pro quo* would raise difficulty if the third party was a mere stranger. Even if the third party was one for whom the defendant was bound to provide, the absence of a fixed rate would be fatal to a claim based upon the original agreement. And at common law this could not be cured by the defendant making a subsequent promise, unless under seal, to pay the amount of the bill. The situation is then back to the *concessit solvere:* in London and elsewhere the promise to pay would itself be enforceable. But promise was not the basis of debt on a contract at common law. This was the true archaism, not covenant.

Covenant was based upon the fertile notion of agreement or promise, though sterilised by the deed. Debt on a contract, apparently more liberal, rested upon a now sterile idea.

Realisation of this by lawyers and hardship to their clients had both been minimised by the general use of conditional bonds for large transactions and by the fact that small transactions did not come to the common law at all. The fall in the value of forty shillings, therefore, did more than bring smaller and therefore more numerous transactions within the ambit of rules of proof which were either cumbrous or ineffective. It exposed substantive gaps. Just claims became increasingly frequent for which there was no remedy, because somewhere between the formal covenant and the real *quid pro quo* the common law had lost the simple enforceable promise to pay money.

As a matter of social history, therefore, the rise of *assumpsit* is another transfer from local jurisdictions, and the transfer is of cases there remedied directly on the basis of promise. Even some of the formulae of *assumpsit* actions seem to echo earlier claims in London and elsewhere. Conceptually, it is not as was once thought the dawn of the idea of enforcing promises: it is the difficulty of accommodating that idea within the framework already established. How was it done?

The question is unanswerable on the present state of research, although the matter has been greatly advanced by recent work. But two general observations can be made. The first is quantitative. Such work as has been done on the plea rolls suggests that more than half of all *assumpsit* actions in the sixteenth century were claims for money, and that only a fraction of these were in the form later known as *indebitatus assumpsit.* Indeed the great *Slade's Case* itself, the climax of the sixteenth-century development, was not in that form: but, as will appear, what that case ratified was not a form but a proposition. Secondly, reports and plea rolls both show that claims were put in many different ways, and that the problem was seen differently in the king's bench and in the common pleas.

It has already been noted of *assumpsit* actions generally that

the "tortious" elements of deceit and consequential damage seem to have become prominent more quickly in the king's bench than in the common pleas. This may reflect the jurisdictional difference between the two courts. Until the Bill of Middlesex became common form, the king's bench was obliged to treat as trespass any personal action it proposed to entertain. But the common pleas was a court of general jurisdiction. It could afford to regard *assumpsit* actions in what we should regard as a contractual light, the light in which such cases had been seen in local jurisdictions. In this light, the problem was to fit *assumpsit* into the existing scheme, and in the case of *assumpsit* for money to range it alongside debt. This could be done in either of two ways. One was to say simply that *assumpsit* would never lie where debt was available, to allow it to fill only the substantive gaps. This was the first attitude of the common pleas, and they may have attempted to resurrect it at the very end of the sixteenth century. But by the end of the third quarter of the century, and perhaps a good deal earlier, they had adopted a less radical position: the mere availability of debt was not in itself a bar to *assumpsit*, so long as there was some basis for the *assumpsit* action apart from the debt itself. On this view there had still to be a substantive difference from debt. The forms of action must not overlap for reasons of propriety, and perhaps also for theoretical reasons which deserve a brief digression.

The myth that case was a development by analogy from trespass *vi et armis* has already been mentioned. It was supposed to have been based upon a statute of 1285 allowing the chancery clerks to issue writs for facts like those covered by existing writs, but not actually within their scope. But such a principle would have allowed development by analogy from any existing writ; and as actions on the case proliferated, their true origin forgotten, it became possible to see in them a general remedy whose only limitation was its residuary nature.

For the common pleas then the problem was merely negative. The trespassory associations of *assumpsit* could be forgotten, and the one impermissible result was that *assumpsit* should

perform exactly the function of debt. The procedural hardship of wager could not be alleviated and, as often happens in such situations, was actually turned round. Wager was the subject's birthright; and to force him to a jury for a debt which he might have paid in private was a denial of due process.

In the king's bench, however, jurisdiction at first anchored *assumpsit* to its trespassory basis. Claims for money had to be expressed in trespassory terms; and although this quickly became artificial, and the artificiality obvious, it had a momentous result. The negative question of the relationship with debt hardly arose, because the *assumpsit* action was positively about something different, about what we should call tortious damage. The freedom thus gained was exploited to the full. Behind the trespassory facade, plaintiffs were allowed simply to recover debts, to bring *assumpsit* when their only complaint was non-payment.

The arguments about *assumpsit* and covenant had an almost academic air, because the disuse of covenant had at least obscured vested interests in the existing law. But debt was still the staple of the common pleas, and more than intellectual symmetry was visibly at stake over this development in the king's bench. The rise of *assumpsit* for money was therefore complicated by a growing dispute between the courts.

ASSUMPSIT FOR MONEY: THE KINDS OF CLAIM

First will be considered the cases of substantive hardship, the claims for which debt just might not be available. These were probably the earliest in both courts, and for some time remained the only kind of *assumpsit* for money clearly acceptable to the common pleas. Only claims against sureties and the like will be discussed. If the plaintiff claims that he supplied the third party in the first place on the strength of the defendant's promise, there seems in general to be no artificiality beyond the talk of deceit. In contractual terms there could hardly be a more obviously just claim. In trespassory terms there could hardly be a more obviously detrimental reliance. And since no *quid pro quo* had come to the

defendant, there was no need to introduce an artificial difference from debt.

But if the plaintiff claims to have supplied the third party before the defendant made his promise, although debt is even more clearly not available, the promise is not obviously deserving of enforcement. One or more of the following allegations is then generally added: that the supplying had been at the defendant's special request; that the plaintiff had paid twelve pence or the like for the promise; or that the plaintiff had released some security from the third party, forborne to sue him, or discontinued an action actually started. As a matter of language, these cases of a past supply to the third party may be expressed in any one of three ways. The transaction with him may be recited in the pluperfect tense: whereas the plaintiff had sold, lent or whatever it is to the third party. Or it may be recited behind an *indebitatus*: whereas the third party was *indebitatus* to the plaintiff for a loan; or whereas the third party was *obligatus* to the plaintiff on a bond. Or the transaction may be left unexplained behind a blank *indebitatus*: whereas the third party was *indebitatus* to the plaintiff in so much, for which the plaintiff was proposing to sue, the defendant, in consideration that the plaintiff would forbear, promised to pay.

If the original transaction was not with a third party but with the defendant himself, if for example the plaintiff had sold the defendant goods, there was a difficulty about a claim that the plaintiff had supplied the defendant on the strength of his promise to pay. Justice required enforcement as clearly as in the case of a similar supply to a third party: but this obligation was precisely the one enforceable in debt. Claims so expressed are found in the plea rolls, but rarely; and they probably betoken a lawyer's confusion among the various formulations rather than any attempt to make *assumpsit* exactly and openly perform the function of debt.

It was therefore essential that the plaintiff should have supplied the defendant before the defendant made his promise. But, as in the case of supply to a third party, this might take the case not

only outside the scope of debt but also outside the scope of any reasonable enforcement. The plaintiff was confronted with two distinct problems: negatively, his claim must not be identical with the claim in debt; positively, it must like any *assumpsit* action show that the subsequent promise was properly enforceable, whether in pure contractual terms or in the trespassory terms of detrimental reliance.

Consider a claim made in the common pleas in 1549:

> "Whereas the plaintiff at such a date and place at the instance and special request of the defendant had delivered such and such cloth to the defendant, and upon that delivery the defendant afterwards, namely on the same date, faithfully promised the plaintiff and took it upon himself that he would well and truly pay the plaintiff such a sum at such a feast next following, and the plaintiff on the faith of this promise and undertaking entered into various other promises and writings for the payment of money to certain other persons at the same feast, but the said defendant, not heeding his promise and undertaking and scheming artfully, falsely and craftily to deceive and defraud the plaintiff of that sum, and that he should be harmed by the promises and writings he had made to others in the hope of that payment, has not paid it, whereby the plaintiff is hurt and damaged in his credit towards various subjects of the king, to his damage of so much".

There are various points worth noting. The sale of cloth is recited in the pluperfect tense, and the promise was made *postea, scilicet eisdem die et anno*. This formulation is not uncommon. But even when the point is not emphasised in words the sequence of tenses always makes it clear; though the caution which here delayed any mention of the price of the cloth until the promise seems to have been abandoned. This matter of chronology goes to taking the matter outside the scope of debt. The other points go to the positive nature of the claim. The original sale is said to have been at the defendant's special request and this, although not universal, becomes common form. Its purpose is to link transaction and promise; and it has to do with the difference between "past" and "executed" consideration. But it is not safe to deduce that the linkage produces a claim seen to rest upon an enforceable promise.

The allegations of deceit and the plaintiff's own undertakings to third parties, not in this case named, express the matter in trespassory terms. This is emphasised by the figures: the sum promised was a little over £8; the damages claimed were £20.

Claims like this, based upon a past sale and delivery, a past bargain and sale, a past loan and the like, are common in the king's bench and not unknown in the common pleas for the remainder of the century. There are of course variations. Sometimes the damage alleged is loss of profit that could have been made with the money, instead of or as well as the lost credit. Occasionally a nominal consideration is alleged to have been given for the promise; and occasionally the plaintiff is said to have forborne action on the strength of the promise.

This allegation of forbearance seems particularly common when the transaction was recited behind an *indebitatus*. This was done with growing frequency, but seems to be a mere alternative mode of expression. The plaintiff instead of saying just that he had sold, may say instead that the defendant was *indebitatus* in respect of goods previously sold to him by the plaintiff. Probably this made no difference: the *indebitatus* served no purpose beyond emphasising the chronology; and in both courts and beyond the end of the century, the plaintiff who was going to recite the original transaction generally did so directly.

But in the third quarter of the century it became increasingly common for him not to recite the original transaction at all. He asserts blankly that the defendant was *indebitatus* to him in so much, and passes immediately to the promise to pay. Towards the end of the century this convenient common form seems to be used about as often as the forms reciting the original transaction, whether or not behind an *indebitatus*. Then it was disallowed, and its subsequent fate will be considered in the next section of this chapter. But it will serve now as an introduction to the dispute between common pleas and king's bench that culminated in *Slade's Case* in which, among other and better known matters, this form was expressly disapproved.

It has been the point of all these formulations that the claim on

the *assumpsit* was somehow different from the claim to the debt recited. On this logic a recital that the defendant was *indebitatus* generally was quite as acceptable as a recital of the actual transaction: it was the promise that mattered. But in these cases of a general recital, a statistical difference in practice between the courts seems particularly marked. In both at first a forbearance or a nominal consideration is often alleged. These disappear in the king's bench, but persist in the common pleas. In the common pleas, the validity of the promise as a ground of action in itself is being emphasised; in the king's bench the promise is of course always alleged, but it is not emphasised.

This difference in pleading practice, particularly well marked when the indebtedness is alleged generally but by no means confined to that case, appears to reflect the substantial difference between the courts. To the common pleas the logic of the action was still real. But the king's bench, in cases in which the defendant was indebted to the plaintiff, whether or not the cause was set out in the claim, was using the logic to overcome the procedural hardship of debt. The separate promise was alleged, but all that the plaintiff was in fact required to prove to the jury was the debt. That the promise had to be proved in the common pleas but not in the king's bench is expressly stated in a report of 1573; and the king's bench had probably been allowing *assumpsit* as an effective alternative to debt for some considerable time. Slogans like "Every contract executory is an *assumpsit* in itself" denote only that in that court a debtor could be presumed to promise to pay, so that the mere existence of the debt justified a finding against him.

There is little doubt that this was the nature of the difference between the courts until about 1585: the common pleas had long departed from its original proposition that *assumpsit* was available only when there was no enforceable debt at all, but still insisted that there must be a distinct cause of action on a genuine *assumpsit*; and the king's bench was allowing *assumpsit* to be used for the recovery of the debt when the plaintiff had no facts beyond those creating the debt. Then came the legislative quirk which, by

establishing the Elizabethan court of exchequer chamber, in effect left the judges of each court with jurisdiction in error over the other. That the common pleas sought to use its new position to defend what it no doubt still regarded as its own property, namely the action of debt, is inherently likely; and it has long been assumed that this converted a difference in practice between the courts into an open dispute.

But a difficulty has been observed. The actual point at which the difference in practice would appear in the legal process would normally be in the direction to the jury on a plea of *non assumpsit*. In the common pleas the general issue would put the plaintiff to proving debt and subsequent promise, in the king's bench to proving only the debt. But all this would be concealed behind a general verdict; and the writ of error would not ordinarily enable the exchequer chamber to attack the king's bench practice, because the key point would not appear on the record. It has therefore been suggested that the common pleas sought to turn the clock back in both courts by several decades, and to resurrect the proposition that *assumpsit* would not lie at all if the claim disclosed the existence of an enforceable debt. That at least would appear on the record, and mechanically therefore the operation was possible. But it would involve the repudiation of logic long accepted in the common pleas itself: the court was, for example, content with claims otherwise identical in which the later promise was not to pay the money but to execute a bond for it.

Whether or not this attempt was in fact made is not clear. Of the reported cases of exchequer chamber reversal, some look like it; but in others the promise is said to have preceded the transaction and on any view debt was then appropriate. What is clear is that if the attempt was made, it was only in the very last years of the dispute. The plea rolls about 1595 show that claims based upon subsequent promises, the prime transaction being recited directly or behind an *indebitatus* or even hidden in a general *indebitatus*, are still common in the king's bench and by no means unknown in the common pleas. But even if the difference between

the courts was not carried to the point at which the validity of the action in any circumstances was fought out at the appellate level, and remained only a difference in practice over the reality of the promise, this would still be sufficiently scandalous. For the litigant, indeed, the result of his case, turning upon the direction to the jury, might depend not upon the court in which the action had started but upon the court to which the *nisi prius* commissioner happened to belong.

The reality of the subsequent promise was certainly a live issue in *Slade's Case*, in which the dispute was finally settled. *Slade's Case* looks like a set piece, manipulated so as to raise all the issues and to put them before that other exchequer chamber which was not so much a court as a meeting of all the judges, a kind of judicial Law Commission; and it was twice argued before that body. The plaintiff sued in the king's bench for the price of a crop sold to the defendant; and his bill, except that it does not allege a resulting loss of credit with third parties, is very like the claim of 1549 quoted above from the common pleas. The word *indebitatus* is not used, and the sale is recited directly: in consideration that the plaintiff had at the special request of the defendant sold the crop to him, the defendant promised to pay. The promise is alleged to have been made on the occasion of the sale but, as the tenses show, after it. The defendant pleaded *non assumpsit modo et forma*, and the issue was tried at *nisi prius*.

Whether or not with the intention of making a test case of it, the parties' lawyers agreed at the Exeter assizes to a special verdict: the defendant bought the crop as alleged, but "there was no [other] promise or taking upon him, besides the bargain aforesaid"; and if upon the whole matter the court decides that the defendant did take upon him in the manner and form alleged, then the jurors find for the plaintiff; if not, they find for the defendant. That the court of king's bench acted on this verdict so as to make a test case of it is beyond doubt. Coke tells us of its difference of opinion with the common pleas. "And for the honour of the law, and for the quiet of the subject . . . the case was openly argued before all the Justices of England." Only after

two such arguments did the court finally enter judgment for the plaintiff.

If it is permissible to speak of the case in terms of the dispute between the courts, it is entirely clear what the position of the king's bench was and what the case decided. *Assumpsit* was always to be available in place of debt on a contract at the election of the plaintiff. What is not so clear is the position of the common pleas. Were they now saying, as they had said in the earliest days of *assumpsit* for money, that it would never lie if debt was available? Or were they saying, as they apparently had for most of the last half-century, that *assumpsit* would lie only if there had been a real promise after the transaction raising the debt? It was of course the latter and lesser proposition that the special verdict put in issue: the former would be independent of any subsequent promise. And the resolutions of the exchequer chamber assume the propriety of the action if there was a real promise: "every contract executory imports in itself an *assumpsit*".

The promise therefore was the theoretical basis of the action. How, as a matter of legal analysis, was it supposed to work? Coke's report of *Slade's Case* again shows the answer. "It was resolved, that the plaintiff in this action on the case on *assumpsit* should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that"—and the conclusion shows that there is no mistake in the order of the words—"a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*...". The *assumpsit* action, then, is not theoretically an action to recover the debt at all. No doubt the debt has always been recovered, but invisibly in general damages supposed to be for "the special loss". Coke, allowing *assumpsit* to perform the central function of contemporary contract, still looks down from that level of thought to the older level of the pleadings, the habitat of the wickedly scheming defendant and of Denne and Fenne. In the sixteenth and seventeenth centuries, as in the twentieth, contract was extricated from its own rules by resort to the essentially trespassory idea of detrimental reliance.

CONSEQUENCES OF *SLADE'S CASE*

Slade's Case settled that *assumpsit* could be used as an alternative to debt on a contract, even though the plaintiff had no facts other than those necessary to ground that action. In considering its consequences, it is important to remember how the result had been reached, namely by working upon a fictitious promise to pay. *Slade's Case* finally divorced cases in which the substance of the claim was a simple contract debt from all other *assumpsit* actions. Real promises, whether to pay money or not, were to go their separate way.

The first consequence of allowing *assumpsit* in place of debt on a contract was to settle a change in the liability of executors. They had not been liable in debt because of the logic of wager: the testator knew and could have sworn, but they could not know. The harsh conclusion that they could not be sued had been avoided in London by an ordinance allowing them to swear to the best of their knowledge; and it appears to have been avoided in the exchequer in *quominus* on the ground that the testator himself could not wage his law against the king. Inevitably it would be argued that since the testator could not have waged in *assumpsit*, it should be possible to sue the executors. Perhaps equally inevitably, the conclusion was resisted on the ground that their ignorance of the truth disabled them from defending before a jury as much as it disabled them from swearing. A subsidiary argument was the incantation about personal actions dying with the person; and it was this that prompted Coke in *Pinchon's Case* in 1611 to refer to the trespassory basis of the action. But he unhesitatingly rejected the result contended for, and the liability of executors was established.

This decision, however, seems only to have been an application of what may be described as the king's bench's victory in *Slade's Case*. For at least the last quarter of the sixteenth century, and perhaps longer, that court had been allowing actions against executors based upon a subsequent promise alleged to have been made by the testator; and the promise was no doubt as unreal as

that of the living defendant. Even the common pleas had apparently been prepared to entertain actions based upon genuine promises, though here as in other situations additional factors like forbearance seem especially to have been alleged in the common pleas. Cases in which the personal representative is said to have himself promised occur in both courts, but do not belong in the present discussion: the promise was clearly genuine.

The course of further development is obscure precisely because it is difficult to tell whether promises were genuine or not, and because this difficulty merges into an obscure change in forms. It is customary to speak of *Slade's Case* as having been about an entity called *indebitatus assumpsit;* and no harm comes of this if it is remembered that what was at stake was a proposition and not a form of words. The proposition was that the defendant who was *indebitatus* by simple contract could be sued upon a supposed subsequent *assumpsit.* It did not matter whether the chronology was expressed as in *Slade's Case* itself by the mere sequence of tenses, or whether an *indebitatus* was interposed between transaction and imaginary promise. In logic, indeed, it would not have mattered if the transaction that had rendered the defendant *indebitatus* was not set out at all.

Or at least, it would not have mattered on the logic of the pleadings, which grounded the action upon the promise. It would then have resembled the *concessit solvere,* mentioned above, a custom in London and elsewhere by which an undertaking to pay an existing debt or series of debts was itself a ground of action; and it may be that this custom was the basis of the general *indebitatus* allegation. But on the king's bench practice of allowing the promise to be fictional, the defendant would be taken to court not knowing the true claim against him: he had never made a real promise or acknowledgment, and the cause of his underlying indebtedness would emerge only in evidence at the trial. And this was probably the principal reason for the express disapproval in *Slade's Case* of the general *indebitatus* form.

There was, however, another objection which had emerged well before *Slade's Case.* The largest claim for *assumpsit* was that

it should replace debt when debt would involve the procedural hardship of wager. It should not therefore be allowed for those kinds of debt in which wager was not available, for rent on a lease, for the balance of an account found by auditors, or upon an obligation. But on the general *indebitatus* form, the basis of the debt would appear only at the trial and would be lost in the jury's general verdict. Outside the common law the *concessit solvere* was thought to be objectionable in the same situations.

This consideration appears to have governed the development in the seventeenth century of the entity which came to be denoted by the phrase *indebitatus assumpsit*. This was a revival of the general *indebitatus* allegation, but with an indication of the nature of the underlying liability sufficient to give the defendant notice of the claim he had to meet, and to assure the court that if the claim was made in debt it could be met by wager of law. The plaintiff would say that the defendant had been *indebitatus* in the amount demanded for goods bargained and sold or sold and delivered, for money lent, for work and materials and the like; and these were the famous "common counts". Ordinary simple contract debts thus became recoverable in an action which avoided wager and the particularity of debt, but did not bring the defendant before a jury blindfolded. What is not clear is when this result was reached. The form of count begins to appear early in the seventeenth century; but it is possible that in the early cases the promise was again real.

An obvious extension of *indebitatus assumpsit* beyond the field of the simple contract debt was to the debt arising out of customary dues and the like. The topic is not in itself of the first importance, but it illustrates the difficulties met by historians today and by lawyers at the time. The question was not whether *assumpsit* could ever lie in respect of sums so owing: it clearly could if the debtor had in fact promised to pay. In 1676 to a claim by the city of London the jury found, as in *Slade's Case*, that the defendant owed the dues, but had made no actual promise to pay them; and the question was whether on such facts a verdict on the general issue should be entered for the

plaintiff. It was answered in the affirmative, against two arguments. One, only hinted at in the reports, turned upon wager. Wager would not necessarily lie against such a claim, and if wager marked the limit of *Slade's Case* this might be outside the principle. The other is clearly expressed: it is one thing to impute a separate promise to one whose debt was itself a matter of agreement, quite another so to reach a defendant who had agreed to nothing.

But still the result of allowing the promise to be implied was to allow the easy enforcement of an undoubted debt. The final extension of *indebitatus assumpsit* was more radical, creating a range of liabilities in quasi-contract. The development, which has not been traced in detail, culminates in two "common counts". One is the count for "money had and received to the plaintiff's use", which became the vehicle of a wide variety of claims. And this seems at least to have passed through debt on its way to *indebitatus assumpsit.* The starting-point was in account, charging the defendant as receiver. But when the defendant had simply received money for the plaintiff, not for any purpose of trading or the like, there was no real accounting to be done; and the action, though conceptually natural, seemed artificial in practice. Plaintiffs were therefore allowed to recover directly in debt, and thence in *indebitatus assumpsit.* Once more the turning-point came in a case with a special verdict in the now familiar terms: the defendant had taken the profits of an office properly belonging to the plaintiff, and the jury found all this, and that the defendant had made no actual promise to pay. It was held that a verdict in the plaintiff's favour was proper and that *indebitatus* would always lie where account lay; and the decision, after some hesitation, was followed and in the eighteenth century extended far beyond the scope of account. The count for "money paid to the defendant's use", equally fruitful, seems to appear later, and may be the product of beneficent confusion: the inability of either debt or account to reach such situations was noted when these actions were discussed.

CONSIDERATION

Slade's Case finally allowed *assumpsit* to perform the function of the medieval debt on a contract, so that a large part of what may be described as the old common law of contract was procedurally united with the new. But before turning back to the new, it is necessary to remark that another part of the old was left out. The motive force had been the hardship of the old law, with its substantive gaps and its wager. Neither was relevant when the plaintiff had a document under seal, and indeed to allow *assumpsit* in such cases would be hard on him. Suppose for example that *indebitatus assumpsit* had been matched with an action of *obligatus assumpsit*: the *assumpsit* would again have been the theoretical basis of the action, the defendant would have to plead *non assumpsit*, and there would be no way of stopping the jury from going behind the document. Debt on an obligation and covenant with their *non est factum* therefore remained inviolable. A curious consequence has already been mentioned. Corporations had to contract under seal, and were therefore always sued in actions in which there was no true general issue; and statute had to rescue incorporated insurance companies from what proved a serious disadvantage, as compared with their unincorporated rivals, in fighting claims.

The procedural segregation of contracts under seal had more serious results. They were excluded from the process by which the common law evolved the doctrine of consideration, its substitute for a theory of contract. The omission was of course not so important as the omission of debt on a contract would have been. But if the formal promise had been accommodated in a single theory of *assumpsit*, it is hard to believe that a place would not have been found for the deliberate but informal and gratuitous promise. In 1765, for example, Lord Mansfield tried and failed to present consideration as a matter of evidence: had the contract under seal not been so obviously distinct, he might have succeeded. As it is, those jurisdictions which have abolished the formal promise as an archaism, but wish in some circumstances to bind

the gratuitous promisor, have been obliged to go back unknowingly to the starting-point of *assumpsit*, and to rediscover the essentially trespassory idea of detrimental reliance.

It is convenient to begin a discussion of consideration with *indebitatus assumpsit*. When this had become an alternative to debt, in the sense that the plaintiff could ground his action on a fictitious *assumpsit* knowing that the existence of the debt would be the only issue for the jury, the only "consideration" in the modern sense was the *quid pro quo* raising the debt. To that extent the *quid pro quo* played a central part in such *assumpsit* actions and may be seen as an element in the later law. But the word consideration is not applied to the *quid pro quo*. If used at all, it is used of the transaction which raised the debt; and the promise for which that transaction was the consideration was, of course, the promise that became fictional. If there was an original concept of consideration, therefore, it included a past transaction.

But this is not to say that there is no organic connection between consideration and the *quid pro quo* of debt. To the extent that *assumpsit* represents a transfer of contract litigation from local to royal courts, it is likely that the royal courts in some sense worked to the local laws. The transactions brought to them had been made in expectations based upon an established pattern, and if they gave weight to those expectations they necessarily approximated to the pattern. If so, then the clauses in which claimants set out the "consideration" upon which promises had been made must reflect the kinds of circumstance that made promises enforceable in local jurisdictions at that time. But this was the second reception of contract work; and the *quid pro quo* of debt, rationalised and restricted and by the early fourteenth century already archaic in comparison with such local customs as had been subjected to mercantile influence, was still a fossil from the first reception. The intervening evolution had not changed the circumstances in which a promise to pay money was enforceable; it had created the idea that a money claim could rest upon a promise. The reality behind *indebitatus assumpsit* was something like a *concessit solvere* in Guildhall, not just a lawyer's

trick in Westminster. But if the promise was enforceable because of some overall mutuality in the circumstances, that may still have been the residue of the almost proprietary notion behind the *quid pro quo*; and to this extent the idea that the common law of contract has its ultimate basis in bargain rather than in promise may reflect history.

This is to suppose that the treatment of *assumpsit* was consciously contractual, and from the time that the reports become copious this is evidently so. The questions discussed in court are whether the promise was such that its breach ought to be actionable, whether it was made upon a sufficient consideration. Consideration had indeed become a term of art, not in the sense that it had a precise content, but in the sense that a fundamental rule could not be stated without it: promises were not actionable unless there was proper consideration. Substantive development of the law was thereafter a matter of refining and altering the content of the word, a familiar legal mechanism. Reported cases of course reflect this process: they are cases in which the question "Should the breach of this promise be actionable?" is argued in the form "Was there a sufficient consideration?" They are cases of doubt, cases on the boundary. More central and clear cases are not reported. It is in the plea rolls rather than in the reports that the most obvious reflections of the general rule are to be found; and in both courts a substantial proportion of early claims allege among the considerations for which the promise was given the payment of a sum like twelve pence or two or four shillings. These sums are nominal in the sense that they bear no relation to the value of the promise; but they were probably paid as a way of binding the promisor.

It has already been said that this allegation, and the almost equally common allegation of forbearance, persist longer in the common pleas than in the king's bench; and it was suggested that this may reflect a persistent difference in attitude between the two courts. The common pleas seems always to have thought in more overtly contractual terms, prepared to accommodate *assumpsit* within the framework of its existing contract law but determined

to confine it accordingly; and the king's bench, having started for jurisdictional reasons on a trespassory basis, was more willing to legislate, to override the existing law of contract. Nominal considerations disappear sooner from pleadings in the king's bench, but Denne and Fenne last longer.

It has also been suggested that the pleadings, the ways in which claims were formally put, must reflect an earlier level of discussion; and at that level things like nominal considerations are outnumbered and overshadowed by trespassory phenomena, by Denne and Fenne and their kind. The question therefore is, how far the actual rules of contract were shaped by their trespassory matrix, how far the statement of those rules in terms of consideration, even if more or less consciously directed to reproducing the basic pattern of local contract law, was distorted by having to be cast in trespassory terms.

There are some curious correspondences. If an essentially contractual complaint cannot be made directly, whether because the relevant law of contract requires a formality which was neglected or because the promisor could not bind himself as an infant or the like, it is natural to resort to the idea of deceit. But then the complaint must concentrate on what the plaintiff gave for the promise and not upon what he did not get because it was broken, upon restitution rather than the lost expectancy. It has been noted that the language of deceit came in with the disablement cases, and that the very earliest cases of pure nonfeasance do not often use it, seeming to go back to yet earlier precedents. But that language did become general in *assumpsit*; and it is asking a lot of coincidence to suppose that there is no connection between this fact, the early necessity for the plaintiff to have performed his part, and the doctrine of consideration.

Nor is it just in the broadest outline that the consideration, when the matter is put as a contract, matches the damage suffered by the plaintiff when it is put in the simplest way as a deceit. Consider the rule that the consideration must move from the plaintiff. The good Samaritan who asks a doctor to attend the injured stranger is discussed in the reports to show the constricting

effect of the *quid pro quo* in debt: the doctor will have trouble over his fee, because no *quid pro quo* came to the Samaritan. This result seems absurd, and is a reason for allowing *assumpsit* against him. If, however, the facts are turned round, so that the doctor is paid in advance and does not attend the stranger, the rule that eventually emerges prevents the stranger from suing even although he was a party to the agreement. But this would indeed follow from the logic of deceit, since it was the Samaritan rather than he who had suffered the damage of the payment.

In that case it is possible to say only that the rule would have followed from the logic: there is no direct evidence that it did. The rule against past consideration, however, does look like a result of the logic, and an unwanted result. It seems first to be stated in 1490: the buyer to whom a warranty is given after the sale cannot bring his action of deceit if the warranty proves false, presumably because it had not induced him to buy. But in contractual terms the rule is not obviously sensible or fair, and it may well prove to have been unknown in local jurisdictions. Significantly it was one of the topics discussed in *Doctor and Student*; and the Student, agreeing that such a promise is not binding at law, admits that it is so in conscience. Also significantly, perhaps, it was a rule that the common law had in some situations to get round; but that is a matter which needs some introduction.

The notion of deceit discussed so far in this section is the simplest: the plaintiff is seen as having been deceived into making his own payment or performance; and his claim, although the point would be lost in general damages, would have been in terms of what he had parted with. But this would have anchored *assumpsit* to a claim theoretically measured in terms of restitution of benefits: the insured merchant whose cargo had been lost would have been supposed to be claiming the return of his premium; and if he had not paid it in advance, he would have no claim at all, so that mutual promises would have been out of reach. Whether or not this simple notion had played a large part outside the spheres of disablement and of warranty, it certainly

did not continue to do so. This is not the deceit that introduces a complaint about lost profits or injured credit. In modern contractual terms, it is not just a restitution of benefits that the plaintiff now demands; it is damage flowing from the breach, often aggravated by his own reliance on the promise. In the trespassory terms of the pleadings, what the defendant's promise has now commonly deceived the plaintiff into doing is forbearing to sue or making his own promises to Denne and Fenne. His own performance is now irrelevant; and on the face of things he could sue for the damage flowing from the breach of any promise. The limitation must be in criteria determining the promises upon which he was entitled to rely, or other circumstances making it possible to represent the matter as deceitful. It is at this point, if at all, that the consideration of the common law links formally with the general understanding about contract as ordered by other courts.

Take once more a promise to pay an existing debt. In London this seems to have been directly enforceable by a *concessit solvere*; and the claim was for the amount actually owed. In the common law the first artificiality is that the matter must be put as a deceit, and the claim formally directed to consequential damage rather than the debt. The plaintiff, for example, says he promised to pay the money over to Denne and Fenne. Was he entitled to rely on the promise? Was it for a sufficient consideration? The natural answer would perhaps have been yes, because of the *concessit solvere* custom. But now the plaintiff meets what may be an obstacle left by an earlier and simpler analysis in deceit: the consideration is past, and he must emphasise this, not hide it, because otherwise it will be said that he should sue in debt. The danger of past consideration is therefore warded off by another artificiality in the pleadings. The plaintiff says that he entered into the transaction raising the debt at the special instance and request of the defendant. This adds a new tortious element: it is the inducement into the whole affair and not just the past transaction that entitles the plaintiff to rely upon the promise, and to recover loss suffered by its breach.

But again it is possible to wonder whether this was merely a piling of artificiality upon artificiality. If so, of course, the request allegation spread from its original home. After *Slade's Case*, it was of no consequence in the case of the debt. But the difference between "executed" and "past" consideration survived; and it may be that cases like that of *Lampleigh* v. *Braithwait* again reflect a general rule about promises in local courts. But if so, one would guess that it was not a rule about requests as such: that particular element looks very much as though it has to do with deceit. Perhaps it was a rule, not about particular kinds of past event, but about the present duties that they left. Perhaps the chancery, countenancing family ties, was not an innovator, but only continuing a kind of local obligation that the common law could not reach from its tortious standpoint. Perhaps Lord Mansfield, when he tried to make a moral obligation sufficient, came near to what had once been a general truth. If so, then consideration is a coherent theory of contract mutilated by its passage through tort.

13 *Rise of Modern Law of Torts*

The rise of *assumpsit* was not the dawning of an idea of contract; and in so far as it was the invention of specific rules, it is likely that the features peculiar to contract in the common law were the product of distortion caused by the trespassory origin of *assumpsit* itself. The whole development was one of adjustment, by which the law was enabled to catch up with life. But life had not outstripped all law, only the common law. This was work that the common law had largely left to other courts, and had disabled itself from doing. Rules such as that requiring a deed in covenant had barred the natural approach to an everyday law of contract. What the common law had deviously achieved by about 1650 may be seen as a counterfeit, and in some respects an imperfect one, of the contractual system existing in say London three centuries earlier and more.

Similarly in the field of tort, it is important to remember that the sequence of events, the early appearance of trespass *vi et armis* and the later rise of actions on the case, was governed by jurisdiction. Local courts in the early fourteenth century had a law of wrongs which protected all the ordinary interests of life. In the common law, the initial unconcern with any wrongs except those affecting the king introduced an artificiality which, not unlike the seal in covenant, affected all later development. Again, the rise of the modern law of torts was not the creation of something new but the restoration of a lost simplicity.

DECEIT

Deceit is taken first because it illustrates this point, and because the subject is related with *assumpsit.* Nearly all early cases about deceit in royal courts depend upon an allegation that the court itself has been deceived; and just as "trespass" has been identified with "*contra pacem regis*" so deceit has been identified with abuse of legal procedure. But the explanation is the same in both cases. Private cheating was clearly wrongful, but the king had no interest in the matter. The deceit of his courts was the only common kind of deceit in which there was an obvious royal interest; and of course the procedure was *ex officio* and almost summary. But just as stray trespasses came to the king's courts which were not *contra pacem,* so did stray complaints of private deceit by favoured persons and the like.

In local jurisdictions, moreover, it is clear that cheating, inducing others into actions detrimental to themselves, was a perfectly familiar idea. It was treated as a wrong because of what we should call the criminal element, because of the public interest in honest dealing. The seller of bad fish, or of caps made from reclaimed wool, wronged not only his buyer; and even if there was no private complainant, even if no sale had been made, merely to offer such things for sale was a wrong which the city authorities might punish.

But such a wrong, at any period of history, is of course most often done in a contractual context. The intention of the wrong-doer is not just to induce harm to his victim: it is to get a benefit for himself, commonly to sell something for more than it is worth. From the point of view of the victim, therefore, the background is in contract as much as in wrong; and even in local jurisdictions it may be that the punitive element was largely harnessed to the victim's interest, being used to compel restitution, the undoing of the transaction, whenever that was possible.

In the royal courts deceit, like any other wrong, could come in after the requirement of a royal interest was abandoned; and the false statement made to induce a sale of goods, the false warranty,

soon became familiar. But, as has been noted, the "criminal" element was entirely lost in royal courts, and this was the factor that had anchored deceit to wrong rather than to contract. The context in which cases came up for consideration was now exclusively that of the private dispute arising out of a contract, and the contractual merits of the matter could be weighed in isolation. If it seemed right to allow the buyer to recover against the merely mistaken seller who had given an untrue warranty in good faith, this could now be done: it would not mean that the seller would also be punished for dishonesty. Perhaps because this was the commercially convenient answer, perhaps because of the difficulty of proving actual dishonesty, that result followed; and warranties became in truth a matter of contract, though it would be long before they could be so in name.

Outside the field of warranty, deceit played the various parts discussed in the preceding chapter. And again the end of it was that the word lost its meaning. If promises are to be enforced on the basis that the promisor deceived the plaintiff, the promisor must not be allowed to say that he acted honestly: that is not what contract is about. Deceit became a series of meaningless allegations in the pleading of contract cases; and the idea itself virtually disappeared.

The consequence of these developments was that the common law hardly ever distinguished the true cheat from his innocent counterpart; and it was no doubt this that prompted star chamber and chancery to interest themselves particularly in fraud. They were indeed restoring different aspects of the old position in local jurisdictions. Chancery, in giving restitution to the victim, was knowingly or not reviving a civil remedy lost in the common law's concentration on damages. And star chamber, in punishing fraud, was knowingly or not making good a criminal sanction lost as the common law of crime became the only law of crime, as punishment was increasingly confined to the ancient pleas of the crown.

But even in the common law the realisation that deceit was itself a proper basis of liability probably never quite died. Cheating

at dice or cards, for example, may have been actionable in the late fifteenth century, though the matter was still not beyond argument in the early seventeenth century. Late in the sixteenth century money had been paid to the plaintiff to pay over to a named third party; and the defendant, who got it by pretending to be that third party, was held liable in an action on the case for the deceit. But claims of this nature were at least rare, perhaps because those who go in for such deceptions are not often worth suing.

It is in the contractual situation, especially the sale of goods, that deceit plays its largest part in real life; and it was here that the idea was now most beset by artificiality. If the defendant had given a warranty, it was immaterial whether he had in fact been deceitful; and if he had not given a warranty, there was an obvious difficulty no matter how deceitful he had been. The plaintiff would either have to use the warranty writ itself, and probably be met by a traverse of the warranty; or he would have to use what would look like a defective warranty writ, alleging deceit but omitting the warranty. The factual complaint was precisely that which the warranty writ had at first made.

Perhaps significantly, the one situation in which there does seem to be a continuous history of liability truly based on deceit is precisely the one in which express warranties were not normally given, and in which therefore the ground was not taken up by a warranty action. This was the sale without title. Cases can be found from the fourteenth to the seventeenth centuries in which the defendant is sued for selling to the plaintiff something to which he knew he had no title. But although his knowledge, *sciens*, is always alleged, we cannot be sure that it was material; and if and when it ceased to be so, the idea of deceit was again being abused to produce the essentially contractual result of an "implied warranty".

There was one situation in which a warranty of quality was "implied", the sale of food by retail for immediate consumption. It is not clear whether this result was reached by using the warranty writ and not allowing the warranty to be traversed or

by using a separate writ based directly on deceit, but probably it was the latter. In 1419, for example, an innkeeper was alleged deceitfully to have served cat to one who had ordered rabbit. There was no allegation of a warranty; and, in view of the possible importance of the matter in the history of contract, it is worth noting that the damage complained of was consequential, not the difference in value between roast rabbit and roast cat but the expense of an illness. It is generally in this special context of sales of food that statements are found in the year books of a liability based simply on deceit. The seller who knows of a defect, it is said, will be liable even if he gave no warranty. But even in the case of food this ceased to be the true basis of the liability: the victualler was liable whether he knew or not and whether he warranted or not. And outside the cases of food and of defect of title, no examples of a *sciens* writ are known until the sixteenth century is over.

The question was raised in 1603 in the case of *Chandelor* v. *Lopus*. The plaintiff had bought a counterfeit jewel and was suing the jeweller. His first action set out the facts, including the special skill of the seller; but it did not allege either that he gave a warranty or that he knew the true nature of the stone. Judgment for the plaintiff was reversed in error. Only one judge would countenance an action based on the deceit, and all the others thought there could be no liability without a warranty: "for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action . . .".

The plaintiff then brought a second action, based not upon a "warranty" but upon an assertion by the jeweller that it was a true stone whereas he knew it was false; and the defendant raised the issue squarely by demurring to the claim. It is typical of our erratic knowledge of this period that the series in which this second action is reported has not been printed, that the report itself shows two inconclusive arguments before the king's bench and a final adjournment for discussion by all the judges, that we have no report of that last discussion, and that nobody has sought

the outcome from the plea roll. Mention in a later case suggests that the plaintiff won, but the report of the argument itself shows great uneasiness: "if it should be decided for the plaintiff it would trench on all the contracts in England, which would be dangerous . . ."; and since cases based upon *sciens* do not seem to be reported thereafter, it is likely that *caveat emptor* continued to stand even against actual fraud.

The interest of this story, however, lies not in an answer reached at the time but in a question for us. Was it indeed the commercially desirable result that fraud should be ineffective? Since fraud is always difficult to prove, it was no doubt desirable, when penal consequences ceased to be involved, to make the liability on a warranty independent of knowledge; and this in turn made it desirable to require express words for a warranty, so that it should be distinguishable from mere commendation by a seller. But was it really desirable to withhold a remedy for clearly dishonest commendation? Was this not truly a legalistic result, a consequence of abusing the idea of deceit? The common law had, as it were, used the cry of "wolf" as a summons to tea. Not until 1789 in *Pasley* v. *Freeman* was a liability for deceit clearly established as an entity in its own right, neither necessarily associated with contract nor excluded by it; and this resurrection of an ancient and elementary liability has been treated by modern writers as an example of the rare "invention" of a new tort. In our own day history has repeated itself. Just as the difficulty in establishing this "new" tort was the pre-emption of the ground by contractual actions, so in recent years there has been a difficulty over liability for mis-statement that is merely negligent; and that has been because the ground was pre-empted by the tort of deceit.

CONVERSION

Just as the growth of *assumpsit* was chiefly conditioned by the older actions of debt and covenant, so the growth of trover was chiefly conditioned by detinue. But whereas *assumpsit* became a

new mechanism for handling old ideas, the very definition of the modern tort of conversion shows it to be an artefact.

The word "conversion", however, is old. Its original sense was almost one of accounting: it denoted the application of assets to one purpose rather than to another. The question could arise only where one person acted in more than one capacity, and a wrongful taking from another would never be described as a conversion. Nor was a conversion necessarily wrongful. An abbot who borrowed money and "converted it to the use of the house" was acting rightfully, and only an unfortunate constellation of circumstances brought this "conversion" into court. But the conversions with which lawyers were concerned were usually wrongful; and the word is most often used of the executor who, while debts are still outstanding, treats the testator's goods as his own. His liability for specialty debts owed by his testator is normally limited to the testator's assets. But if it is found that those assets are indeed exhausted because the executor converted some to his own use, then he is liable from his own goods.

The position in local courts has not been sufficiently investigated, but in the early common law there was no place for conversion as a cause of action. The left hand does not sue the right. The testator's creditor had an independent cause of action, and the conversion affected only the pocket which the judgment would reach. The legatee's claim would be relevant but was outside the common law altogether. Other enduring situations in which the resources of one person were under the control of another were covered by the actions of waste and account; and account in particular may be seen as obviating any need for the treatment of such misappropriation as a wrong.

This concept of conversion was about assets, funds, rather than about specific objects: any specific objects there might be were properly under the control of the party who could apply them to this purpose or that, and any impropriety came in the application of their value. In the sixteenth century this is reflected in two features of the nascent tort of conversion. One, despite the difficulty of identification and despite a growing incongruity as

the tort came to be thought of as alternative to detinue, is that conversion was applicable to money. The other is that specific goods were not generally made the grammatical object of the verb "convert". Most early actions speak of the defendant as selling the goods to persons unknown and converting the money to his own use. This may prove important.

These linguistic considerations have been put first at the expense of chronology in order to make the point that there was at the beginning a definite concept of conversion, although it was not in itself a cause of action and although it was not much concerned with specific goods. How did it come to be so?

It will be convenient to begin with the civil protection given by the common law to the owner of a chattel at about the middle of the fifteenth century. If the wrong is done while the chattel is in the plaintiff's hands, his remedy is trespass *vi et armis*; and this may extend to the case in which the defendant did the wrong after securing a delivery to himself for some temporary purpose such as to look at a deed. So long as the plaintiff was at the time actually or constructively in possession of the thing, he has this remedy; and it will cover all possibilities, whether the thing was taken away or destroyed or merely damaged. But if the plaintiff was not at the time in possession, it is necessary to distinguish destruction or disposal from mere damage. If the thing was damaged in the hands of the defendant, the plaintiff's primary remedy is an action on the case. This may rest upon an *assumpsit* or negligence or, as in the misfeasance cases, it may often rest upon both; but the defendant is even more obviously a wrongdoer if he did the damage deliberately.

He is of course equally a wrongdoer if he destroyed the chattel altogether or allowed it to perish or disposed of it. But in these cases the primary remedy of the plaintiff is detinue. Whatever the reason, the plaintiff is not going to get his chattel back: and even if the reason is a wrongful act by the defendant, his remedy upon the wrong is occluded by the older action. Once again, the point of growth is a boundary between an action on the case and an older remedy.

But boundaries can always be drawn more clearly on paper than in real life; and since detinue was subject to wager and the other infirmities of debt, it was inevitable that any uncertainty should be exploited. There might be uncertainty on the facts. If the owner brought detinue in respect of an extensively damaged chattel, the defendant could meet his liability by tendering the remains; and the plaintiff would still have to bring his action on the case for the damage. He would therefore prefer to write the chattel off as a total loss, and sue at once in case; but then the defendant would argue that since judgment in detinue would be for the object or its value, a claim for the full value must properly lie in detinue. In a case of 1472, indeed, a defendant said that he had in fact been sued in detinue in respect of the loss concerned, and had successfully made his law; and the question was whether the one action barred the other. That was an action on the case against a bailee for negligent keeping so that the object perished; and it neatly illustrates both the uncertainty created by the two kinds of analysis and the temptation to exploit it.

But this purely factual uncertainty is general, covering all kinds of harm and all kinds of possessor. And its most important outcome was in connection with the liability of bailees for accidental harm. In principle their liability for accidental damage would come up in actions on the case, and would affirmatively rest upon negligence. Their liability for accidental loss or destruction, however, would be in detinue; so that they were *prima facie* liable, and the burden of raising absence of fault would rest upon them. That is the true basis of the "bailee's liability". The dramatic change which came over that liability, signalled in *Coggs* v. *Bernard*, was due precisely to the final abandonment of detinue, so that even for a total loss or destruction the bailor would bring an action on the case based affirmatively upon wrongdoing, an action using the principle tried in 1472.

That development runs parallel to the rise of the tort of conversion, but is distinct and will not be traced here. A conversion was at least a positive act; and it was settled in the sixteenth century that an allegation of conversion could not be supported

by evidence of negligent keeping no matter how destructive. But the 1472 action against the bailee alleging loss by negligent keeping is matched by the earliest actions on the case alleging conversion by possessors. The first use of the word to denote a wrong was in the famous *Carrier's Case* in 1473; and six years later a bailee who was similarly said to have broken open containers was sued in case for converting the contents to his own use. But it was held that only detinue lay.

Two arguments are discernible in that case. One is purely factual, and is reminiscent of the argument that covenant was inappropriate for damage actually done. If the thing itself cannot be recovered, it is argued, the plaintiff is not driven to detinue: the primary demand of that action cannot be satisfied. The other is metaphysical: detinue must lie here because the property is not altered. This argument probably owed more to the concept of conversion than to the mystical need for a property in detinue. Conversion, as has been noted, implied a power to allocate specific assets to this purpose or that; and the allocation could be effective even if it was wrongful and would create some liability in respect of the proceeds. This defendant had no power to alter the plaintiff's right in the thing itself, so that what he had done could not be a conversion.

On this view the openings for an action on the case for conversion would be restricted to situations in which the possessor could make some disposition effective against the owner. It has been plausibly suggested that one such situation was actually referred to in the case of 1479. An earlier case was cited in which cloth had been made up into clothes and an action on the case succeeded; and it may well have been argued that this depended upon an alteration of property by what Roman lawyers would call a *specificatio*. But a decade later in another context it was decided that such manufacture would not alter the property in the materials, so that this particular mechanism of conversion could play no further part.

What would be the effect of a mere sale by the possessor? If it was in market overt, the property in the goods would of course

be altered; and though market overt seems never to be formally alleged in this context, it is possible that for lawyers this was still the regular mode of sale. Only in the sixteenth century does market overt begin to appear in legal sources as something clearly exceptional. Alternatively, it is possible that the owner would, as it were, adopt the sale made by the possessor, abandoning the claim to "property" in the goods and thereby enabling himself to avoid detinue and sue in case for conversion. What is clear is that for most of the sixteenth century these actions did not in fact allege a conversion of the goods themselves: they alleged a sale of the goods by the defendant and a conversion of the money. The sale, moreover, was always specified as having been made to persons unknown to the plaintiff; and this clearly goes to the point that the goods themselves are irrecoverable. It may, however, have a deeper relevance than that: it may to go the point that detinue is not available to the plaintiff.

So far no distinction has been drawn between bailees and other possessors. The logic of conversion seems equally applicable or equally inapplicable to both; and in the early sixteenth century, although opinion was divided on their propriety, actions on the case are found against bailees who have sold the goods. But the action for conversion is also known as the action of trover for the reason that the possession of the defendant came always to be attributed to a finding. That is to say, that the "count in trover" was borrowed from detinue; and the count on a bailment was not used in the action on the case after the early decades of the sixteenth century.

The reason for this lies in the difference between detinue *sur* bailment and detinue *sur* trover. Detinue *sur* bailment retained a legacy from its early analysis as a claim indistinguishable from debt. The bailee owed the thing just as the debtor owed the money. The distinction which arose over accidental destruction took the form of allowing the bailee a special plea. He could confess the bailment and seek to avoid liability by setting out the mishap. But, although there was no earthly sanction to prevent his pleading the general issue, he should not in conscience do so.

If he did, he would be his own judge on a point of law, and might decide for example that his own necessities justified a sale to a third party. Mere non-possession, whether for good reason or bad, did not justify a bailee in pleading *non detinet.* This was the whole basis of the "bailee's liability".

But there was no equivalent "finder's liability". The claim in detinue *sur* trover had no ancestry in debt, and no trace of contract. It went back to the local *de re adirata,* and involved only the defendant detaining the plaintiff's goods. If he did not detain them he was not liable in detinue, and this was true whether he had never had them or had parted with them before the claim was made. In either case he did not detain, and could conscientiously plead the general issue in detinue. The point is stated in 1535 and repeated at least twice in the sixteenth century.

But of course nobody would think the finder or other neutral possessor entitled to sell the goods and keep the proceeds. The owner can sue him in trespass on the case, affirmatively making him out a wrongdoer. What he cannot usefully do is sue in detinue: if he does, he will be met by *non detinet.* Detinue *sur* trover is effective only against the person who actually has the goods. This is the relevant point of contrast with the bailee, whose possession at the time of the action is immaterial. The bailor sues in detinue, relying merely upon the bailment; and if the bailee is out of possession he must himself affirmatively plead that he is so in circumstances which excuse him. The bailor is relying upon the bailment, not upon any wrong.

To return now to actions on the case for conversion, it is easy to see why they ceased to be brought against bailees, or rather why they ceased to be brought against persons expressly said to be bailees. The bailee sells to a third party unknown to the plaintiff, and converts the proceeds to his own use. Detinue is in theory an effective remedy for the bailor: the bailee must not in conscience plead the general issue, and cannot produce a proper excuse like accidental destruction. Now suppose the finder to do the same thing, the neutral possessor whose detinue liability would be *sur* trover. The owner truly has no remedy in detinue. He does not

know who now has the goods, and cannot sue him; and the possessor who sold them will correctly plead *non detinet.* He must be reached as a wrongdoer, and that is the action on the case alleging a trover and conversion.

After the middle of the sixteenth century the action is very common to the king's bench, but not in the common pleas; and there seem to have been two difficulties. They can best be seen in terms of the plaintiff's claim, which generally follows the pattern long known from *Mounteagle* v. *Worcester* in 1555: the plaintiff was possessed of the goods and lost them; they came to the possession of the defendant by finding; and the defendant, knowing they were the plaintiff's and scheming to defraud him, sold them to persons unknown and converted the proceeds to his own use. The first difficulty arises on the face of the claim: was the property altered by the sale? Dyer, reporting *Mounteagle* v. *Worcester* itself, thinks not, and therefore that detinue is proper. But of course the circumvention of detinue was now the aim; and a precedent book a decade later actually has the caption "Action on the case instead of action of detinue". And this introduces the second difficulty. The claim is not necessarily what it seems to be on its face. Although the availability of the action depends upon the case being one of "trover" rather than bailment, it is in fact being used against bailees.

Even if anybody had wanted to prevent this, and the common pleas may have wanted to, it would have been practically impossible. The count in trover had established itself as a fiction in detinue, not true but having the conventional sense of possession otherwise than by bailment. In detinue there was no danger of abuse, because the bailor who counted in that way was only giving up advantages. In case, however, the advantage was reversed: his count hid the fact that he was using an inappropriate action. But to allow the bailee to take the point would be to allow a traverse of what everybody knew to be untrue; and the pleading convenience would be endangered even in the cases where it did no harm.

Since all actions for conversion used the trover fiction, and

since most ended in the general issue, it is impossible to tell how often the parties were really bailor and bailee. The earliest reported case is in 1550, where the defendant turns out to be holding as pledgee in respect of an unpaid debt; and the question is whether this should be pleaded specially or whether he should say Not Guilty and give it in evidence. This particular plea is in fact found from time to time on the rolls in the second half of the century. Again in 1557 a defendant pleads that he is a common carrier, that the plaintiff entrusted the goods to him for carriage, and that they were taken from him in an inn by the negligence of the innkeeper. The plaintiff demurs and there the entry unhappily ends.

So well accepted did the use of the action by bailors become that toward the end of the century they occasionally ventured out into the open. In 1594 a plaintiff who counted on a bailment secured a verdict and judgment apparently without objection being made. But in 1600 the objection was made, though unsuccessfully; and in 1615 the question was rationalised out of existence. In *Isaack* v. *Clark* in that year a count in the common trover form was answered by the general issue, Not Guilty; and the facts emerged on a special verdict. In effect, the plaintiff had pledged his own property to the defendant on behalf of a third party, and later demanded it back before the third party's obligation was resolved. It was said that the fact that there was a bailment did not invalidate the action alleging a trover; and that if there had been a conversion, it would terminate the bailment and so make the defendant properly chargeable as a neutral possessor.

The result was that both the bailee and the neutral possessor who had sold or otherwise dealt with the goods could now be reached in this action instead of in detinue. In the case of the bailee the justification for this was merely verbal. In the case of the neutral possessor, it was true that he was liable in detinue only so long as he had the goods, and that detinue was therefore no remedy against him. It was also true that if he had indeed sold to persons unknown, detinue was no remedy to the plaintiff at all:

the goods were gone for ever. But this concept of "conversion" is very different from the original concept: the mere possessor had no power to make a legally effective disposition of the goods. There was, however, obvious justice in allowing him to be treated as a wrongdoer, and obvious pressure to extend the treatment to the bailee who had sold.

But what about the bailee or other possessor who merely kept the plaintiff's property? On the face of it detinue must be the proper remedy, and fiction could not help. And this conclusion would at first sight seem to be reinforced by a pleading decision. Between the finding and conversion, there was often inserted an allegation that the plaintiff had demanded his goods and been refused. But it was held, in connection with cases in which they had been sold, that such failure to redeliver was not necessary to the gist of the action, the conversion. This, however, could be turned round. The pressure was always to replace detinue, and even when the defendant still had the goods it could be argued that there was a difference between his detaining the plaintiff's property, and his "converting" it so that it became his own. Instead of changing the property by selling it to another, and applying the proceeds to his own purposes, he is applying the thing itself. On this view a mere refusal to redeliver might amount to a conversion. The question was squarely raised in 1596 by a special verdict: the defendant gained possession by a trover, knew the goods to be the plaintiff's, and refused to give them up; and the jury left it to the court to decide whether this was a conversion. Three reporters fail to tell us much about the argument or its outcome, but there was evident perplexity. What was to happen, for example, if there was a conversion in this metaphysical sense, and then the goods were in fact returned? This matter too was finally resolved in *Isaack* v. *Clark*. The plaintiff who proved a mere refusal to deliver had proved a detinue but not a conversion: but if the refusal was absolute, such as to show that the defendant was indeed appropriating the goods to himself, that was a conversion.

Detinue could now be avoided in every situation; but it was

an end that had not been reached without cost. There was some damage to legal thinking and perhaps some to justice. The conceptual damage appears at a prosaic level in the definition of the modern tort of conversion. What is the essence of the "denial of title"? What, indeed, must be the nature of the title denied? Litigants at the end of the eighteenth century paid heavily to learn that ownership was neither necessary nor sufficient and that the title in question was once again a relative thing.

But there was perhaps a deeper wound, and it may be looked at from two angles. The concept of conversion would have been congruous with things as they were before the common law had committed itself to the basic idea of property in chattels, to the basic rule that *nemo dat quod non habet*. The defendant by converting has altered the property, and *mobilia non habent sequelam*. The plaintiff therefore must look to him for his remedy, and cannot follow the goods. All innocent purchasers would have been protected, and the "owner" left to recoup himself against the wrongdoer. But the common law has been kind to the owner. This concept of conversion has been utilised to give the owner full recovery against the wrongdoer. And yet, although he cannot recover more than once, he can still follow the goods and attack all into whose hands they come except through market overt; he can still rely upon *nemo dat*.

The same damage can be viewed from another angle. What was to be the position of the innocent purchaser of the plaintiff's goods? Once again it is worth observing that so long as his purchase was presumptively in market overt this question could not arise. Nor would it arise at all in detinue. *Ex hypothesi* the plaintiff would count *sur* trover. If the defendant had the goods, he would be liable, and nobody would wish him to be excused by his innocence: that is what is meant by property in chattels. If the defendant had not got the goods, he would not be liable in detinue at all. The plaintiff would then have to sue him as a wrongdoer; and in terms that is what he does in the action of trover. The defendant is said to have known that the goods belonged to the plaintiff, and to have acted dishonestly.

In 1590 a defendant pleads that he acted honestly: he supposed that his vendor had been entitled, and resold before he heard of the plaintiff's right. Longing backward glances are cast at detinue, but the plea is held bad. It is by no means clear, however, that the defendant would have been held liable if he had pleaded the general issue and proved his lack of knowledge to the jury. The case is at least discussed in terms of what we should call tort, and for that kind of conversion those terms would probably have continued to be acceptable. But detinue was not just supplemented: it was replaced. What was to happen with the innocent buyer who did not resell the goods, but simply refused to give them up because he believed his vendor to have been entitled? If the action on the case was to do the work of detinue here, the purely proprietary work, his honest belief must be made irrelevant. And once it was made irrelevant in that case, it was inevitably made irrelevant when he had resold: the entity of "conversion" had to be endowed with a general rule.

The result has been to allow the owner to fix the almost absolute liability appropriate to the proprietary claim not merely upon the present possessor, the proper target of that claim, but also upon past possessors. The innocent auctioneer who sells another's property may find himself liable for its full value to an owner of whom he could not possibly have known, and although he got nothing out of the sale but his commission. We tell ourselves that he is a victim of a policy which ultimately discourages theft; but in truth he is a victim of history.

DEFAMATION

Defamation, and indeed slander of goods and of title, were familiar in local jurisdictions in the fourteenth century; and there is some mystery about their late arrival in the common law. When the king's courts took in actions for wrongs in which the king had no interest, one would have expected to find actions on the case for words. But they do not appear until about 1500.

Various explanations suggest themselves. Until that time no

actions on the case were common, presumably because litigants preferred the cheapness of local justice; and perhaps words never seemed to matter enough. Or perhaps it was the judges who feared the flood of difficult and pointless litigation that did indeed ensue when actions were accepted. Or again, like other wrongs, defamation had been treated in local courts from the two aspects that we should call criminal and civil: the victim might be compensated, and the wrongdoer might be punished. For punishment two motives were at work: the general threat to good order inherent in insult, and the particular threat to authority inherent in sedition; and it may be that these so overshadowed the "civil" aspect, that the king's courts did not feel it appropriate to allow cases to be treated purely as private wrongs.

What was actually said by the king's courts on the eve of the change was that defamation was a spiritual offence and matter for the church; but this is easily misunderstood. The word is apparently being used in the technical sense that it bore in church courts, where one *diffamatus* was one whose ill reputation was itself sufficient basis for a charge of sin. The kinds of words which would tend to defame a man in this sense would cover much of the field of defamation in its modern sense, including for example the sexual offences, perjury, and all the common law crimes: but important areas would be left out, such as imputations of professional incompetence. Insults and lies might be independently punishable by the church; but it is likely that these omitted areas were regarded by the common law courts at the end of the fifteenth century as belonging to local courts, and that the exclusive jurisdiction of the church was confined to defamation in its own sense.

But even in that sense there were limits to the jurisdiction. Theft and murder, for example, were sins as well as crimes, and to call a man murderer was in its nature an ecclesiastical defamation. But from a statute of 1327 forbidding proceedings for such defamation against indictors, the common law had evolved a general rule; and prohibition would issue against any such proceedings in which the words complained of alleged a temporal

crime. Again the so-called statute *Circumspecte Agatis* in 1285 had been made the basis of a rule confining the church to punishment of sin; and it could not award compensation to the injured party. These two limitations played a large and increasingly artificial part in the common law's own treatment of defamation; but it is important to remember that for the victim of rumours they might be serious. He was left without redress.

We do not know how or exactly when the common law courts began to entertain actions on the case for words. In the second half of the fifteenth century actions are found in which the defendant is said to have claimed the plaintiff as his villein. The preamble to the writ sets out the plaintiff's free condition much as later writs set out his good name and reputation; but the gist of the action is that the defendant so lay in wait for the plaintiff and threatened him that he dared not go about his business. The writ has *vi et armis* and *contra pacem*, and so far as the nature of the wrong goes its affinity is with assault. But the damage is consequential, the business injury to the plaintiff flowing from the constraint upon himself, not from the disinclination of others to deal with him. In contrast, an entry of 1511 is truly one of slander:

> "That whereas the plaintiff was of good and honourable name, fame and bearing, and was so held, spoken of and esteemed among good and grave men, the defendant, scheming wrongly to harm and take away his name and estate, called the plaintiff *nativus*, in English bondman, and at such a day and place he publicly said and pronounced these words in English 'Thow knave, thow ar sir John Rysley bondman and somme of thes dayes he will seize thy body and thy goods,' whereby the plaintiff is widely harmed and wronged in his estate and name and in his lawful business of buying selling and dealing with honourable persons, whereof he says that he is injured and suffered damage to the value of £20."

The defendant pleaded Not Guilty.

Only a systematic examination of the plea rolls in the first decade of the century will show whether the old action for claiming the plaintiff as villein had somehow led the way. But the 1511 entry is not the earliest known action for slander. The earliest which chance searches have yet brought to light is one of

1508 in which the plaintiff complains that the defendant called him a thief. It is like that of 1511, but a particular point of difference and a particular similarity are both worth noting. It does not, as nearly all later entries seem to do, set out the actual words in English. But it does allege exactly the same damage as in 1511, with the emphasis upon a trading loss.

Convenience and chronology both divide the sixteenth century cases into two kinds. There are defamations in the ecclesiastical sense, in which financial loss is relevant as one of the factors relied upon to bring a complaint within the lay jurisdiction. And then, rare before the middle of the century, there are words which would not amount to ecclesiastical defamation, and of which the whole substance lies in financial loss: the allegation of professional incompetence, for example, seems to be closer kin to slander of goods than to an imputation of theft.

The theme of all the early reported cases is the boundary between the jurisdictions. To call a man adulterer or heretic is not actionable: only the church can investigate the charge, and a lay court would be powerless if a justification were pleaded. To call a man a thief, far and away the commonest slander in the plea rolls, is actionable precisely because the church cannot even punish the slanderer. The nicety of the boundary is illustrated by "witch". This was for the church, unless it were alleged that the witchcraft had caused death or consisted in conference with the devil: these were felony by statute.

This theme depends solely upon an idea that the allegation must be dealt with by the jurisdiction which could punish the wickedness alleged. And its simplicity was disturbed by the other great limitation on the church, namely that it might not order (though it could in fact induce) compensation in money. Suppose the allegation of a spiritual matter caused worldly loss? As early as 1513 a sad figure sought to raise this point and perhaps to give his name to a leading case. A London merchant embroiled with church authorities, he was charged with heresy. And when he tried to go to church, the parson declared before the congregation that he was "accursed", that is excommunicated, and ordered

him from the church, refusing to begin the service while he was there. For this the merchant sued the parson, saying that in fact he was not excommunicated, and that because of the statement that he was, other merchants dared not deal with him. To this claim the parson demurred; and after adjournments it ended without a decision, as did a *praemunire* also brought by the merchant. The cases ended because the plaintiff had died; and his death in a church prison gave his name, not to the leading case he had hoped for, but to one of the episodes leading up to the reformation. But, suspicious though the circumstances were, it is likely that the cases were going against him, and that he took his own life in disappointment.

Not until near the end of the century does it seem that the point was taken up again. In 1594 a rector sued one who had said he came to his benefice by simony, whereby the plaintiff's benefice was endangered and he was put to great trouble; and again the defendant demurred. But from a report of the preceding year it seems that the plaintiff would be entitled to recover if the special damage was proved. The defendant had said that the plaintiff had had an illegitimate child, and she thereby lost a marriage. To accuse her merely of incontinence would be for the spiritual court, unless perhaps she lived in a jurisdiction in which this itself was punishable. To accuse her of having a bastard child might be actionable, because this was an offence by statute, though doubts arose: the statute punished only the having of bastards chargeable to the parish. So far all this turns on the simple point of jurisdiction. But even the allegation of mere incontinence, a purely spiritual offence, would be actionable if it caused temporal loss, as of the marriage.

Imputations of heresy and sorcery have long been unfashionable, and the narrow effect of this line of thought was upon allegations of sexual misconduct not amounting to a crime. It is a legacy of the church jurisdiction that men today cannot sue upon these unless they can prove actual damage; and women could not do so until 1891, although in the nineteenth century actual damage was as likely as it was hard to prove.

But temporal damage was to play a wider part than in bringing into the lay jurisdiction allegations of a purely ecclesiastical offence. This coalesced with a distinct notion that temporal damage might itself be a cause of action even if the words were not a "defamation" in the ecclesiastical sense. Villeinage was not a sin, and its wrongful imputation would not lead people to think worse of the plaintiff in the moral sense. But they might treat him differently, as with a plaintiff in 1530 who had lost his marriage. Similar considerations apply to "alien" and "Scot", and later to "bankrupt" said of a merchant. The affinities of these are with slander of goods or of title, which seem not to appear before about 1570. The confusion can be seen in discussions of "bastard". If the plaintiff is so called, is it not for the church? But suppose an inheritance depends upon it? And if it does, if land is entailed for example, suppose the plaintiff's father is called bastard? Or suppose in the same situation, that the plaintiff's bastard elder brother is said to be legitimate?

From this intermixture of scandal and monetary loss, two features of the modern law developed, though neither can be dated. One is the incoherence of the definition of the tort. The other is the division of slanders into those actionable *per se* and those requiring proof of special damage. The slanders actionable *per se* began as those categories of words which were accepted as actionable at all. They will be considered one by one. It will be seen that allegations of temporal crime were by nature defamatory in the ecclesiastical sense; but the church could not hear them. Allegations of professional misconduct and of certain diseases similarly seem to have begun as allegations of wickedness; in both temporal loss gained the upper hand, but the question of proving it never arose. The rule about proving an actual loss first arose with allegations of purely ecclesiastical offences, where it was the temporal loss that gave the lay court jurisdiction. But this category became merged in the wider and woollier idea that temporal loss itself could be a cause of action, so that into the nineteenth century the law of slander would be stated, not in terms of actionability *per se*, but as a list: imputations

of crime, professional incapacity, disease, and imputations causing loss. And the last, beginning from allegations that were merely disadvantageous, morally as neutral as a slander of title, could only be brought within a definition by having a definition that did not mean much.

In the sixteenth and seventeenth centuries, however, the question is why the common law stopped with its artificial categories, with its list of diseases that left out smallpox, its refusal to remedy general imputations of roguery unless aimed at professional men or, later, causing actual damage. And the answer lies in the flow of litigation. The extent of this can be seen only from the plea rolls, where a surprising proportion of the weary annual miles of parchment is taken up with actions for words. Most of these concerned imputations of crime; and it was particularly to these that another limit was applied. This was the *mitior sensus* rule, well known from the reports. Defendants would seek to construe the abuse which they had uttered so as to show that it did not necessarily impute a crime. Some very absurd examples can be found. "Thou art a thief and hast stollen my appletrees out of my orchard" is actionable, because the two propositions are separated and the first can stand though the second falls; but it would have been otherwise had the words been "for thou hast stollen my appletrees". "Thou has stoln by the high-way side" is not actionable "for it may be taken, that he stole upon a man suddenly, as the common proverb is, that he stole upon me, innuendo, that he came to me unawares"; or "it may be intended that he stole a stick under a hedge, and these words are not so slanderous, that they are actionable." "If ever man was perjured, Wittam was" and "Thou art as very a thief as any in Gloucester Gaol" are not actionable without averments, respectively, "that any man was perjured" and "that there was a thief in Gloucester Gaol".

Similar arguments could be raised over imputations of disease. "Leper" was unambiguous. But "pox" could be the French pox or smallpox; and if the latter, the speaker may have been warning rather than defaming, an early indication of something

like privilege. Behind the seeming absurdity, however, there lies a serious question. What was the basis of these actions for diseases? "Pox" was the earliest and the commonest to come in issue; and it may at first have been because of the stigma of sin, temporal damage being mentioned only to take the case out of the jurisdiction of the church. Then the damage was made the very basis for the action, so that imputations of past venereal disease were not actionable and imputations of disease not shameful by nature might be so. The accidental end of it was the illogical list of ills, imputations of which were actionable *per se*.

This shift whereby temporal damage might be the ground of the action irrespective of any imputation of wickedness, irrespective of "defamation" in the ecclesiastical sense, may also be reflected in imputations of professional unfitness. The early cases seem all to concern lawyers or public officers, and to involve allegations of dishonesty or other positive misconduct rather than mere incompetence. The earliest example known is in 1513: the defendant had said of Richard Eliot, a king's serjeant, that he had advised clients against the crown; and this was to the prejudice of the plaintiff's good name as well as of his fees. In 1557 Roger Manwood was not accused of stupidity: he was "the craftyest and falsest man of lawe that ever was, and I wold that all men shuld beware of hym for he is so full of falshed and deceyte"; and what is more his defendant sought to justify it. In 1564 an attorney recovered for "He is the falsest knave in England, and by God's blood he will cut thy throat"; though at that time a mere layman could not have recovered for "false knave", or for far more specific allegations of murderous intent. Not until 1591, upon error to the exchequer chamber, does it seem that mere incompetence in a lawyer was held sufficient. In the same year it was laid down in the case of a surgeon that professional disparagement was actionable by those who gain their living through practice of a trade, an art or a science. But in both cases there is some suggestion of deliberate misconduct, and there may still have been doubt about the nature of the allegation necessary. Mere unfitness had to be extreme; and there was ample scope for

the *mitior sensus* rule. "He hath as much law as a jack-an-apes, or my horse" is actionable "because they are unreasonable creatures, but if he had said, that he hath no more law than I.S. that is not actionable, although I.S. be no lawyer." "He is a blood-sucker and sucketh blood", or "He is a blood-sucker and thirsteth after blood", spoken of a justice of the peace and of oyer and terminer was twice argued before all the judges, and eventually decided for the defendant, "quia poit thirst after blood en care de Justice", or "for it cannot be intended what blood he sucked".

But only the internal mysteries of slander are due to the action on the case for words, and therefore to the boundary between the ecclesiastical and the lay jurisdictions. The greater mystery in the modern law, the distinction between slander and libel, is due to another jurisdictional boundary, that between the ordinary lay jurisdiction, the common law courts, and the extraordinary jurisdiction of the star chamber. The star chamber was seemingly prepared to entertain complaints of private defamation at the end of the fifteenth century, before the common law courts had opened their doors to actions for words. But the motives which took it into this field at all were not those of private law, of the compensation of injury, but of criminal law. The star chamber's approach was much that of the local courts, seeking primarily to repress disorder and disaffection.

The earliest governmental dealing with subversive words not amounting to treason was a statute of 1275 creating an offence of *scandalum magnatum*, which punished the publication of discreditable matter about important people. This statute was several times re-enacted with changes, the last occasion being in 1559. It was the occasional basis of proceedings at common law, though the only ones of sufficient interest to lawyers to be reported were civil in nature. The substantive effect of these was to allow "magnates" to recover for words which their lesser neighbours would have to swallow, though their advantage was not great: in 1562 for example "un covetous & malicious Bishop" was sent empty away. As to proceedings of a criminal nature, the statutes could cause jurisdictional problems; and what came in fact to happen

was that cases were handled by the star chamber without reference to statutory authority.

In the early years of the seventeenth century the star chamber built up its own body of law about words, stemming mainly from the criminal basis of their action. Although redress might be ordered for the victim, the chief concern was with the punishment of sedition on the one hand and of words likely to cause private disorder on the other. The prime difference between the libel of the star chamber and the slander of the common law was a difference in motive and treatment, not a difference in the nature of the act. But the difference between writing and speech may have been more fundamental than is generally supposed. In the common law, actions on the case for words were always overwhelmingly concerned with spoken words; and in 1558 it was said that what was written in a letter to a friend could not be actionable, "for it shall not be intended that it is done to the intent to have it published". The same argument was made, though unsuccessfully, as late as 1583. The position finally reached by common law was, of course, that the essence of the wrong was harm to the plaintiff resulting from publication to third parties, so that a letter to a third party was actionable while a letter to the plaintiff himself was not.

The star chamber was not concerned with the harm to the victim so much as the wickedness of the defendant; and this mainly lay in doing something of a seditious nature or likely to provoke disorder. It did not matter that the victim was dead, or that what was said of him was true, or that it was "published" only to him. "Publication" was whatever fell within the mischief. Copying was not in itself a publication; but unless the copy were handed to a magistrate it was a suspicious act. Repetition was punishable, but mere listening was not. And it did not go without saying that "cestuy que laugh quant il oye un auter a lier le libel n'est un publisher sil ne fait pluis".

It will be noticed, however, that the laughing audience was listening to something being read, not just spoken. And it is curious how regularly the early discussions of libel assume writing

or the like. The earliest major statement, Coke's report *De Libellis Famosis* in 1605, does indeed say that a libel "*aut est in scriptis, aut sine scriptis*". But "*Famosus libellus sine scriptis* may be, 1. *Picturis*, as to paint the party in any shameful and ignominious manner. 2. *Signis*, as to fix a gallows, or other reproachful and ignominious signs at the party's door or elsewhere." His only mention of words is in his account of how a libel *in scriptis* may be published: "1. *Verbis aut cantilenis:* as where it is maliciously repeated or sung in the presence of others. 2. *Traditione*, when the libel or any copy of it is delivered over to scandalize the party." Since, as the star chamber itself eventually concluded, the mischiefs of the offence could lie as much in speech as in writing, the early preoccupation with writing must have had a deeper cause than the chronic governmental dislike of the printing press. It is possible that so far as private defamations were concerned the star chamber first complemented the common law remedy rather as the common law complemented that of the church. The only trace of a reason given by Coke is an analogy with poisoning: harm easily done in secret must be severely punished when brought to light. Nor was this merely fanciful: another writer thought it necessary expressly to deny that the essence of a star chamber libel lay in anonymity, so that the author who signed his work was not punishable. The peculiar malice inherent in writing may also lie behind the one difference in legal consequence between writing and speech at the fall of the star chamber: spoken words could be justified, but truth was no defence if the libel was written.

Whether or not there had once been more to it, the association of libel with writing and slander with speech was at the fall of the star chamber a matter of statistics rather than of principle; though the statistics were emphatic. The misfortune is that this association survived and was made or remade into a rule. When the common law inherited the star chamber jurisdiction, it could not have treated libel exactly as the star chamber had. The categories of public and private wrong were too distinct to allow proceedings for punishment and compensation to be combined. What it could

and perhaps should have done was to accept it merely as a crime. Private abuse would then have been punished for whatever criminal mischief it contained, as indeed happened in the eighteenth century; and the offence would have remained a congener merely of seditious libel and the like. In fact the common law accepted libel also as a civil wrong. The difference came over mere abuse. Under the action on the case, there was no remedy for this unless a crime was distinctly alleged or unless it could be proved that actual damage had followed. But general abuse had, of course, been within the ambit of star chamber libel, and continued to be punishable.

The question was, whether to allow an action for damages without proof of damage. This was done, seemingly without much thought, in *King* v. *Lake* in 1667. But several reports of the eighteenth century show uneasiness, and only in *Thorley* v. *Lord Kerry* in 1812 was the position finally established, and then with regret. The defendant sought by writ of error to reverse a judgment against him for damages for mere abuse. His counsel "contended that all actionable words were reducible to three classes: 1, where they impute a punishable crime; 2, where they impute an infectious disorder; 3, where they tend to injure a person in his office, trade, or profession, or tend to his disherison, or produce special pecuniary damages." This argument reflects the old classification as clearly as the judgment shows how the modern tort acquired its definition. "There is no doubt", said the court, "that this was a libel for which the Plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action . . . The purpose of this action is to recover a compensation for some damage supposed to be sustained by the Plaintiff by

reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken."

But the court allowed the clarity of its own thought to be overborne by authority, and gave the common law a tort with a function and a definition both partly appropriate to the criminal law. In our own day we have chosen to preserve it, and even to refine and extend the distinction between libel and slander. The possibility of large damages for gossip and scandal is no doubt a deterrent, one of the major factors in society's control over the press; and in our present legal structure it is perhaps the only way of doing what needs to be done. But inappropriate tools are always clumsy; and confused motive in the liability leads to confusion between the public and the private interest in matters of defence. The story may have a moral related to the last chapter of this book. The separation of crime and tort has mostly harmed crime; but there may also be harm to private law when compensation of the victim is left as the only sanction protecting a general interest.

NEGLIGENCE

Negligence and deceit are the two moral ideas which the common law has used as a basis of liability. In the case of deceit, as appeared particularly in the rise of *assumpsit*, the moral idea performed a pioneering role: it opened up new territory for the common law, and itself died in the process. The liability which it had created was generalised, reaching defendants whom nobody thought fraudulent but who were called so, in a stylised way, for the purpose of fixing them with the liability. First the law ordains that the result should follow from the facts, then it ordains the facts because it desires the result. The fraudulent machinations of

the eighteenth-century defendant in contract were as much a fiction as the force and arms attributed to the fourteenth-century defendant in tort.

When the history of negligence in our own time comes to be written, and our own will be the important period in the story, it may seem that something similar has been happening. The incidence of loss is allocated by the use and abuse of a moral idea. Negligence is of course more flexible than deceit because less distinct, so that artificiality is less obvious. But the historian of the future may think it inappropriate to many of the uses to which it is put, may think that its great role in our law was artificial, and due to the accident that it was accessible in so wide a range of situations. How did it become so?

The modern tort of negligence resulted from the confluence of two streams which had been separated in the first instance only by the jurisdictional division that produced "trespass" and "case". One stream was that of the accident between strangers, for example the road accident. From the fourteenth century to the seventeenth, this was invariably dealt with under the form of battery or other writ of trespass *vi et armis*; and until the seventeenth century the nature of the facts and the problem of fault are uniformly hidden behind a blank Not Guilty.

The other stream was that of the harm arising out of a situation or a pre-existing relationship between the parties. These could not be brought within a *contra pacem* formula, and so were dealt with by actions on the case. But the owner of the house from which fire spread, the keeper of the inn from which goods were stolen, the riparian owner who did not mend his stretch of wall, the smith, the surgeon, the carrier, the bailee—these were not different in kind from the careless driver. They were first separated by jurisdiction and kept apart, as has been seen, by a mishap over process.

The chance nature of their separation is seen in the use of *contra pacem* to smuggle actions against smiths and the like into royal courts at a time when they would not accept cases without that passport. "Why with force and arms and against the king's peace

did the defendant smith kill the plaintiff's horse" raised exactly the same question as was later raised by "Why did the smith do his job of shoeing the horse so badly that the horse died". But there was no less artificiality in reaching the careless driver in battery, asserting that he had broken the king's peace. And this artificiality was perpetuated, because there was no change in the form of the writ when the king's peace ceased to be necessary for jurisdiction.

Chance, however, has consequences; and this chance was to obscure until our own day the most elementary questions in the law of torts, namely questions about the principles of liability. There was no initial separation in this respect. The smith smuggled into the common pleas under a *contra pacem* writ was procedurally worse off than his colleague later brought in openly by a writ on the case, because *capias* went with *contra pacem*. But he cannot have been worse off as a matter of substantive law: the *contra pacem* would not harden a jury's attitude to the basis of his liability. The growth of a difference represents a movement of "trespass" rather than of "case". Writs on the case commonly set out an element of fault in the writ, saying either that the defendant had failed to perform a distinct duty, or that he had acted *negligenter*, *incaute*, *improvide* and the like. Such an element was affirmatively a part of the plaintiff's case, and when jury trial so developed that questions of "burden of proof" could arise, the burden was clearly on the plaintiff.

But it was otherwise with "trespass". The language of the writ and count against the careless driver suggested deliberate wickedness. But everybody knew it was nonsense, and there could be no holding the plaintiff to proof of his formal allegations. The pleadings therefore reduced themselves to the plaintiff's assertion that the defendant had done the harm, and the defendant's Not Guilty. Almost inevitably that Not Guilty came to mean "I did not do it"; and if the defendant in some sense had done it, then it was for him to allege and prove, in the words of *Weaver* v. *Ward* in 1616, that it was "utterly without his fault", "that it had been inevitable, and that the defendant had committed no negligence

to give occasion to the hurt". The *contra pacem* fiction did its damage long after it had done its useful job: it excluded from the formalities of the plaintiff's case any genuine statement of fault, so that fault ceased to be an ingredient of his case. In terms of jury trial, the burden of proving accident or the like was on the defendant. Not until 1959 was a statement of claim that "the defendant shot the plaintiff" held to disclose no cause of action without an allegation that the shooting was intentional or negligent.

There is, of course, nothing absurd about fault playing a different part and being subject to different burdens of proof in different kinds of situation. That is the direction in which the common law is now moving; and the point of the future historian's criticism may be that we move towards it too slowly, making our "negligence" cover too wide a spectrum. The absurdity lay in the circumstance that the situations were not necessarily different. For well over a century the plaintiff of 1959 had been able to choose between "trespass" with its laconic "the defendant shot the plaintiff", and "negligence" or "case" in which he would have to state and prove the nature of the fault on which he relied. The same was of course true of the plaintiff run down by the careless driver; but in highway cases, inevitably the most common, the point was obscured by a premature attack of common sense which had required the plaintiff to prove fault even if he sued in trespass. This was the exception, however: the rule allowed the plaintiff in such cases to choose the form of action and thereby to determine the burden of proof; and the choice was an important part of his lawyer's learning.

This had come about as a result of the process described in an earlier chapter, whereby trespass *vi et armis* became a legal concept. Lawyers did not know, as we do, that the division between "trespass" and "case" was juristically accidental: and since it had consequences, for a time over process, always in the form of the writ, they hunted its essence. The essence that they found was the test of directness. In terms of the plaintiff's writ and count, "direct forcible injury" was the meaning that remained to *vi et*

armis and *contra pacem* when all the more obvious things they did not mean were set aside. In terms of the defendant's Not Guilty, when in the seventeenth century the changing mechanics of trial brought the content of that denial to the surface of legal thinking, what it seemed to mean was that the defendant had not directly done the harm.

Consider the defendant in 1695 whose horse had bolted and run down the plaintiff. The plaintiff sued in battery; the defendant, if well advised, would have pleaded Not Guilty; and the jury, if satisfied that the bolting was not his fault, would have given their verdict in his favour. Then consider the defendant of 1676 whose horse had also bolted and run down the plaintiff; but this was an unbroken horse being trained in a busy public place. Its bolting was equally not the immediate doing of the defendant; and if sued in battery he might well be found Not Guilty. The plaintiff therefore brought his action on the case setting out the circumstances; and it is one of the earliest examples of what we should call an action for "negligence" instead of the customary "trespass" brought upon an accident between strangers.

The 1676 case has already been compared with the *scienter* action. In both, although the physical impact was by nature as much *vi et armis* and *contra pacem* as any other "trespass", the pre-existing situation, keeping such a dog or breaking such a horse in such a place, was a necessary ingredient of the wrong. Nearly a century before *Scott* v. *Shepherd* the hazy outline can be seen of the test of directness, of the difference between the mere collision and the situation with its sequel, between the log that hit the plaintiff and the one lying in the road to trip him. But the test was not enunciated as a proposition of law until the late eighteenth century, and not until then was real harm done.

We do not know to what extent actions on the case were brought in the intervening period for street accidents and the like. Plaintiffs would no doubt prefer trespass except when there was apparent danger that upon Not Guilty a jury would exonerate a culpable defendant on the ground that he had not "done" it. This would most obviously arise when the harm had immediately

been done by the defendant's servant. Unless the master had actually ordered it, his liability if any would have to be in case: he might be responsible for the situation, but no jury would say that he had done the harm. If no servant was involved, trespass would generally serve. The carelessness of a careless driver would not often need to be set out like the rashness of training an unbroken horse in a public place. But it might be. If there was a collision between two moving parties, the plaintiff might rest his case expressly on the improper speed of the defendant. Or if a boat had been blown against sluice-gates despite the proved efforts of the helmsman, the owner of the gates might wish to say that the helmsman should never have come so close. These were the kinds of case that were to raise difficulty. But they did not raise it until the last quarter of the eighteenth century, until the test of directness had become a rule of law.

When that happened, there were distinct forms of action appropriate for identifiably distinct kinds of fact situation. The plaintiff would fail unless he chose the right one. He could not guard himself by using them both in the alternative, because they could not be joined. He must therefore predict accurately how the court would analyse the facts in rare cases like *Scott* v. *Shepherd*. And he must also, and in cases not at all rare, predict accurately what facts would emerge at the trial. The owner of the sluice-gates brings case against the owner of the barge that stove them in; and the owner says that he himself was at the helm, not his servant, so the action should be in trespass. The owner of the gates sues in trespass, and upon Not Guilty is faced with evidence of the sudden gust of wind.

The ancient artificiality began to cause real injustice as soon as it was formulated into a rule; and the rule in its full rigour lasted little more than half a century. The distinction between trespass and case of course survived the abolition of the forms of action, and continued to affect the proof of fault until our own day. But this was a distinction of forms. What was unworkable was the proposition that the forms corresponded to distinct kinds of fact and were mutually exclusive. It continued to be true, and for

what difference it may make still is true, that a plaintiff could not bring trespass unless the injury was "direct". But in *Williams* v. *Holland* in 1833 it was held that he was not obliged to bring trespass for a "direct" injury. Except in the rare and unimportant event of wilful harm, he could if he chose bring case.

Three consequences followed. Immediately, the plaintiff was freed from the necessity of deciding whether his injury had been "direct" or "consequential" before he knew the defendant's version of the facts. If he did not know who had been driving, or whether some external factor had at the last moment truly caused the driver to lose control, he would choose case rather than trespass. The carelessness of the driving would then be the basis of his claim and would have to be proved; but he could not be defeated on purely formal grounds.

The second consequence was the oddity already described. Until 1959 the plaintiff had a choice of forms of action. So long as the injury was "direct" he could proceed by way of "trespass" on the one hand, or "case" or "negligence" on the other; and the precise relevance of the defendant's fault depended openly upon the plaintiff's choice of form rather than upon the facts.

But this oddity was only the most recent example of a situation often reached by the common law. Much of its development has turned upon the question whether an action on the case should be allowed on facts covered by some other action. That "trespass" and "case" should ever have become so clearly distinct that the question could arise between them is extraordinary; but as soon as they did, the question was punctually asked. Its affirmative answer, which in 1833 seemed to break down some great barrier, did no more than correct an old oversight. About 1370, when *contra pacem* ceased to be necessary for jurisdiction, the writ against the careless driver could have become as truthful as the writ against the careless smith. Only conservatism and the advantage of *capias* kept the old form in use, and divided the law of torts into two. The beginning of its reunification, still not complete today, may be seen as the last and greatest consequence of the process epitomised in *Williams* v. *Holland*.

It may also be regarded as the "origin" of the modern tort of negligence. Only when the two streams had come together was it possible for negligence to be considered as an independent basis of liability. But there is still some mystery about the way in which it became "a" tort. The writ system had the effect of organising the common law of wrongs by reference to the nature of the injury suffered by the plaintiff: defamation, conversion, deceit up to a point, even "trespass" conceived as "a" tort, were all distinguished by the nature of the wrong rather than the fault of the wrongdoer. Negligence is part of a different organisation, cutting across the others; and that is why today we can still have territorial disputes like those between the old forms of action. The difficulty over negligent misstatement and deceit is an example.

But of course any law of torts must take account of both elements, and the choice is between modes of statement: is the primary organisation to be in terms of kinds of harm or kinds of fault? Negligence as "a" tort seems to be the result of an accident of classification. The elements from which it was made existed as a multitude of writs for special situations involving fire, professional misfeasance, unbroken horses in public places, and so on. And writers of abridgments, seeking only a heading more informative than "Miscellaneous", brought all these separate "torts" together under headings like "Actions on the Case for Negligence". What happened, in effect, was that the classification became inverted in lawyers' minds. What had been separate torts, brought almost artificially together because of a common theme, were seen as different manifestations of a single tort. They were examples of a general principle.

More than language was at stake. There is nothing special about applying a general principle to a new situation. It is not a great legal step like creating a new tort, sanctioning a new writ. Judges who would have hesitated long over the latter have not hesitated to bring new kinds of facts within the ambit of negligence. But the two processes are in reality the same. To hold that a duty of care exists in a situation that has not previously arisen

involves precisely the decision that was taken in sanctioning a new writ. The difference is in its apparent magnitude.

Whether this accidental freedom has been well used is a question for the future. It may have been too much used. Many situations have been discussed in which liability was based upon a wrong, not because that was the natural analysis of the facts but because the natural analysis, in contract for example, could for some reason not be brought to bear. *Donoghue* v. *Stevenson* ended a difficulty inherited by negligence from that strain in its ancestry which went back to *assumpsit* for misfeasance: if a contract was involved, privity came into play. At the time it seemed a triumph to reach the manufacturer purely on the basis of wrong, and to exclude any trace of contractual analysis. But perhaps it was the contractual position that really needed reconsidering. Individual moral fault may be as artificial a basis for reaching the manufacturer today as it was for reaching the ordinary contractor in the sixteenth century. But it is always available.

IV. CRIME

14 *Criminal Administration and Law*

The miserable history of crime in England can be shortly told. Nothing worth-while was created. There is no achievement to trace. Except in so far as the maintenance of order is in itself admirable, nobody is to be admired before the age of reform. Centuries of civilisation have passed the subject by, so that the law itself still largely reads like an Anglo-Saxon tariff; and the only intellectual interest and the only hope for the future lie in the external investigations of the criminologist.

A book concerned with foundations can have little to say about Stonehenge, and the aim of this chapter will be negative: to suggest what went wrong, what was lost, why the subject was not developed. Partly of course, it may be that little development was possible: murder and theft stand as they always have, legal monoliths, because they are unalterable parts of the social landscape, because the law can do nothing except decide whether the accused did it and if so, dispose of him. But, whatever chances there were of more sensitive adjustment, the common law placed them one by one out of its reach. The history of crime, if "history" is an appropriate word for continuation, is a history of institutional expedients all sensible in their day, all in the long run tending to make the subject nobody's business.

PLEAS OF THE CROWN

The starting-point is that of tort. Wrongs were not divided into two conceptual categories, offences against society to be

punished, and injuries to victims who must be civilly compensated. But they might be brought to justice at the instance of either authority or the victim, and it is from these different procedures that the conceptual distinction grew. The justice to which they might be brought and the authority which might bring them to it were the same, the body controlling the law that had been broken; and for ordinary offences it was the immediate community, the manor, the city, the hundred.

But the ancestor of the modern criminal law is of course in those wrongs which were matters for royal justice, in pleas of the crown. Or rather, it is in the mechanism by which pleas of the crown were brought to justice at the instance of the crown. They might also be brought to justice at the instance of the party, by appeal of felony in the case of felonies, by action of trespass *contra pacem* in the case of those other wrongs which were in contravention of the king's special law, his peace.

There were, then, three distinctions to be made about wrongs. One was procedural: authority or the victim might take the initiative. The second was, or came to be, jurisdictional: the wrong might be a plea of the crown or a "local" offence. And the third did in principle go to the nature of the wrong: it might be a felony or something less. The two last will be taken first.

Pleas of the crown were originally matters in which the crown had an interest, as opposed to common pleas; and they included "civil" claims involving royal rights. In the case of wrongs, the prime interest was in a forfeiture, partial or total, of the wrongdoer's property. It was noted in connection with the civil action of trespass, and with novel disseisin, that a breach of the king's peace involved imprisonment of the offender until he made fine with the king. In that civil action, this became a mere matter of process: the defendant was liable to *capias*. But when action was taken on behalf of the crown, when the trespass was prosecuted as a crime, the penal aspect was the object of the proceedings. To avoid confusion, trespasses so prosecuted came to be known as misdemeanours; and they were the foundation of that category of the criminal law.

The felonies are more mysterious. Their ancestors were ancient lists of offences so grave as to place the offender's life and property at the mercy of the crown. But the word felony has feudal connotations: it originally meant some offence as between lord and man so fundamental as to break the relationship of faith between them and to cause the holding to be forfeited to the lord. And this effect continued to be attached to the word: the chattels of a felon were forfeited to the crown or its grantee, his land "escheated" to his lord. The mystery is that the word lost its original feudal sense, came to denote nothing about the relationship of lord and man except for the consequence of escheat, and was attached to the list of grave but in no way feudal offences. It is possible that this was an accommodation between feudal realities and an older state of things. If an offence had placed all the wrongdoer's property, land as well as goods, at the disposal of the king, an obvious difficulty would arise when his land was no longer "his" in the same sense. A tenant-in-chief, for example, would not see why part of his fee should return to the king merely by the wrong of a sub-tenant, and might call the wrong a felony in the feudal sense precisely because it endangered the tenement. Some such legalistic compromise is suggested by the crown's right of "year, day and waste", and by its insistence upon a forfeiture to itself for treason, a breach of the overriding duty of faith owed to it by everybody.

These then were the two categories of wrong which ranked as pleas of the crown. The felonies, whatever their conceptual unity, constituted a short list of very grave offences. Wrongs against the king's peace, at first serious as in some way an affront to the king, slowly turned into a broad miscellany concerning good order; but they were confined to merely physical wrongs. And here it will be convenient to record one of the casualties of this development, not the less important for being little noticed.

The criminal law grew from the methods evolved by the crown for prosecuting pleas of the crown at its own suit. Other wrongs were left for local jurisdictions, in which the division of procedure between "prosecution" and "action" cut less deep. In

the civil sphere of actions by the victim for compensation, the common law allowed itself to come back to the local jurisdictions and take in those wrongs which it had first left behind. At the instance of the victim, as on its own initiative, it would first accept only pleas of the crown, only trespass *contra pacem*. But for reasons already described this became artificial; and in the years around 1370 plaintiffs were allowed to bring to royal courts trespasses which were not *contra pacem*. The "origin" of the action on the case was a second reception of wrongs. But it was confined to actions for redress by the victim. There was no corresponding change in the criminal sphere. The list of pleas of the crown was not reconsidered, and the catalogue of common law crimes remained as it had first been fixed. Local offences died with local justice, and were simply lost; and in particular the offences of dishonesty not amounting to theft were left without penal consequences, and had later to be invented all over again. It is hard to say which did more damage, the correction of the jurisdictional accident in the civil sphere, or the failure to correct it in the criminal. But in both it is important to remember that the later law reflects an accident, and not a society so primitive that it could address itself only to physical wrongs.

THE INITIATION OF PROCEEDINGS

Nothing more will be said of actions for trespass *contra pacem*, and little of appeals of felony. Perhaps a formalised relic of the feud, this was a process in which the whole responsibility for catching the felon, bringing him to justice, and proving his crime rested upon the victim or his kin. It was not formally abolished until the nineteenth century; and it continued to be of genuine importance long after indictment at the suit of the crown had become the normal routine. This was partly because it offered some chance of recovering stolen goods, and partly because of the system of "approvers", whereby a convicted person could turn "king's evidence" by appealing other malefactors known to him. Trial in the appeal of felony, although it was often avoided, was

properly by battle; and this link with the writ of right again suggests the feudal connotation of felony.

But of course a felony was no less a plea of the crown for being the subject of an appeal; and the earliest royal control over pleas of the crown was probably directed to controlling appeals, requiring for example the participation of coroners, rather than to providing other mechanisms for bringing felons to justice. There is, however, doubt about the position before 1166. Legislation in that year, generally taken to have established the indictment system, may in fact have altered and improved it. Communal responsibility for producing identified suspects is certainly much older; and the doubt concerns the responsibility for identifying them in the first place. What mattered for the future of the law, however, was the result. By the end of the twelfth century the system of juries of presentment, later to turn into "grand juries", was in full operation. A duty, checked by the coroners and the eyre system, was cast upon local people to present suspects, to charge them with their offence first before the sheriff in his tourn and then before a royal judge. By this mechanism all serious crime came to be brought to justice.

The system and its control seem to have been efficient; and it was an administrative achievement of the first order. But we do not know how long it operated in its original fashion, or where from time to time the true initiative lay. So long as royal justice was normally manifested at a meeting of the county court, the actual presentment of a suspect for trial would be by a presenting jury of truly local people, a jury of the hundred. But when royal justices came to hold sessions independently of the county court, the collection of juries from every hundred became impracticable. The "grand jury" of the county was a body which made the fina presentment after earlier processes; and the dignified body of later days with a partly judicial function was something very different from the humble hundred jury from which it had grown. Of the nature of these earlier processes we know little. In the sixteenth century justices of the peace, as a by-product of their functions concerning bail, came to make and record preliminary

examinations. And after the organisation of police forces in the nineteenth century, this function of justices came to duplicate that of the grand jury; both decided whether there was a case for the accused to answer. In our own day the grand jury was abolished in England, though it survives in the United States.

What the social historian needs to know about that development is how the police function actually worked before the organisation of police forces. For the legal historian, however, it has another significance; and there is a second possible casualty to be recorded. The indictment was the king's suit: and although actual initiative often lay with the victim, he played no formal part in the proceedings and had no interest in their outcome. This may even have been a matter of sound policy at first, to encourage immediate appeals. But the ultimate result was a conceptual segregation of crime from other aspects of the law which became too fundamental to reconsider. In practical terms it is not self-evident that a road accident, for example, should be followed by separate criminal and civil proceedings which can reach different conclusions about responsibility. And in social terms, it is not self-evident that the penal and civil disincentives should be separately considered, that offenders should see themselves and be seen as ranged against an impersonal society, or that their victims and other law-abiding persons should see the whole matter as somebody else's business.

MODE OF TRIAL

The indictment system, then, was responsible for the growth of a criminal law irrevocably separated from the law about civil wrongs. The development of that separate law was governed by the way in which those indicted were tried. The indictment was an accusation only, precisely equivalent to the plaintiff's count in a civil case. To it the defendant must plead, and his guilt or innocence must be established. How and before whom did these things happen?

The mode of trial will be considered first. Until the early

thirteenth century, those indicted were put to an ordeal. In the ordeal of water, for example, a priest would conjure the water not to accept a liar, the accused would swear to his innocence, and then he would be lowered in: if he floated his oath was shown to be perjured, and he was therefore guilty of the offence. The whole mechanism turned upon the invocation of the priest; and after long and anxious inquiry the church in 1215 decided that it was all superstition and forbade priests to take any part. The decree was promptly obeyed in England, and the mode of trial of centuries was brought to an end.

It is today impossible to imagine the practical and intellectual disarray caused by this decision. The responsibility for putting men to death could no longer be rested comfortably upon God, and the only known governmental decision did not seek to rest it anywhere. The judges going on eyre in 1219 were told to imprison those accused of grave crimes and thought dangerous, "yet so that they do not incur danger of life or limb by reason of our prison"; to allow those accused of medium crimes to abjure the realm; and to take security for good behaviour from those accused of lesser offences. No trials were contemplated because no trials were now possible.

But the issue could not be avoided. There had to be a method of trial, and in the decades that followed the justices seem to have solved the problem for themselves. The grand assize had familiarised them with the idea that even on matters of ultimate right a defendant might choose to abide by a human decision instead of divine judgment; and in the thirteenth century they were seeking to apply it generally, in debt for example and in appeals of felony. Their difficulty was with the indicted suspect who would not so choose, since the only alternative, the ordeal, was forbidden. At first they seem sometimes to have imposed the verdict of a specially large body of neighbours; but sometimes recalcitrance was rewarded by a bargain for abjuration of the realm or the like. Nothing illustrates the magnitude of the difficulty so clearly as the solution. By 1275 trial by the countryside, by a petty jury, was the normal thing: but it had to be chosen

by the accused, and if he refused statute provided for him to be put into a prison *forte et dure*. The hardness of the prison was slowly increased until the word itself was read as *peine*, torture; and under this some accused died: they were not convicted felons, their property was not forfeit, and their choice was between deaths. This choice was taken away in 1772, when a refusal to plead became a conviction; and only in 1827 was a plea of Not Guilty entered so that jury trial was imposed upon one who would not "choose" it.

Of the composition of the petty or trial jury we know a little. From the many indicting juries who would be before the justice, he would at his discretion have a body chosen. It would at first always include some members from the jury which had indicted this accused: how else could the trial jury be informed? Only in 1352 was the accused allowed to challenge a member of the trial jury on the ground that he had been an indictor; and this statute may possibly have been responsible for the odd rule that a prisoner was allowed up to thirty-five peremptory challenges: this would enable him to disqualify the twenty-three members of a grand jury, and the twelve of a hundred jury which might have informed them.

Of the actual conduct of a trial we know almost nothing before the sixteenth century, not nearly enough until the eighteenth. How the jury informed itself or was informed, how rules of evidence emerged, when and in what detail directions were given by the justices, these are things we do not know. In the sixteenth century evidence was given under oath on behalf of the crown. But the prisoner, whether or not he could call willing witnesses, had no means of compelling them. Nor was he allowed counsel at the trial itself, and this rule lasted until 1696 in cases of treason, until 1836 in cases of felony. He was allowed to argue for himself as best he might at the discretion of the judge; and in the sixteenth century as many cases would be heard as the jury felt they could remember before they gave their verdict.

But this is not just a history of inhumanity: there is here a third casualty to be recorded in the law itself. By the sixteenth century

the common law had in civil matters created one intellectual system, that represented by the old actions, and was engaged in replacing it by another. In criminal matters it had done no more than systematise barbarity. Why should there have been this difference? Largely the answer lies in the invariable Not Guilty. In civil matters, it was the possibility of some other answer, the growth of pleading, that forced questions to the surface and so made the common law. To this process the only equivalent in criminal cases was the possibility of objecting to the indictment; and in the fifteenth century counsel were apparently permitted for strictly legal argument. But hardly ever would a prisoner know there was anything to say about that; and any questions of law which the pleading of a civil case might have raised, even if visible to a frightened illiterate, would be argument for other illiterates to misunderstand or at best for them to take account of in a general verdict. To this day, it is only in appellate proceedings that the law relating to a criminal case can be found in a judgment: at first instance, it appears only in a direction to the jury. The judgment is as automatic, except in the matter of sentence, as that which followed an ordeal. The mere form of a criminal trial is surely the most ancient relic in any modern legal system.

ORGANISATION OF CRIMINAL COURTS

The failure of development represented by the unalterable general issue is connected with another institutional point. Before whom were those indicted to be tried? Pleas of the crown were for royal justice, but obviously the eyre system could not handle such work. Eyres could check on a balance sheet of crimes and criminals, but could not come often enough actually to clear the lists. The citizens of London did indeed have the privilege to be tried only before the justices in eyre; and a scandal in the eyre of 1321 illustrates the point. Years earlier one suspected of grave crime had corruptly procured his registration as a citizen to be ante-dated so that he could have the privilege; and at the time,

since eyres were now so infrequent, he must have thought he had bought effective immunity.

Something less high-powered and more frequent than the eyre was needed; and an early solution was to use the king's regular local agent, the sheriff. But this gave him too much power for anybody's comfort, and it was brought to an end in 1215 when *Magna Carta* provided that sheriffs were not to hear pleas of the crown. This left as the only practical possibility the frequent issue of special commissions, known generally as *oyer* and *terminer* and jail delivery.

These commissions might be issued to two classes of people, professional justices from the central courts or other professional people, and to prominent laymen; and in both cases geography might play a part in their choice. Moreover there was an obvious convenience in combining judicial sessions, so that these criminal commissions might be combined with commissions to hear pending possessory assizes. And when in the fourteenth century the *nisi prius* system was put on a regular basis, the same commissioners would take verdicts in civil cases on issues which had been reached by the pleadings in Westminster. The modern assize system, which ironically takes its name from the earliest of these functions to die, derives from this practice. After the Judicature Acts, the *nisi prius* function was converted into full jurisdiction over civil cases to be heard on circuit; and the civil jurisdiction of the commissioners then became a jurisdiction over the whole case from first to last. But their criminal jurisdiction had always been of that nature; and this must be emphasised now because it will prove important. The assize judge was never a delegate in criminal matters: he was the court before which the entire case from pleading to judgment was transacted.

But no great legal skill was needed to hear a man say Not Guilty, to take the verdict of a jury, and to pronounce sentence. Although it became steadily less common for laymen to play much of a part in the commissions sent out from the central courts, the old practice of using local magnates in some matters continued. And it combined with a different institution. Besides

the coroners, the crown in the thirteenth century took regularly to appointing "keepers of the peace" in some parts, with a police and sometimes almost military function. They did much administrative work in connection with pleas of the crown, receiving indictments and arranging for suspects to be kept until the royal commissioners came. And in the fourteenth century they came to be used for trial. The quarter sessions of justices of the peace was simply the result of issuing standing commissions to local persons, who were at regular intervals to meet and deal with indictments. An attempt was made in the early days to ensure that these sessions would include justices with some technical knowledge; but this became ineffective and the result has been secured in modern times only by the system of professionally qualified chairmen.

The division of functions between these two kinds of justice, the assizes and the justices of the peace in quarter sessions, was a matter which fluctuated. In the early days there was hesitation about leaving felonies to the justices of the peace, but they were within their commission after the late fourteenth century. It seems, however, to have been customary to reserve the most difficult and serious matters for the justices of assize; and by the eighteenth century this had become invariable with capital offences. The greatest part of the work of the quarter sessions was therefore always concerned with the indictable trespasses, the earliest common law misdemeanours.

The nature of the proceedings, however, was the same in quarter sessions and in assizes. The accused was indicted by a presenting or grand jury and pleaded his invariable Not Guilty; the issue was put to a petty jury, and judgment followed upon their verdict. The case began and ended before the justices in the country; and this may be seen as the cause of yet another casualty in the development of the criminal law.

In civil cases, it will be remembered, there were two sources of legal development. The earlier was the possibility of special pleading, the process represented by the year books; and it has already been noted that this was shut out by the invariable Not

Guilty of a criminal case. But in civil cases, even when the general issue was pleaded, a second means of development later came into play. The facts which emerged at the trial could be caught by various mechanisms, such as the special verdict; and they could then be returned to Westminster for legal discussion.

None of these mechanisms were available in criminal cases. It would have been technically possible, and no doubt in effect sometimes happened, that a jury would find a special verdict: but only the justices present could consider the legal effect of the facts so raised. The other ways in which civil cases legal discussion was commonly started at Westminster all depended upon the *nisi prius* system. The motion for a new trial and the motion in arrest of judgment, for example, were mechanically possible precisely because judgment was not formally given by the trial judge, because the verdict had to be reported back to the court in Westminster. But in criminal cases, other than charges of misdemeanour first preferred in the king's bench and committed for trial at *nisi prius*, there was just no opportunity for raising matters that had emerged at the trial. This mechanism of development was shut off as effectively as the earlier mechanism of special pleadings.

Both points are more familiarly reflected in the dismal history of criminal appeals. The writ of error was always available, and almost always uselessly. The record that it evoked would contain the indictment, the invariable Not Guilty, the verdict and the judgment. The trial, all rulings on the admissibility of evidence, the direction to the jury—all this was encapsulated in the recital of plea and verdict; and there was not even the chance, useless though it would have been to accused without counsel, of supplementing it with a bill of exceptions. The means of appeal open to the accused was of little value to him and, since only the formalities appeared on the record, of no value to legal development.

The judges, however, recognising this and accustomed in civil cases to motions for a new trial and the like, could and did reserve difficult questions for discussion in London. The discretion was theirs, but at the request of the accused or on their own initiative

they could adjourn a case for discussion in Serjeant's Inn. And in 1848 this process was formalised, largely in the interest of chairmen of quarter sessions who would normally have no access to the club. The court for crown cases reserved at last provided a forum for legal discussion in criminal matters comparable to the civil court *in banc*. For legal development it was a little late. For justice to accused persons it was still a little soon: not until 1907 could they appeal as of right even on a point of law.

But it is with legal development that this book is concerned. The medieval arrangements for the quick local trial of offenders were an administrative achievement and a legal disaster. They ensured that crime would stagnate, cut off from the stream of discussion that shaped other branches of the common law.

VEHICLES OF CHANGE IN CRIMINAL LAW

It follows from what has been said that there was little chance for development by the mechanisms which made the common law in Westminster; and such changes as came about in the criminal law were made from outside. The most important method was the direct one of legislation, which played a far larger part here than in any branch of private law; and the patchwork result suggests some general reflections. The criminal law had by the eighteenth century reached an incoherence which seemed to defy even the modest order of the alphabet; and at its less serious levels was perhaps dependent for its workability on the ignorance of all concerned. However devious the conceptual manipulations by which change came about in civil matters, the result was more coherent and more practical: the solution of today's problem had to be squared with yesterday's and would play its part in tomorrow's.

But there may be another side to this. Legislation in the common law system may have suffered from its long association with crime. To lawyers in the fourteenth century a statute was not something external to the law: it was an internal alteration, and it lived in its context so that its application was neither mechanical

nor unalterable. Only today, and then only in the United States where the necessary handling of constitutions has familiarised lawyers with the idea, is there any sign of a return to this organic view of a legislative act. Its disappearance may have followed inevitably from the lawyers' instinct to play upon the words. But that instinct would be reinforced by the shadow of a gibbet; and the restrictive and wooden view of legislation traditional in the common law may owe something to the decent feeling which today requires penal statutes to be construed with exceptional strictness.

A second method of adjustment by which much was contributed to the criminal law was the creation by the star chamber of new offences which, after its fall, were absorbed as common law misdemeanours. Some of these seem to have been true innovations. Perjury by witnesses, for example, could not be a common law offence because witnesses had no formal existence. The jurors themselves, although of course never witnesses in a real sense, were the persons responsible for saying the truth about the matter; and the medieval equivalent of perjury was the process of attaint against the jurors. It may be noted in passing that attaint was at first confined to assizes imposed upon the parties, was gradually extended to juries upon which they put themselves in civil matters, but was never extended to the criminal jury which had been "chosen" by the defendant. But as juries slowly became judges of fact, proceeding upon evidence, perjury by witnesses became a real problem; and it was dealt with by the star chamber and also by statute.

Some star chamber offences, however, were not innovations at all. They were matters which had been familiar in local courts and had just not been pleas of the crown. The civil aspect of fraud, for example, had come to the common law courts when they took in trespasses with no royal interest; and, for reasons already considered, it there largely lost its identity. But the criminal aspect remained in local courts; and the star chamber was the first royal jurisdiction to undertake punishment for fraud, not because its wickedness had not previously been seen but because it had not

been a plea of the crown. Libel provides another example. Denigration and insult had been a local wrong; but not even the civil aspect had come to royal courts with the early actions on the case. This may have been due to the interest of the church or to simple unconcern; or it may have been because the criminal aspect bulked so large. And this introduces another aspect of the star chamber's work. Like local courts it treated wrongs as injuries to be compensated as well as offences to be punished, and a good deal of its work consisted in hearing essentially private disputes. Indeed, in the matter of establishing jurisdictional propriety, history may be heard to repeat itself, though indistinctly and in an undertone. To match the old mechanical *vi et armis* and *contra pacem regis*, star chamber wrongs are often equipped with flimsy allegations of riot and conspiracy, matters advertised as the special business of that body.

But this dual treatment in the star chamber could not survive its fall. The procedural segregation of the ancient pleas of the crown had divided the common law system too deeply: a wrong was either a crime or not. Even if a misdemeanour was brought before the king's bench, it was treated wholly as a crime, the injured party being left to bring separate proceedings for compensation if he would; and the main surviving legacy from the star chamber was the possibility of commencing a prosecution by information. Whether the substantive result was beneficial is a matter of opinion. But it is a fact, and possibly an important one, that the rigid separation of the civil from the criminal aspect of a wrong is not a course that was ever chosen: even upon this latest reception of work from an undifferentiated jurisdiction, the question did not arise.

The other two methods of adjustment were indirect. The law was not changed, but its application was made a little less insensitive by regularising special treatment. The pardon played a considerable part until the establishment of a proper appellate procedure in this century. In the middle ages it was at first a matter of purchase, but its availability prompted two connected developments: juries would seek to distinguish the gravity of crimes, so

that the worst offenders would find it difficult to get their pardons; and statute sought to restrain the issue of pardons in various classes of case. And, although the process has been little traced, some legal differentiation was thereby brought about. Later, of course, penal differentiation was similarly achieved: and in the eighteenth and nineteenth centuries only a fraction of the death sentences passed were executed, a growing proportion being commuted to transportation and the like.

Similar in its operation, though in the middle ages more capricious, was the benefit of clergy. A great dispute in the late twelfth century established the principle that jurisdiction over ordained clergy belonged to the church. The procedure which eventually evolved was for the accused to be tried as though he were a layman, and then, if he satisfied the test of clergy, to be handed over to the church. The lay trial, however, was conclusive of nothing. His chattels were impounded to await the trial which would now take place in a church court; and if he was convicted there, the punishment was also for the church. Since the church's trial came to be by compurgation, and its punishment a commonly insecure prison, what really mattered was whether the accused could obtain this treatment. In the sixteenth century any pretence that the church played a real part was abandoned: the convicted accused was set free, though justices could imprison him for up to a year.

This irrelevant anomaly was harnessed in two ways. One was by rationalising the availability of the privilege. The first general test was ability to read, but even one who was literate might be disqualified. One might safely marry once but not twice; and it was important not to marry a widow. A woman, moreover, could not by any stretch be in orders; and in the seventeenth century parliament was obliged to prove that in this respect it could turn a woman into a man. But the disqualification which became useful was that a clerk convicted would be degraded from his order, or at least that the lay courts could assume this to be so. One could therefore have the benefit only once, and in 1489 the branding-iron was brought into use to enforce this. The

benefit thus became a means of sparing first offenders. But we must not suppose that reason had entirely got the upper hand. The brand only raised a presumption that its bearer was not in orders, and it was still open to a second offender to show that he was in truth a clerk. And even a first offender still had to qualify himself by passing the reading test, which was not abolished until 1706.

The second means of harnessing the benefit was always more rational, but not the less remarkable. Just as statute might restrict the issue of pardons in specially bad kinds of case, so it might take away the benefit of clergy. This left the offence as punishable with death on first conviction, and so introduced some rough gradation into the list of felonies. But reasonable though this was, it made the development of the criminal law more oblique than anything that Westminster Hall had contrived. The common law would have sent all felons to the gallows; the benefit of clergy as it developed would have saved them all; and legislation sought to introduce order by deciding when the second anachronism should interfere with the first. This is not a matter for moral judgment; but it is a fact to be considered by those who feel surprised at the small part played by legislation in the development of the common law generally. What is a matter for moral judgment, by those who feel entitled to judge, is the use made of this mechanism in the age of reason: the list of felonies excluded from the benefit of clergy was steadily lengthened. Only in 1827 was the privilege abolished, and the process begun of adjusting punishments directly to offences.

SUBSTANTIVE DEVELOPMENT OF CRIMINAL LAW

There is either too much to say or too little. To describe the visible changes made by the methods just considered would be to compile a catalogue of facts. On the other hand, there is no development to trace of the kind which has occupied most of this book. Our blank records, monotonously reciting indictment, general issue and verdict, certainly conceal much that the social

historian needs to know. No doubt they also conceal matters which would to us be matters of law, especially about mental elements. But it is the point of the story, or rather of the absence of a story, that those matters remained locked up in the general verdict, and were not brought into the open arena of legal discussion. The account that follows will seek only to outline the largest changes, to give the main headings; and it will take offences in descending order of seriousness.

There is in treason a mystery which may be a counterpart of the mystery concerning felony: there the word for a breach of feudal faith was somehow attached to a list of offences which had nothing feudal in their nature; and the motive may have been to secure the feudal consequence of escheat to the lord. Treason seems to contain two elements. One is about kingship, *lesé-majesté*. The other is about treachery as such, less specific than the feudal notion of felony but of the same nature. The first of these, the political element, came uppermost, and has always been uppermost in the minds of historians. But the early history of the offence must take account of the second, and accommodate what came to be known as petty treason. This was said by statute in 1352 to be the offence of the servant who killed his master, the wife who killed her husband, the ecclesiastical subject who killed his ecclesiastical sovereign; and it will be noticed that there was no mention of feudal lord and man. Perhaps the original sense of felony was too well remembered. But the purpose of the statute was to define "high" treason, to indicate a boundary, for example, between making war against the king and using armed force for private purposes. And the need was to distinguish between offences which caused a forfeiture to the king of land as well as chattels, and offences which, while causing a forfeiture to him of chattels, left land to escheat to the lord.

The gravest of the felonies is similarly beset with a verbal difficulty. "Murder" had an original sense of secret killing. But until the middle of the fourteenth century, the only technical usage which can be identified is in connection with the "murder fine". As a measure of protection not unlike those employed by

occupying forces in later days, the Conqueror imposed a collective liability on the hundred in which a Norman was found killed; and a cumbrous machinery of "presenting Englishry" managed long to outlive any real racial distinction. Thereafter the word becomes appropriated to certain grave kinds of homicide, possibly indistinct and possibly with some regional variation. It appears in justices' commissions in company with killing in ambush and killing with malice aforethought; and more significantly it appears in the same company in a statute of 1390 seeking to restrain pardons. Presumably they are not synonymous, but there would be no occasion to distinguish them: they were just the most wicked kinds of homicide. The inclusion of all under "murder" is suggested by a statute of 1532 withdrawing benefit of clergy from, among other things, "petit treason" and "wilful murder of malice prepensed". By such indirect means was homicide differentiated; and the precise lines of demarcation caused difficulties which grew as the facts of cases were presented with increasing precision.

Theft is also the subject of an early mystery; and probably it directly reflects that concerning felony. For Glanvill theft is not a plea of the crown: it belongs to the sheriff. But it must have been the staple of many franchise jurisdictions, and this may explain the peculiarities. For Glanvill also, theft produces an escheat which is not like other escheats: the land goes directly to the lord and there is no year, day and waste. This escheat presumably signals felony, and later doctrine was to make all theft felony. But until the sixteenth century it looks as though felony was, as it were, an ingredient which might or might not be present in a theft. An indictment might say that the thing was taken feloniously or merely that it was taken in breach of the king's peace, which would make it an indictable trespass, a misdemeanour. The common law may have brutalised into a single wrong what had, first in local jurisdictions and later before justices of the peace, been a more sensitive range.

Indeed in one respect even the common law did not produce a single wrong. In the thirteenth century a distinction becomes

visible between grand larceny which was punishable by death, and petty larceny which was not. It depended upon a money value, twelve pence; and this in itself became an instrument by which some flexibility was introduced. The jury, by finding the value of the stolen goods, had a power to determine the possible penalty; and their exercise of this power became both more conspicuous and more necessary as the value of money fell. They might, for example, feel obliged to find that coin was of less than its face value. More striking was the contribution of the judges to the same merciful end. They could not undervalue things, but they could hold them to be without any value in law; and they tried this with jewels and succeeded with bank-notes. These anomalies were of course reflected by strange lists in remedial statutes.

The principal factor in the development of theft, however, was a limitation which was all too clear. To be a plea of the crown there had at least to be an act that could be called *contra pacem*: there had to be a taking. This raised perennial difficulties over taking by servants and employees, which were put right mostly by piecemeal statutes. It meant that bailees could not steal, and even the fifteenth-century doctrine of "breaking bulk" did not greatly help. It meant that receivers were not thieves, and their position greatly improved as the old processes of appeal and *de re adirata* faded. Those actions had commenced against the possessor, innocent or not, and relied upon vouchers to warranty for producing the thief. For a time it seems that receivers were in fact indictable; but the logic of the king's peace left them immune, and they were eventually and hesitatingly reached by statute. A large part of the legislation concerning crime was indeed concerned to fill one gap after another in the punishment of dishonesty. It was the symptomatic treatment of a single ailment, the capricious scope of the king's peace.

Of the category of misdemeanours, too little is still known. Until the exploration in recent decades of the early records of justices of the peace, it was supposed that the medieval criminal law consisted of the felonies and of small offences dealt with in

such ancient institutions as the tourn. It is now clear that many trespasses, misdemeanours, were dealt with on indictment before justices of the peace. The greatest bulk of these were batteries and the like, matters which could be the subject of civil proceedings for trespass *vi et armis.* We need more information about their treatment, and particularly about their relationship with felony: it has already been noted that a theft could apparently be treated as either felony or trespass, and the same appears to be true of other wrongs.

In the middle ages there may have been some elasticity in this class of misdemeanour. Besides a few indictments for receiving stolen goods, for example, there are also found charges of attempt. But such offences, which may well have been matters of local but not royal justice, seem to have been driven out by the king's peace; and they had later to be deviously resurrected. The crime of attempt is one of those reintroduced by the star chamber. And the list of misdemeanours attributable to that court reflects, as does the statute book, the way in which crime, like tort, was constricted by an anachronism. What had been the boundaries between royal and local justice became the boundaries of justice itself as local jurisdictions fell away.

But even in the fourteenth and fifteenth centuries the justices dealt with some wrongs which were not offences against the king's peace, though they may have been rationalised in terms which recall the original sense of the king's peace as his special law: it was sometimes said that anything done against the king's command was done against his peace. These were economic offences in breach of statute. Much the most important were offences against the labour laws, the harbingers of a whole system of local government. Under judicial forms the justices came to exercise the administrative functions of the countryside, as well as to deal with statutory crimes which seemed to be new, but which must often have reproduced offences familiar in the truly local jurisdictions now dying.

It is not known how far this is true also of the last and largest growth to be mentioned, that of the summary offences. From the

sixteenth century on, statute took to the piecemeal creation of offences, conferring summary jurisdiction without jury upon one justice or two, sitting in some special place or not, with some right of appeal or without, and all without much reference to the gravity of the offence or the severity of the penalty provided. The result was a patchwork, the capricious nature of which can be gathered only from the alphabetical manuals produced for justices. Not until the nineteenth century was any attempt made to systematise the result; and even then those parts of the law which most immediately affected most people were among the most confusing. Crime has never been the business of lawyers.

NOTES

I. INSTITUTIONAL BACKGROUND

1—*The Centralisation of Justice*

I

For the subject-matter of this chapter generally see H. G. Richardson and G. O. Sayles, *The Governance of Medieval England from the Conquest to Magna Carta* (1963), and *Law and Legislation from Aethelberht to Magna Carta* (1966); D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (1964).

II

Page 2. For the structure in Kent see J. E. A. Jolliffe, *Pre-Feudal England: The Jutes* (1933). For the Danelaw see F. M. Stenton, *The Danes in England* (British Academy lecture, 1928). See generally F. M. Stenton, *Anglo-Saxon England* (2nd ed. 1947).

Page 3. The distinction between agents or ministers of the crown on the one hand and grantees or usurpers on the other is of course too simple. See especially H. M. Cam, "The Evolution of the Medieval English Franchise", *Speculum*, 32 (1957), p. 427; reprinted in *Law-Finders and Law-Makers* (1962), p. 22.

Page 3. On the county court see W. A. Morris, *The Early English County Court* (1926); G. T. Lapsley, "The Court, Record and Roll of the County in the Thirteenth Century", L.Q.R., 51 (1935), p. 299, and the literature there cited. On the sheriff see W. A. Morris, *The Medieval English Sheriff to 1300* (1927).

Page 4. Regularity of meetings of county. See W. A. Morris, *The Early English County Court* (1926), pp. 90 *et seq.*; H. M. Cam, *The Hundred and the Hundred Rolls* (1930), pp. 107 *et seq.*; G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. III, Selden Soc. vol. 58, p. xcv. For protests at the change in Surrey, see H. G. Richardson and G. O. Sayles, *Select Cases of Procedure without Writ*, Selden Soc. vol. 60, pp. 87, 90. For the frequency see *Magna Carta*, 1225, c. 35.

Pages 4–5. Persons actually responsible for county business. H. G. Richardson and G. O. Sayles, *The Governance of Medieval England* (1963), esp. at p. 182;

G. T. Lapsley, "Buzones", *English Historical Review*, 47 (1932), pp. 177, 545. For influence of stewards see *Fleta*, II, 66 (ed. H. G. Richardson and G. O. Sayles, Selden Soc. vol. 72, p. 225); note their alleged irresponsibility.

Page 5. Hundred courts and franchises. H. M. Cam, *The Hundred and the Hundred Rolls* (1930); and papers collected in *Liberties and Communities in Medieval England* (1963), and *Law-Finders and Law-Makers* (1962).

Page 7. Memoranda of early law-suits. D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (1964), Chapter 1.

Page 7. County court records. W. A. Morris, *The Early English County Court* (1926); T. F. T. Plucknett, "New Light on the Old County Court", *Harvard Law Review*, 42 (1929), p. 639 and *ibid.*, 43 (1929), p. 1111; G. H. Fowler, *Rolls from the Office of the Sheriff of Beds and Bucks, 1332–1334*, Bedfordshire Historical Record Society, Quarto Series, vol. III (1929). The rolls from Chester are interesting but must not be taken as typical; see R. Stewart Brown, *Calendar of County Court, City Court and Eyre Rolls of Chester*, Chetham Soc., N.S. vol. 84. Pleas of false judgment from all kinds of local and private court are to be found in *Bracton's Note Book*, edited by F. W. Maitland (1887), and in the printed *Curia Regis Rolls.*

Page 7. Formularies for use in local courts. See F. W. Maitland, *The Court Baron*, Selden Soc. vol. 4.

Page 9. On the method by which Domesday Book was compiled see V. H. Galbraith, *The Making of Domesday Book* (1961).

Page 10. The courts of honours. See F. M. Stenton, *The First Century of English Feudalism* (2nd ed., 1961). Cf. W. O. Ault, *Private Jurisdiction in England* (1923).

Page 11. For examples of the working of manorial courts, on which there is much literature, see F. W. Maitland, *Select Pleas in Manorial and other Seignorial Courts*, Selden Soc. vol. 2.

Page 12. For examples of the working of urban and mercantile courts see *Calendar of Early Mayor's Court Rolls of the City of London, 1298–1307; Select Pleas and Memoranda of the City of London* (a series now running from 1323 to 1482); and *Select Cases Concerning the Law Merchant*, vol. I, Selden Soc. vol. 23.

Pages 13–15. Church courts. For a picture of their working in the middle ages see B. L. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952). For the establishment (or not) of the jurisdictional frontier by means of prohibitions see N. Adams, "The Writ of Prohibition to Court Christian", *Minnesota Law Review*, 20 (1935–36), p. 272, and "The Judicial Conflict over Tithes", *English Historical Review*, 52 (1937), p. 1; G. B. Flahiff, "The Use of Prohibitions by Clerics", *Medieval Studies*, Pontifical Institute of Toronto, 3 (1941), p. 101, and "The Writ of Prohibition to Court Christian in the Thirteenth Century", *ibid.*, 6 (1944), p. 261; 7 (1945), p. 229; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. cxcviii.

Page 15. Local justiciars. H. A. Cronne, "The Office of Local Justiciar in

England under the Norman Kings", *University of Birmingham Historical Journal*, 6 (1957–58), p. 18.

Pages 16–20. The eyre system. See generally the works of Lady Stenton and of Mr Richardson and Professor Sayles cited under I, above. Lady Stenton has edited many eyre rolls; see e.g. Selden Soc. vols. 53, 56, 59, all concerned with the period about 1220. For year book reports of a century later see W. C. Bolland, *The Eyre of Kent, 1313–1314*, Selden Soc. vols. 24, 27, 29; and H. M. Cam, *The Eyre of London, 1321*, Selden Soc. vols. 85, 86 (to be published in 1969).

Page 17. The example of 1221 is taken from D. M. Stenton, *Rolls of the Justices in Eyre for Lincolnshire and Worcestershire*, Selden Soc. vol. 53, pl. 1071.

Page 19. Equity in the eyre. The idea was propounded in W. C. Bolland, *Select Bills in Eyre*, Selden Soc. vol. 30. For the procedural ordinariness of bills see H. G. Richardson and G. O. Sayles, *Select Cases of Procedure without Writ under Henry III*, Selden Soc. vol. 60; and G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. IV, Selden Soc. vol. 74, p. lxvii.

Pages 19–20. For the possessory assizes and the local administration of criminal justice see respectively pp. 114 *et seq.* and pp. 361 *et seq.* For the *nisi prius* system by which verdicts in civil cases in the central courts were taken locally see pp. 37 *et seq.*

Pages 20–22. Rise of the central courts. The most recent work is in the books by Lady Stenton and by Mr Richardson and Professor Sayles cited under I, above. See also the introductions to G. O. Sayles, *Select Cases in the Court of King's Bench*, esp. vol. I, Selden Soc. vol. 55, vol. II, Selden Soc. vol. 57, and vol. IV, Selden Soc. vol. 74. For the chief justiciar, see F. West, *The Justiciarship in England* (1966).

Page 21. *Magna Carta*, 1215, c. 17 (common pleas); c. 18 (possessory assizes).

Pages 22–25, Writ system. See especially G. J. Turner and T. F. T. Plucknett, *Brevia Placitata*, Selden Soc. vol. 66; H. G. Richardson and G. O. Sayles, *Select Cases of Procedure without Writ*, Selden Soc. vol. 60; G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. IV, Selden Soc. vol. 74, p. lxvii. And on the evolution of writs see R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Soc. vol. 77.

Page 24. Common pleas to be held in a known place. *Magna Carta*, 1215, c. 17.

2—*The Institutions of the Common Law in its First Formative Period*

I

There are no general accounts of the subject-matter of this chapter. On the court of common pleas in the fourteenth and fifteenth centuries respectively see N. Neilson, "The Court of Common Pleas", in *The English Government at Work*, vol. III (1950), p. 259, and M. Hastings, *The Court of Common Pleas in Fifteenth Century England* (1947).

On the king's bench see G. O. Sayles, *Select Cases in the Court of King's Bench*, Selden Soc. vols. 55, 57, 58, 74, 76, 82.

On the legal profession see Sayles, *ibid.*, *passim*, and S. E. Thorne, "Early History of the Inns of Court", *Graya*, 50 (1959), p. 79. See too H. Cohen, *History of the English Bar* (1929).

On the legal literature of the middle ages see T. F. T. Plucknett, *Early English Legal Literature* (1958).

On the processes by which substantive law first came into being see S. F. C. Milsom, "Law and Fact in Legal Development", *University of Toronto Law Journal*, 17 (1967), p. 1.

II

Page 26. *Glanvill.* The book known by this name is edited with a translation by G. D. G. Hall (Nelson; in association with the Selden Society, 1965).

Page 26. *Register of Writs.* See F. W. Maitland, "The History of the Register of Original Writs" in *Collected Papers*, vol. II, p. 110. An edition of some early registers by Miss Elsa de Haas and Mr G. D. G. Hall will shortly be published by the Selden Society.

Page 28. Beginning of *narratores*. See F. Pollock and F. W. Maitland, *History of English Law*, 2nd ed. vol. I, p. 211.

Page 29. *Novae Narrationes*, edited by E. Shanks and S. F. C. Milsom, Selden Soc. vol. 80. *Placita Corone*, edited by J. M. Kaye, Selden Soc., Supp. Series, vol. IV. *Court Baron*, edited by F. W. Maitland, Selden Soc. vol. 4. *Brevia Placitata*, edited by G. J. Turner and T. F. T. Plucknett, Selden Soc. vol. 66.

Page 29. *Bracton*, edited by G. E. Woodbine (1915–42), 4 vols; new edition with translation by S. E. Thorne (Harvard U.P. and Selden Society, 1968–); *Bracton's Note Book*, edited by F. W. Maitland (1887), 3 vols.

Page 33. Apprentices' crib in the common pleas: G. J. Turner, YB. 3 & 4 Ed. II, Selden Soc. vol. 22, p. xli.

Page 33. Year books. For their beginnings, see W. H. Dunham, *Casus*

Placitorum, Selden Soc. vol. 69. The early "quarto" editions were reproduced in a single folio series known as Maynard's edition, 1678–79. The principal modern editions are those of Edward I in the Rolls Series, of Edward II in the Selden Society series, of Edward III in the Rolls Series, and of Richard II in the Ames Foundation's series. For discussions see F. W. Maitland, *Year Books of Edward II*, Selden Soc. vols. 17, 19, 20; G. J. Turner, *ibid.*, vols. 26, 42; T. F. T. Plucknett, *Year Books of 13 Richard II*, Ames Foundation; W. C. Bolland, *Manual of Year Book Studies* (1925); A. W. B. Simpson, "The Circulation of Year Books in the Fifteenth Century", L.Q.R., 73 (1957), p. 492. For the indistinctness of their ending see A. W. B. Simpson, "Keilwey's Reports", *ibid.*, p. 89.

Pages 33–36. Pleading in trespass. S. F. C. Milsom, "Trespass from Henry III to Edward III", L.Q.R., 74 (1958), pp. 195, 407, 561, esp. at p. 578. The justification for treating epilepsy is YB. 22 Lib. Ass. pl. 56, f. 98.

Page 35. Relation between year book report and record in plea roll. This can be seen in the year book editions of the Selden Society and the Ames Foundation, where the record, when found, is always printed after the report.

Page 36. The plea of accident in 1290. Sayles, *Select Cases in the Court of King's Bench*, vol. I, Selden Soc. vol. 55, p. 181.

Page 36. Pleading of payment in an action of debt. S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at p. 269.

Page 37. *Nisi prius*. Regulated by Stats. 13 Ed. I (Westminster II), c. 30; 27 Ed. I, stat. 1 (*De Finibus Levatis*), c. 4; 12 Ed. II, stat. 1, cc. 3, 4; 2 Ed. III (Statute of Northampton), c. 16; 14 Ed. III, stat. 1, c. 16.

Page 38. "*. . . mettre sey en la grace du pays*": *Brevia Placitata*, Selden Soc. vol. 66, p. 209. The late year book discussions of accident are YBB. Mich. 6 Ed. IV, pl. 18, f. 7; Trin. 21 Hy. VII, pl. 5, f. 27.

Page 42. *Magna Carta*, 1215, c. 17: common pleas to be held in known place.

Page 44. Petition of 1372. *Rotuli Parliamentorum*, vol. ii, p. 311.

Page 45. For the different method of enrolling cases begun by plaint see Richardson and Sayles, *Select Cases of Procedure without Writ*, Selden Soc. vol. 60, and Sayles, *Select Cases in the Court of King's Bench*, vol. IV, Selden Soc. vol. 74, p. lxvii.

Page 45. *Humber Ferry Case*. YB. 22 Lib. Ass. pl. 41, f. 94; *Bulletin of Institute of Historical Research*, 13 (1936), p. 35; Sayles, *Select Cases in the Court of King's Bench*, vol. VI, Selden Soc. vol. 82, p. 66.

Pages 46–47. Exchequer chamber to hear error from king's bench. Set up by Stat. 27 Eliz., c. 8, amended by Stat. 31 Eliz., c. 1. Exchequer chamber to hear error from exchequer: set up by Stat. 31 Ed. III, stat. 1, c. 12; see L. O. Pike, *Year Books of 14 Edward III*, Rolls Series, pp. xvii *et seq.*

Page 48. Bill of exceptions. Provided by Stat. 13 Ed. I (Statute of Westminster II), c. 31.

3—*The Institutions of the Common Law in its Second Formative Period*

I

The subject-matter of this chapter has been unevenly treated. The procedural fictions have been often described; for a clear and critical eighteenth-century account see R. Boote, *An Historical Treatise of an Action or Suit at Law* (1st ed., 1766). But very little work has been done on the mechanisms by which, after the introduction of written pleadings, legal discussions were started in Westminster. See R. Sutton, *Personal Actions at Common Law* (1929), esp. pp. 122 *et seq.*, and J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898). The account here tentatively given is based largely upon deduction from sixteenth-century reports. But certainty will be achieved only by collating reports and plea rolls.

II

Pages 53–54. Court of exchequer. On the early history of the court generally, see H. Jenkinson and B. Formoy, *Select Cases in the Exchequer of Pleas*, Selden Soc. vol. 48; on *quo minus* see H. Wurzel, "Origin and Development of Quo Minus", *Yale Law Journal*, 49 (1939), p. 39.

Pages 54–57. Bill of Middlesex. G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. IV, Selden Soc. vol. 74, p. lxvii. "Discourse" by Hale C. J. in *Hargrave's Law Tracts* (1787), p. 359.

Page 57. Bill of Middlesex and bail. Stat. 13 Car. II, st. 2, c. 2 (1661). There is dispute about the motivation of this act. See Hale's tract cited in the preceding note; Blackstone, *Commentaries* (5th ed., 1773), vol. III, p. 287; W. S. Holdsworth, *History of English Law* vol. I (7th ed.), p. 200. See too the preamble of the act itself.

Page 58. Eighteenth-century criticisms of procedure. See e.g. R. Boote, *An Historical Treatise of an Action or Suit at Law* (1st ed., 1766.)

Page 58. Statute of 1585 setting up exchequer chamber. Stat. 27 Eliz., c. 8.

Page 64. Special verdict considered without argument by counsel. *Kidwelly* v. *Brand*, 1 Plowden, 69.

Page 65. Colour. See J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), pp. 118, 232,

Page 69. Mansfield's use of special verdicts. By taking special verdicts in mercantile cases, Mansfield was able to get from his juries direct statements of mercantile custom. These customs were then treated in his judgments; and what

were technically matters of fact were thereby counterfeited into law. See C. H. S. Fifoot, *Lord Mansfield* (1936).

Page 71. Pleading errors "cured" by verdict, known as "jeofails". Stats. 32 Hy VIII, c. 30 (1540); 18 Eliz., c. 14 (1576); 27 Eliz., c. 5 (1585); 21 Jac. I c. 13 (1624).

Page 73. Pleading changes in 1834. The "Hilary Rules" were made by the judges in pursuance of Stat. 3 & 4 Wm IV, c. 42.

4—*The Rise of Equity*

I

The only general accounts are old: G. Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846–1849), 2 vols.; and D. M. Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890).

Modern work in the medieval period has largely concerned itself with the derivation of the chancellor's power. On this see B. Wilkinson, *Studies in the Constitutional History of the Thirteenth and Fourteenth Centuries* (2nd ed., 1952), p. 196, and the works there referred to. See also the same author's *Constitutional History of England in the Fifteenth Century* (1964), p. 264. For an important study of the relationship between the two sides of the chancellor's jurisdiction, see A. D. Hargreaves, "Equity and the Latin Side of Chancery," L.Q.R., 68 (1952), p. 481. Cf. G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. V, Selden Soc. vol. 76, p. lxvii.

For early cases see *Select Cases in Chancery*, Selden Soc. vol. 10, and *Calendar of the Proceedings in Chancery in the Reign of Queen Elizabeth* (1827–32), 3 vols. The latter contains many examples from earlier periods.

For an institutional study of the court in the sixteenth century see W. J. Jones, *The Elizabethan Court of Chancery* (1967).

For the settlement of doctrine see D. E. C. Yale, *Lord Nottingham's Chancery Cases*, Selden Soc. vols. 73 and 79; *Lord Nottingham's 'Manual of Chancery Practice'* etc. (1965).

II

Pages 74–77. Early relationship between equity and law. Cf. F. W. Maitland, *Equity* (1909), Lecture 1, esp. p. 6: "I do not think that in the fourteenth century the Chancellors considered that they had to administer any body of substantive rules that differed from the ordinary law of the land."

Pages 75–76. Petitions of right. L. Ehrlich, *Proceedings against the Crown, 1216–1377* (1921).

Page 78. Fraud. The history of fraud in the common law is treated in more detail in Chapters 12 and 13, pp. 275–278, 282 *et seq.*, and 317–321.

Page 80. *Doctor and Student.* An edition first begun by the late Professor Plucknett is being prepared for the Selden Society by Mr J. Barton. The edition used for the present work is that of W. Muchall (1874). Compare the rather later work by E. Hake, *Epieikeia* (edited with an introduction by D. E. C. Yale and a preface by S. E. Thorne, 1953).

Page 82. Courts Christian adjudicating upon lay debts. B. L. Woodcock, *Medieval Ecclesiastical Courts in the Diocese of Canterbury* (1952).

Page 84. Chancery proceedings seen as illegitimate appeal. The argument was based upon Stat. 4 Hy IV, c. 23, sometimes numbered 22 (1402). The discussion in *Doctor and Student*, Dialogue I, c. 18 (ed. W. Muchall, 1874, p. 50) is exactly followed in R. Crompton, *L'Authoritie et Iurisdiction des Courts* (1594), f. 67.

Page 84. "This Court forbeareth directly to examine any judgment given at the common law"; the note is in *Anon*, Cary 3.

Page 85. Advice to James I about power of chancery. See 1 Chan. Rep., Appendix. The words quoted are at p. 47.

Page 85. Lambarde, *Archeion* (ed. McIlwain and Ward, 1957), p. 46.

Page 86. "Where a common inconvenience will follow . . .", Cary, 12. The note is based upon *Doctor and Student*: the "common inconvenience" may be compared with Dialogue I, c. 12 (ed. W. Muchall, 1874, at p. 38) on the paid bond, the "conscience of the party" with Dialogue I, c. 18 (*ibid.*, at p. 51). Cf. R. Crompton, *op. cit* in note to p. 84., f. 67.

Page 86. Lord Nottingham's natural and his civil conscience. *Cook* v. *Fountain* (1672), 3 Swanst. 585 at 600; *Lord Nottingham's Chancery Cases*, Selden Soc. vol. 73, p. 362 at p. 371. Cf. *Lord Nottingham's . . . 'Prolegomena of Chancery and Equity'*, III, 27 (ed. D. E. C. Yale, 1965, p. 194).

Page 87. Expansion of judicial staff. The statute of 1813 created a single vice-chancellor: Stat. 53 Geo. III, c. 24. For a full account see W. S. Holdsworth, *History of English Law*, vol. I, esp. p. 442.

Page 87. Fog in the court of chancery. Charles Dickens, *Bleak House*.

II. PROPERTY IN LAND

5—*Tenures*

I

Behind this chapter there lie many of the deepest questions about medieval society. They may never be answered. From the large literature, only a few items can be selected. The following seem especially illuminating: M. Bloch, *Feudal Society* (English edition, 1961); F. L. Ganshof, *Feudalism* (English edition, 1952); Sir Frank Stenton, *The First Century of English Feudalism* (2nd ed., 1961); G. C. Homans, *English Villagers of the Thirteenth Century* (1941); H. S. Bennett, *Life on the English Manor* (1937); R. Lennard, *Rural England, 1086–1135* (1959); A. L. Poole, *Obligations of Society in the XII and XIII Centuries* (1946).

II

Page 91. Military value of military feudalism. The basis of military organisation after the Conquest is a topic upon which the most divergent views have been taken. Recent studies include: M. R. Powicke, *Military Obligation in Medieval England* (1962); C. W. Hollister, *Anglo-Saxon Military Institutions* (1962), and *Military Organization of Norman England* (1965).

Page 91. Heritability. See S. E. Thorne, "English Feudalism and Estates in Land", [1959] *Cambridge Law Journal*, p. 193.

Page 91. Effect of warranty in making heritable land alienable as against the heirs. See S. J. Bailey, "Warranties of Land in the Reign of Richard I", *Cambridge Law Journal*, 9 (1946), p. 192, and "Warranties of Land in the Thirteenth Century", *ibid.*, 8 (1944), p. 274, 9 (1945), p. 82.

Page 93–95. On the incidents of tenure in the middle ages see especially T. F. T. Plucknett, *The Legislation of Edward I* (1949), esp. Chapter IV. On the working of wardship in the sixteenth century, see especially J. Hurtsfield, *The Queen's Wards* (1958).

Page 96. On distraint *per feodum* and *cessavit* see T. F. T. Plucknett, *op. cit.* in the preceding note, pp. 88 *et seq. Cessavit* was created by Stats. 6 Ed. I (Gloucester), c. 4; 13 Ed. I (Westminster II), c. 21.

Page 96. Effect of tenant's alienation on lord's right of distress. B holds of A and grants the land to C by subinfeudation. B and C can make what arrangement they like as between themselves about A's services, but this cannot affect A's right to distrain on the land. If the goods he takes are C's, and if as between B and C, B is bound to do the services and "acquit" C of A's rights, then C can

bring an action of mesne against B. If B's grant to C were by substitution, the problem did not arise; and it therefore slowly disappeared after the Statute *Quia Emptores*, 1290, for which see p. 98.

Page 97. Mortmain. Stats. 7 Ed. I (*De Viris Religiosis*); 13 Ed. I (Westminster II), c. 32. Cf. Petition of the Barons (1258), c. 10. For discussion see T. F. T. Plucknett, *The Legislation of Edward I* (1949), pp. 94 *et seq.*

Page 98. *Quia Emptores*. Stat. 18 Ed. I. For discussion see T. F. T. Plucknett, *op. cit.* in the preceding note, pp. 102 *et seq.* For the Chester ordinance of 1260, see *ibid.*, p. 108.

Page 100. Reservation of freehold rents after *Quia Emptores*. The early year books show many problems arising. For discussions of rent-service, rent-charge and rent-seck see F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, p. 129. See also S. F. C. Milsom in *Novae Narrationes*, Selden, Soc. vol. 80, p. clxix.

6—*Early Actions*

I

The classical account of the real actions is that of Maitland in F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 1–80. A simplified version is to be found in F. W. Maitland, *The Forms of Action at Common Law* (with *Equity*, 1909; separately, 1936).

The present chapter suggests a development which differs fundamentally from that envisaged by Maitland, but only in its earliest stages. For Maitland, the actions all came into being to play much the parts they were playing in the thirteenth century, when land was just an object of property and "feudalism" an economic shadow. But works such as Sir Frank Stenton, *The First Century of English Feudalism* (2nd ed., 1961), show that conditions had been very different in the twelfth century; and the proposition here stated is that the actions all took shape in a truly feudal framework, and that it was largely they themselves that caused the collapse of that framework into the more modern world seen by Maitland. This suggestion was first made in my introduction to the 1968 re-issue of Pollock and Maitland's *History of English Law*, vol. I, pp. xxvii *et seq.*; the bibliography, *ibid.*, pp. lxxxiv *et seq.* refers to the principal work done since Maitland's. But none of it can be vouched in direct support of this suggestion. The important study by S. E. Thorne, "English Feudalism and Estates in Land", [1959] *Cambridge Law Journal*, p. 193, however, envisages a legal world which is in many ways similar.

II

Page 103. On the nature and importance of seisin in the thirteenth century and later see in particular F. W. Maitland's two articles, "The Mystery of Seisin", L.Q.R., 2 (1886), p. 481, and "The Beatitude of Seisin", *ibid.*, 4 (1888), pp. 24, 286, reprinted in *Collected Papers*, vol. 1, pp. 358 and 407 respectively. The most extensive later study is F. Joüon des Longrais, *La conception anglaise de la saisine* (1924), summarised by T. F. T. Plucknett in *Harvard Law Review*, 40 (1926–27), p. 921. For a recent study, see R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Soc. vol. 77, esp. pp. 261 *et seq.*

Page 104. Dreyt dreyt: e.g. *Bracton*, ff. 283d, 434d.

Page 106. Glanvill on claims to baronies: I, 3 (ed. G. D. G. Hall, 1965, p. 4). His writ of right patent is at XII, 3 (ed. Hall, p. 137).

Page 106. *Magna Carta* and the writ *praecipe*. See N. D. Hurnard, "Magna Carta, Clause 34", in *Studies in Medieval History presented to F. M. Powicke*

(1948); M. T. Clanchy, "Magna Carta, Clause Thirty-Four", *English Historical Review*, 79 (1964), p. 542.

Pages 107–111. What happened in court on a writ of right can most vividly be followed in the formularies. See *Brevia Placitata*, Selden Soc. vol. 66, pp. 1–3, translated at pp. 224–226; *Novae Narrationes*, Selden Soc., vol. 80, pp. 2–3, 25–37, 144–158.

Pages 109–111. Logic of trial by battle. The oaths of the champions in their later form are given in *Brevia Placitata*, Selden Soc. vol. 66, p. 127; *Novae Narrationes*, Selden Soc. vol. 80, pp. 28, 150. For the change made in 1275, see Stat. 3 Ed. I (Westminster I), c. 41. The treatment of the champion as a single witness, against the twelve of the grand assize, is in *Glanvill*, II, 7 (ed. G. D. G. Hall, 1965, p. 28).

Pages 112–113. Objection to grand assize on ground that parties are of same stock of descent. See *Glanvill*, II, 6 (ed. G. D. G. Hall, 1965, p. 26). For discussion see S. F. C. Milsom, "Law and Fact in Legal Development", *Toronto Law Journal*, 17 (1967), p. 1, at p. 16.

Page 115. Assize of Northampton, 1176, c. 4. The text is printed in *Stubbs' Select Charters* (9th ed., repr. 1946), p. 179.

Page 115. Glanvill's account of mort d'ancestor is XIII, 2–13 (ed. G. D. G. Hall, 1965, pp. 149–157).

Page 117. Suggestion that novel disseisin began as a "criminal" process. This was made by R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Soc. vol. 77, pp. 261 *et seq*.

Page 117. *Appellans* and *appellatus* in novel disseisin: *Glanvill*, XIII, 38 (ed. G. D. G. Hall, 1965, p. 170).

Page 118. Re-seisin of chattels. The writ is referred to in *Glanvill*, XIII, 39, and given in full XII, 18 (ed. G. D. G. Hall, pp. 170, 144 resp.). The alpha rubric to the latter is *Breue de aueriis replegiandis*.

Page 120. *Quia Emptores*. Stat. 18 Ed. I: "*Quia emptores terrarum . . . de feodis magnatum . . . in feodis suis sunt ingressi . . .*". *Cf. Bracton*, f. 46b, speaking of the lord's powerlessness against his tenant's grantee: "*Item si dicat quod iniuste ingressus sit feodum suum . . .*".

Pages 121–124. The "degrees" in writs of entry. For the working of the rule see S. F. C. Milsom in *Novae Narrationes*, Selden Soc. vol. 80, pp. cxxxiv *et seq*. The statute of 1267 is Stat. 52 Henry III (Marlborough), c. 29. On its origin see *Bracton*, f. 219b; E. F. Jacob, *Studies in the Period of Baronial Reform* (1925), pp. 81, 124, 368–369; T. F. T. Plucknett, *Legislation of Edward I* (1949), p. 27 n. 1. For explanations of the degrees see F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 65, 71 n; and introduction to 1968 reissue, vol. I, p. xlvii. For related matters see S. J. Bailey, "Warranties of Land in the Thirteenth Century", *Cambridge Law Journal*, 9 (1945), at pp. 95, 96 n. 63; T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 553 n. 2; J. E. A. Jolliffe, *Constitutional History of Medieval England* (2nd ed., 1947), p. 2. See too R. Lennard, *Rural England, 1086–1135* (1959), pp. 159–175.

Page 123. Writ of entry treated as writ of right. See *Bracton*, ff. 326–326b; G. J. Turner in *Brevia Placitata*, Selden Soc. vol. 66, p. lxxix. Note that it is the demandant's count that allows the tenant to go outside the nature of the writ: the "forms of action" were yet in the future.

Page 125. Glanvill's contrast between right and possession. *Proprietas* and *possessio* are used in I, 3, *rectum* and *saisina* in XIII, 1 (ed. G. D. G. Hall, 1965, pp. 4, 148 resp.).

Page 125. Roman influence in the creation of the possessory assizes. The specific canonist ancestry suggested for novel disseisin by Maitland, in F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 47–48, has been rendered inadmissible by chronology; H. G. Richardson and G. O. Sayles in *Select Cases of Procedure without Writ*, Selden Soc. vol. 60, pp. cxxviii *et seq*. But the possibility of general influence remains. For opposing views, see R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Soc. vol. 77, pp. 303, 386; and F. Joüon des Longrais, *Henry II and his Justiciars had they a Political Plan in their Reforms about Seisin?* (1962).

7—*Later Actions*

I

There is no systematic study of litigation concerning land for any period between the early fourteenth century and the late seventeenth, and we know very little about how claims were actually made. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), pp. 38–43; W. S. Holdsworth, *History of English Law*, vol. VII (2nd ed.), pp. 1 *et seq.* The best starting-point is still F. W. Maitland, "The Beatitude of Seisin", L.Q.R., 4 (1888), pp. 24, 286, reprinted in *Collected Papers*, vol. I, p. 407.

II

Page 127. Early terms of years. See R. Lennard, *Rural England, 1086–1135* (1959), p. 174. The exact uses to which terms were put were no doubt various, but they are elusive. See F. Joüon des Longrais, *La conception anglaise de la saisine* (1924), pp. 140 *et seq.*

Page 128. Reasons for denying novel disseisin to termor. Maitland inclined to a Romanist explanation: F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 110 *et seq.*, and "The Seisin of Chattels", L.Q.R., 1 (1885), p. 324, reprinted in *Collected Papers*, vol. I, p. 329, esp. at p. 349. Joüon des Longrais (see last note) thought the economic use of the term a sufficient explanation. A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 68, thought that the termor did not have a tenement, let alone a free tenement within the words of the assize. On the view of the origin of novel disseisin proposed in the preceding chapter, "tenement" was indeed not yet a lawyers' word for a piece of land, but more literally what a tenant held from his lord.

Pages 128–131. Covenant, *quare ejecit, ejectio firmae*. See T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), pp. 373, 573; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, pp. clxxxv–cxc, and "Trespass from Henry III to Edward III", L.Q.R., 74 (1958), at pp. 198 *et seq.* For a clear example of *quare ejecit* being called a writ of "trespass", see YB. 6 Ed. II, Selden Soc. vol. 34, p. 222. For the fourteenth-century view of the relationship between *quare ejecit* and *ejectio firmae*, namely that the former could not have *vi et armis* and *contra pacem* because the defendant was the freeholder, see YBB. Mich. 38 Ed. III, f. 33d; Hil. 48 Ed. III, pl. 12, f. 6d; Pasch. 1 Hy V, pl. 3, f. 3d. The rule that one could not act *vi et armis* or *contra pacem* within his fee is commonly referred to Stat. 52 Hy III (Marlborough), c. 3 about distraint: "*non ideo puniatur dominus per redemptionem*". It is certainly of feudal origin, and

possibly connected with the beginnings of novel disseisin suggested in the preceding chapter. The early history of *vi et armis* findings in novel disseisin needs investigation.

Page 129. Bracton's discussion of *quare ejecit*: see f. 220.

Page 130. Retrenchment on remedies at the end of thirteenth century. See *Britton*, II, xxxiii, 3 (ed. F. M. Nichols, 1865, vol. 1, p. 417). The passage seems in particular to deny the existence of *quare ejecit*.

Page 130. *Ejectio custodiae*. See S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, pp. cxlviii *et seq*., and "Trespass from Henry III to Edward III", L.Q.R., 74 (1958), at p. 408.

Page 131. Dogma that trespass actions could not give redress for the future. See *Vieux Natura Brevium* (ed. 1584), f. 123; Fitzherbert, *Abridgment*, Eiectione firme 2.

Page 133. Change in the nature of novel disseisin, so that questions of rightfulness could be raised. See F. W. Maitland, "The Beatitude of Seisin", L.Q.R., 4 (1888), pp. 24, 286, reprinted in *Collected Papers*, vol. I, p. 407.

Page 134. Fourteenth-century cases of novel disseisin. The case of the claimant half way through the window is YB. 8 Lib. Ass., pl. 25, f. 17. The case of the claimant who had not entered at all is YB. 38 Lib. Ass., pl. 23, f. 228d.

Page 135. Statutes of forcible entry: 5 Ric. II, stat. 1, c. 8; 15 Ric. II, c. 2; 4 Hy IV, c. 8; 8 Hy VI, c. 9.

Page 136. Use of *ejectio firmae* by freeholders. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 135; W. S. Holdsworth, *History of English Law*, vol. VII (2nd ed.), p. 4. See too Blackstone, *Commentaries* (5th ed.), vol. III, p. 198. There is a useful short account in R. Sutton, *Personal Actions at Common Law* (1929), p. 52.

Page 137. Prevention of successive claims in ejectment. See W. S. Holdsworth, *op. cit.* in the preceding note, p. 17. In *Earl of Bath* v. *Sherwin* (1709), 4 Bro. P.C. 373, the House of Lords held that after five trials a perpetual injunction should be granted. But Cowper, L.C., 10 Mod. 1, refused it even in that case, largely because of the capricious strictness of the common law rules.

Pages 137–138. Whether ejectment introduced new substantive principles. W. S. Holdsworth, *History of English Law*, vol. VII (2nd ed.), p. 62 and L.Q.R., 56 (1940), p. 479, thought that a more absolute concept of ownership resulted. This was refuted by A. D. Hargreaves, "Terminology and Title in Ejectment", *ibid.*, p. 376.

Page 138. Protection of copyholder. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 145; C. M. Gray, *Copyhold, Equity, and the Common Law* (1963).

8—*Settlement of Land at Law*

I

Most of the institutions discussed in this chapter lived too long. Their survival as current law into modern times ensured that they were provided with a traditional history which seemed at least plausible; and this, together with the degree of complexity involved, has had the result that little modern historical work has been done. The principal exceptions, which will be noted in their places, for the most part relate to the earliest period. For developments after the early fourteenth century, our picture is still largely the traditional one. Abstractions fit together, but it is often difficult to relate them to a real world inhabited by conveyancers and their clients, to make out who was trying to do what.

The present chapter has made much use of A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), and of W. S. Holdsworth, *History of English Law*. For a study of actual arrangements made by great land-owners, see G. A. Holmes, *The Estates of the Higher Nobility in Fourteenth-Century England* (1957).

II

Page 140. Heritability. See S. E. Thorne, "English Feudalism and Estates in Land", [1959] *Cambridge Law Journal*, p. 193.

Page 141. *Maritagium*. See T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 546, and *Legislation of Edward I* (1949), p. 125; S. J. Bailey, "Warranties of Land in the Thirteenth Century", *Cambridge Law Journal*, 9 (1945), at p. 91. A new study is being made by Miss Catherine McCauliff.

Pages 142–145. Conditional fees and *De Donis*. The statute is 13 Ed. I (Westminster II), c. 1. The earlier protest is c. 27 of the Petition of the Barons, 1258. The text is in *Stubb's Charters* (9th ed., repr. 1946), p. 377, translated in T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 551. For the procedural effects of the statute, see W. H. Humphreys, "*Formedon en Remainder* at Common Law", *Cambridge Law Journal*, 7 (1940), p. 238; S. F. C. Milsom, "Formedon before *De Donis*", L.Q.R., 72 (1956), p. 391. For the conceptual effects see the two references to Plucknett in the preceding note; J. Updegraff, "The Interpretation of 'Issue' in *De Donis*", *Harvard Law Review*, 39 (1925), p. 200; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. cxxii.

Page 144. Remainders before *De Donis*. See F. W. Maitland, "Remainders

after Conditional Fees", L.Q.R., 6 (1890), p. 22, reprinted in *Collected Papers*, vol. II, p. 174; Challis, *Real Property* (3rd ed., 1911), p. 428. For the existence before the statute of formedon in the remainder, see the articles by Humphreys and Milsom cited in the preceding note, and S. J. Bailey, "Warranties of Land in the Thirteenth Century", *Cambridge Law Journal*, 8 (1944), at p. 275 n. 9.

Page 145. Year book evidence on the conceptual effects of the statute. See e.g. YBB. 20 & 21 Ed. I (R.S.), p. 59; 21 & 22 Ed. I (R.S.), p. 321; 33–35 Ed. I (R.S.), p. 497; 1 & 2 Ed. II, Selden Soc. vol. 17, pp. 70, 115; 5 Ed. II, Selden Soc. vol. 31, p. 159.

Page 146. The case of 1312 in which the grandson of the original donees in tail succeeded in recalling a grant made by their son is YB. 5 Ed. II, Selden Soc. vol. 31, p. 176, and vol. 33, p. 225.

Pages 147–148. Warranties in general. See above, pp. 108–109; S. J. Bailey, "Warranties of Land in the Thirteenth Century", *Cambridge Law Journal*, 8 (1944), p. 274, and *ibid.*, 9 (1945), p. 82; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. clix.

Page 148. Assets by descent. An analogous principle operated in dower. The widow's claim was primarily against the heir; and the dead husband's grantees could ultimately be made liable only to the extent that the heir had no assets by descent. See F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, p. 423.

Page 149. Settlement of rule that issue in tail barred by father's warranty if he has assets by descent. The case is YB. 33–35 Ed. I (R.S.), p. 387 (1306). The jury expressly found that the father had within a few days of his death enfeoffed his son of lands which would have come to him by descent, and that this was by fraud and collusion to exclude the warranty.

Page 149. Husband alienating wife's land with warranty. The rule about assets by descent was applied to this situation by Stat. 6 Ed. I (Gloucester), c. 3.

Page 149. Case of 1292 in which son brought formedon against tenant to whom father had alienated with warranty, and tenant purported to vouch son to warranty: YB. 20 & 21 Ed. I (R.S.), p. 303. The report is not ideally clear, but there is no doubt about what happened.

Pages 149–150. Collateral warranties. The hypothetical case of the remainder-man in tail being heir general of the tenant in tail who had alienated with warranty is based upon YB. 11 Ed. II, Selden Soc. vol. 61, p. 280. The original grant had apparently been to elder brother in tail, remainder to younger brother in tail, a common situation. For the London ordinance of 1365, see *Calendar of Letter Books of the City of London, Letter Book G*, p. 190; *Liber Albus* (R.S.), vol. I, p. 495, vol. II, p. 196. In 1705, Stat. 4 Anne, c. 16, s. 21, made void (a) all warranties made by tenant for life, and (b) all collateral warranties made by one having no estate in possession.

Page 151. The action *de fine facto*. See S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. clxxxii. *Scire facias* was provided instead by Stat. 13 Ed. I (Westminster II), c. 45 (1285).

Page 152. Final concord in honour court. See Sir Frank Stenton, *The First Century of English Feudalism* (1961), p. 52.

Page 152. Whether remainderman barred by fine. See the discussion in YB. 11 Ed. II, Selden Soc. vol. 61, p. 12.

Page 152. Court considering the propriety of proposed fine. See in general W. S. Holdsworth, *History of English Law*, vol. III (5th ed.), p. 252. On the particular point of the fine turning out to deal with land in tail, see YB. *Eyre of Kent*, vol. II, Selden Soc. vol. 27, p. 201.

Pages 152–153. Statutory regulation of fines. Stat. 34 Ed. III, c. 16 (1361), removed the barring effect against strangers to a fine. Stats. 1 Ric. III, c. 7 (1484), and 4 Hy VII, c. 24 (1489), provided that a fine with proclamations, i.e. public announcements in court, would bar strangers with immediate claims after five years, and reversioners and remaindermen five years after their interests accrued. Nothing was said about heirs in tail, who had always hitherto been protected by *De Donis*. But since entails were now barrable by recovery, it perhaps seemed pointless to preserve their immunity against the fine. So far as reversioners and remaindermen were concerned, this made little difference: they always had their five years after the accrual of their interests. But the heirs in tail were not remaindermen: they succeeded to the estate of their ancestor, and that was now destroyed by the fine. They were held to be barred in *Anon* (1527), 1 Dyer, 2b; and this result was reaffirmed by Stat. 32 Hy VIII, c. 36 (1540). See generally C. A. F. Meekings, *Surrey Feet of Fines* (Surrey Record Society, 1946).

Page 153. Voucher and aid-prayer. See T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 411. The two processes are discussed, none too clearly, in YB. 21 & 22 Ed. I (R.S.), p. 469.

Pages 153–154. Receipt. See T. F. T. Plucknett, *op. cit.* in the preceding note, and *Legislation of Edward I* (1949), p. 123; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. cxxxi. The process was not unknown at common law; T. F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1922), p. 131; *Bracton*, f. 393b; YB. 33–35 Ed. I (R.S.), p. 399 (1307). But it was put on a regular footing in 1285 by Stat. 13 Ed. I (Westminster II), c. 3. This was open to abuse, and in 1292 Stat. 20 Ed. I, stat. 3 (*De Defensione Juris*) provided that one received who ultimately lost should compensate the demandant for the delay caused, and should also be amerced or, if he had nothing, imprisoned. In 1390 Stat. 13 Ric. II, stat. 1, c. 17, allowed receipt when the tenant was pleading so as to lose the tenements. There was the same safeguard as to compensation for delay if the demandant was successful; but it is not easy to imagine how the statute actually worked: two actions might apparently proceed in parallel.

Page 154. Tenant in tail after possibility. The statute of 13 Ric. II (see preceding note) applied to "*tenantz a terme de vie tenantz en dowere ou par la ley d'Engleterre ou en le taill apres possibilite dissue exteint.*" The statute of 1572, Stat. 14 Eliz., c. 8, avoided as against reversioners and remaindermen recoveries suffered by

persons "seised . . . as tenants by the curtesy of England, tenants in tail after possibility of issue extinct, or otherwise, only for term of life or lives . . .".

Page 154. Receipt of heirs in tail. Early fourteenth-century examples are YBB. 33–35 Ed. I (R.S.), p. 497; 1 & 2 Ed. II, Selden Soc. vol. 17, p. 70; 5 Ed. II, Selden Soc. vol. 31, p. 159. Dispute turned upon the word "*heredes*" in Stat. Westminster II, c. 3, which allowed receipt to "*heredes & illi ad quos spectat reversio*" in actions against "*tenens in dotem per legem Anglie vel altier ad terminum vite*". On the earliest analysis of *De Donis*, as here suggested, tenant in tail would be covered by these last words, and "*heredes*" would cover his heir as well as the heir of the deceased spouse in cases of dower and curtesy. Seven years after the statute of Westminster II, of which of course *De Donis* was a part, the statute *De Defensione Juris* (20 Ed. I, stat. 3; see note to pp. 153–154, above) assumed that receipt was available when land was claimed "*versus tenentem per legem Anglie per feodum talliatum nomine dotis vel alio modo ad terminum vite vel annorum.*" See also T. F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1922), p. 45; S. F. C. Milsom, *Novae Narrationes*, Seldon Soc. vol. 80, p. cxxiii, n. 2. In 1346 an heir was denied receipt expressly on the ground that the tenant in tail had a fee; YB. 20 Ed. III (R.S.), vol. 1, p. 137.

Page 156. Common recovery. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 121; T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 620. The debate about who had to be vouched, and whether it was enough that judgment went against the vouchee without *escambium* being forthcoming, appears in *Taltarum's Case*, YBB. Mich. 12 Ed. IV, pl. 16, f. 14d and pl. 25, f. 19; and perhaps Mich 13 Ed. IV, pl. 1, f. 1. A translation of the pleadings is to be found in A. K. R. Kiralfy, *A Source Book of English Law* (1957), p. 87. We do not know enough to tell whether this marked any definite stage of development. But "under the common law system everything ought to have a history, and so a singularly obscure case came to be conventionally regarded as the historical foundation for common recoveries"; T. F. T. Plucknett, *op. cit.*, p. 621.

Page 157. The London merchant who directed restitution to his vendor's heirs in tail. *Calendar of Plea and Memoranda Rolls of the City of London, 1413–1437*, pp. 291, 298.

Pages 157–158. *Doctor and Student* on the barring of entails. Dialogue I, c. 26 (ed. W. Muchall, 1874, p. 68).

Page 159. Blackstone, *Commentaries* (5th ed., 1773), vol. II, p. 357 describes the common recovery. His criticism is at pp. 360 *et seq.*

Page 159. Fines and Recoveries Act, 1833: 3 & 4 Wm IV, c. 74.

Page 159. Legislative project preceding Statute of Uses. The draft is printed in W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), p. 572. The sections relevant to entails as numbered by Holdsworth are s. 2 (abolishing them) and s. 5 (excepting peers, and prohibiting alienation by them without royal licence). For discussions of the place of this project see T. F. T. Plucknett, "Some Proposed Legislation of Henry VIII", *Transactions of the Royal Historical*

Society, 4th series, 19 (1936), p. 119; E. W. Ives, "The Genesis of the Statute of Uses", *English Historical Review*, 82 (1967), p. 673; J. M. W. Bean, *The Decline of English Feudalism* (1968), p. 258.

Page 159. Attempts to create unbarrable entails, or "perpetuities" in the first sense of the word. The matter came to a head over two devices, and the difference between them partly reflects the conceptual strength which the fee tail had developed. In one the settlement provided that upon any attempt to alienate or to bar the entail, the interest of the persons making the attempt was to "cease only in respect, and having regard to such person so attempting, in the same manner, quality, degree, and condition, as if such person so attempting was naturally dead and not otherwise." The language is taken from *Corbet's Case* (1599–1600), 1 Co. Rep., 77b at 83b. That used in *Mildmay's Case* (1605), 6 Co. Rep., 40a at 42a is similar. (Electors in Oxford and Cambridge colleges will find it reminiscent of the Elizabethan statute against bribery—Stat. 31 Eliz., c. 6, ss. 1 and 2—which by s. 4 should be read to them at the time of election. The settlement supposed to be in issue in *Corbet's Case* was made the year before that statute). It may be added that there is some mystery about *Corbet's Case*. In a second report of *Mildmay's Case*, Moore K. B., 632, counsel argues that "*quant al Corbets case, ceo fuit que feigned case, et n'est de lier le conscience dascun judge*"; and it is sometimes described as "fictitious". The law-suit, of course, was real enough; and it is also reported in Moore K. B., 601 and 2 Anderson, 134. No doubt the settlement and the question between the parties were also real. But the question was raised on demurrer by the pleadings in an action for trespass *quare clausum fregit*, and it may be that the facts alleged as constituting the trespass had been imagined by the lawyers. In this sense all actions of ejectment were soon to become fictitious; and counsel's attack in *Mildmay's Case* on the authority of *Corbet's Case* throws interesting light on the artificiality which had enveloped actions concerning land. To return to the substance of the matter, such a clause was intended to extrude only the tenant in tail himself "as if he were naturally dead", and therefore to pass the land on to his heir in tail if there was one. This would have been acceptable if tenant in tail had a mere life interest, but was inconsistent with his having for the time being the entire interest, the fee tail seen as an entity. For this and other reasons such clauses were held bad; and the second device sought to meet the objection by providing for forfeiture of the whole estate. Any attempt to bar was to destroy the entail for the heirs in tail as well as the malefactor himself, and to pass the land on to the remainderman etc. In *Mary Portington's Case* (1613), 10 Co. Rep., 35b, the settlement provided (f. 36a–36b) that upon an attempt to bar, the estate should "utterly cease, and be determined . . . as fully to all intents and purposes, as if she or they . . . were dead without heirs of their bodies lawfully begotten . . .". Such a clause had been held valid in *Scholastica's Case* (1572), Plowden, 403, but was now rejected. The idea that an entail is by nature barrable, and that any device to prevent this must be bad, may be seen clearly stated in Co. Litt., ff. 223b–224a.

Page 161. Remainder described as *conventio* in 1220: *Bracton's Note Book*, pl. 86. A gift in *maritagium* was made *tali convencione*, that if the donee or her

heirs should die without heirs of their bodies, the land *reverteretur* to her sister and her heirs.

Page 161. Bracton on remainders: *Bracton*, ff. 68b, 69.

Page 162. Formedon in the remainder. The literature and evidence about the existence of the writ before *De Donis* are discussed in S. F. C. Milsom, "Formedon before *De Donis*", L.Q.R., 72 (1956), p. 391, at p. 392; and the difficulty about counting on such a writ, whether to make the remainderman "quasi-heir" to grantor or grantee, is discussed in *Novae Narrationes*, Selden Soc. vol. 80, p. cxxvi.

Page 162. Remainderman not given immediate writ of entry upon wrongful alienation by tenant for life. The matter is discussed by S. F. C. Milsom, *ibid.*, pp. cxxxvii–cxl. Stat. 6 Ed. I (Gloucester), c. 7, provided an immediate writ of entry for the heir upon an alienation by doweress. The remedy was extended to cover alienations by other kinds of tenant for life by applying the spirit, though not at first the letter, of Stat. 13 Ed. I (Westminster II), c. 24, the famous *in consimili casu* clause. But it was not extended from heirs and reversioners to remaindermen; YBB. 33–35 Ed. I (R.S.), p. 427; 3 Ed. II, Selden Soc. vol. 20, p. 16; 12 Ed. II, Selden Soc. vol. 70, pp. 18, 90; Pasch. 7 Ed. III, pl. 19, f. 17; *Registrum Omnium Brevium*, f. 237r, *Nota*; Fitzherbert, *Natura Brevium*, f. 207B.

Page 162.Remainderman's right to receipt. Not mentioned in Stat. 13 Ed. I (Westminster II), c. 3, giving receipt to heirs and reversioners. Granted in YBB. 5 Ed. II, Selden Soc. vol. 63, p. 98; 18 & 19 Ed. III (R.S.), p. 375.

Page 163. Remainder to heir of living person. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), pp. 90 *et seq.*

Page 163. *Shelley's Case* (1581), 1 Co. Rep., 88b; 1 Anderson, 69; Moore K. B., 136; 3 Dyer, 373b; Jenkins' *Centuries*, 249. For differing views, see T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 564; A. D. Hargreaves, "Shelley's Ghost", L.Q.R., 54 (1938), p. 70. Relevant fourteenth-century cases are YBB. 32 & 33 Ed. I (R.S.), p. 329; 2 & 3 Ed. II, Selden Soc. vol. 19, p. 4; Mich. 18 Ed. II, p. 577; Mich. 24 Ed. III, pl. 17, f. 32d, pl. 79, f. 70; Mich. 38 Ed. III, p. 26; Hil. 40 Ed. III, pl. 18, f. 9; Trin. 41 Ed. III, pl. 10, f. 16d; Pasch. 42 Ed. III, pl. 4, f. 8d.

Page 164. Remainder to heirs of one who himself takes no interest under the grant. See YB. 11 Ric. II, Ames Foundation, p. 283: William granted land to Joan and the heirs of her body, but if she should die without heir of her body then to the heirs of Adam. Adam died, then Joan died. Adam's heir brings detinue against Joan's executor for the charter, and wins. It has been suggested (A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 95 n. 1) that the validity of the limitation does not arise upon the pleadings. The pleadings are unusually imprecise, and we do not know enough about the relationship between an action such as this and the actual title to the land; but the plaintiff had no claim at all apart from his remainder. At one point it is argued for the defendant that since Adam was alive at the time of the grant he could have no heir, so that the remainder was void. This is denied for the plaintiff, whose counsel assents to this proposition from the bench: "Then you think

that although he was alive when the remainder was granted, it is enough that he was dead and had an heir by the time that it fell in." In YB. Trin. 11 Hy IV, pl. 14, f. 74 (1410), the grant was to E for life remainder to the heirs of W; and W was dead at the time of the grant. A third party sues E, who prays aid of W's heir; and since that heir is within age, prays that the plea should await his age. The rule is that an infant can take advantage of his age if he is in as heir, not if he is in as purchaser. It is eventually decided that the heir should give aid at once, and therefore that he is purchaser. But there is discussion of what would have happened had W been alive: whether the grant would have been void, whether a grant can ever have a delayed operation, whether a fee simple can be *in nubibus* and so on. The point is also discussed, and is evidently regarded as doubtful, in YB. Trin. 9 Hy VI, pl. 19, f. 23 at f. 24 (bottom) *per* Martin, Paston and Babington. The case known only from the abridgments is attributed to Hil. 32 Hy VI (1454): Statham, Done 7; Fitzherbert, Feffements & faits 99; Brooke, Done & remainder 37. *Cf.* Littleton, s. 721.

Page 165. Conditions intended to forfeit the interest of tenant in tail seeking to bar. See pp. 159, 200. For the rule that only the grantor or his heirs can re-enter for breach of condition, see p. 175.

Page 165. The fine of 1535: grantee in tail to serve as standard-bearer, and if he should fail "the land should remain to a stranger". See YB. Mich. 27 Hy VIII, pl. 2, f. 24; Brooke, *Abridgment*, Done & remainder 3, Fines levies de terres 5; reminiscence by Mountague, C. J. in *Colthirst* v. *Bejushin*, 1 Plowden, 21 at 34 (end). Compare the reasoning in YB. Mich. 18 Hy VIII, pl. 17, f. 3.

Page 166. Confusion between conditions and remainders. See Littleton, s. 723. See also YB. Mich. 18 Hy VIII, pl. 17, f. 3.

Page 166. Appearance of contingent remainders in 1550: *Colthirst* v. *Bejushin*, 1 Plowden, 21.

Page 167. Rules against indefinite series of remainders. See e.g. *Perrot's Case* (1594), Moore K. B., 368; *Rector of Chedington's Case* (1598), 1 Co. Rep., 148b.

Pages 167–168. Destructibility of contingent remainders. See R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (3rd ed., 1966), pp. 188 *et seq.*, esp. pp. 199 *et seq.*

Page 168. Trustees to preserve contingent remainders. See W. S. Holdsworth, *History of English Law*, vol. VII (2nd ed.), p. 112. The conceptual basis of the device was pointed out as early as 1597; *Cholmley's Case*, 2 Co. Rep., 50a at 51a. Its exploitation by conveyancers appears to date from the mid-seventeenth century. That the remainder of the trustees was itself vested, and therefore not subject to artificial destruction, was finally decided in *Smith d. Dormer* v. *Packhurst* (1740), 3 Atkyns, 135.

Page 168. Developments in the nineteenth century and later. The artificial destruction of contingent remainders was mostly prevented by the Real Property Limitation Act, 1833, and the Real Property Act, 1845. The Contingent Remainders Act, 1877, completed the work over artificial destruction, and all but equated contingent remainders with executory interests: even the natural ending of the prior estate before the remainder vested would not

generally destroy the interest of the remainderman. But the old rule was preserved for limitations which without it would be bad *ab initio* as infringing the rule against perpetuities.

Page 168. Settled Land Acts 1882 and 1925. The legal ancestry of these in the special powers inserted into settlements and in the distinct institution of the trust for sale cannot be traced here. For the economic consequences of settlements without powers of disposition see *Bruce* v. *Marquess of Ailesbury*, [1892] A.C. 356, at 364 *per* Lord Macnaghten. For a splendid attack on the state of the land law in general see F. W. Maitland, "The Law of Real Property", *Westminster Review* (1879), reprinted in *Collected Papers*, vol. I, p. 162. We have still not learnt all Maitland's lessons, including his reminder that "It is we who are guilty of our own law . . ."; *ibid.*, at p. 194.

9—*Uses and Trusts of Land*

I

More modern work has been done on the evolution of uses than upon their common law background, the subject of the two preceding chapters; and this very fact has increased the tendency to read back into too early a period a concept like our modern trust. If instead the total situation is seen through the eyes of landowners and their advisers, the trust relationship can be seen as growing incidentally from simple operations long seen wholly in common law terms. This point is apprehended, but not followed through, in T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), pp. 575 *et seq.*

For early cases see F. W. Maitland, "The Origin of Uses", *Harvard Law Review*, 9 (1894), p. 127, reprinted in *Collected Papers*, vol. II, p. 403; F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, p. 233. See too J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562; A. D. Hargreaves, "Equity and the Latin Side of Chancery", L.Q.R., 68 (1952), p. 481.

For the preponderant part played by wills, and the long-term background to the Statute of Uses, see J. M. W. Bean, *The Decline of English Feudalism* (1968), a most valuable study, though to be read with reserve on the feudal beginnings.

On the immediate background of the statute see W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), pp. 407 *et seq.*, 572 *et seq.*; J. M. W. Bean, *op. cit.*; E. W. Ives, "The Genesis of the Statute of Uses", *English Historical Review*, 82 (1967), p. 673.

On the consequences of the statute and on the rise of the modern trust see W. S. Holdsworth, *op. cit.*, vol. VII (2nd ed.), pp. 116 *et seq.*; J. B. Ames, "The Origin of Trusts" in *Lectures in Legal History* (1913), p. 243 and "The Origin of Uses and Trusts" in *Select Essays in Anglo-American Legal History*, vol. II (1908), p. 737; D. E. C. Yale, "The Revival of Equitable Estates in the Seventeenth Century: an Explanation by Lord Nottingham", [1957] *Cambridge Law Journal*, p. 72; J. E. Strathdene, "Sambach v. Dalston: An Unnoticed Report", L.Q.R., 74 (1958), p. 550; J. L. Barton, "The Statute of Uses and the Trust of Freeholds", *ibid.*, 82 (1966), p. 215.

II

Page 169. ". . . a situation rather than an institution"; T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 579.

Page 169. Salman. See e. g. W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), p. 410. For a recent discussion see J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562.

Page 170. London will of 1259. *Calendar of Wills Proved and Enrolled in the Court of Husting, London* (1889), vol. I, p. 5.

Page 170. Godmanchester custumal, 1324. *Borough Customs*, vol. II, Selden Soc. vol. 21, p. 163.

Page 170. Ancestry of orphan's court. See *Calendar of Plea and Memoranda Rolls of the City of London, 1323–1364* (1926), pp. 123 n. 1, 205 n. 1.

Page 171. "Will and intention not carried into act . . ."; F. M. Nichols, *Britton*, vol. I, p. 174 n.f. For this annotator see *ibid.*, Introduction, pp. lx *et seq.*

Page 172. Franciscan friars and uses. See F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 231, 238; T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 577 n. 3; J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562 at p. 564; YB. 2 & 3 Ed. II, Selden Soc. vol. 19, p. 75.

Page 173. Mortmain. *Magna Carta*, 1225, cc. 32, 36; Petition of the Barons, c. 10; Provisions of Westminster, c. 14; Stat. 7 Ed. I (*De Viris Religiosis*); Stat. 13 Ed. I (Westminster II), c. 32. For mortmain in general see T. F. T. Plucknett, *Legislation of Edward I* (1949), p. 94. For its relevance to uses see J. L. Barton, *op. cit.* in the preceding note, at p. 565.

Pages 173–174. Statute of 1391 extending mortmain to lands held to use of religious houses: Stat. 15 Ric. II, c. 5. For licences concerning small plots of land under Edward I see J. M. W. Bean, *The Decline of English Feudalism* (1968), p. 54.

Page 174. Grant and re-grant. See T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 577; J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562, at pp. 565–566.

Page 174. *Shelley's Case*. See p. 163.

Page 175. Re-entry for breach of condition. See Littleton, ss. 352 *et seq.*; J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562, at pp. 566–568.

Page 176. Wills of land made by putting lands into uses. *Calendar of Wills Proved and Enrolled in the Court of Husting, London, 1258–1688* (ed. R. R. Sharpe, 1889–1890), 2 vols., is revealing. Citizens primarily, of course, dispose of city tenements; but leaseholds outside the city also begin to appear; and towards the end of the fourteenth century, directions to feoffees of ordinary freehold lands are found. For a complement in the wills of outsiders see next note.

Page 177. Magnates acquiring customarily devisable tenements. J. M. W. Bean, *The Decline of English Feudalism* (1968), p. 31, draws attention to wills of magnates disposing of city properties. In 1310–11 the earl of Lincoln directed that city land should "be sold by order of my executors to assist in fulfilling my testament"; in 1324 the earl of Pembroke left houses in London to his wife; in 1348 the earl of Pembroke left city rents for the maintenance of two charities; *Calendar of Wills* cited in the preceding note, vol. I, pp. 218, 310, 507.

Page 178. Licensing of alienations by tenants-in-chief. See generally J. M. W. Bean, *op. cit.* in the preceding note.

Page 178. Evasion of incidents by granting to heir, or by granting to others so that the land will come to the heir at his majority. Prevented by Stat. 52 Hy III (Marlborough), c. 6. See T. F. T. Plucknett, *Legislation of Edward I* (1949), p. 79. On the former device see Fitzherbert, *Abridgment*, Garde 155 (Pasch. 31 Ed. I); YB. 17 & 18 Ed. III (R.S.), p. 321.

Page 178. Effect of *Quia Emptores* on the second device in the preceding note, and use of fee tail. See Fitzherbert, *Abridgment*, Garde 119 (Trin. 4 Ed. II); YB. Pasch. 18 Ed. II, p. 602; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. clxxxv.

Page 179. Evasion by granting to third persons upon condition that they re-grant to heir when of age. See *Vieux Natura Brevium* (ed. 1584), f. 96; Fitzherbert, *Abridgment*, Collusion 29 (Pasch, 31 Ed. III); *ibid.*, Garde 33 (Trin. 32 Ed. III); YBB. 42 Lib. Ass., pl. 6, f. 258d; Trin. 45 Ed. III, pl. 25, f. 22; Fitzherbert, *op. cit.*, Garde 102 (Trin. 47 Ed. III); *ibid.*, Collusion 47 (Mich. 8 Ric. II), also Bellewe 99; YBB. Mich. 9 Hy IV, pl. 20, f. 6; Mich. 10 Hy IV, pl. 3, f. 2d, and pl. 11, f. 4; Trin. 11 Hy IV, pl. 23(1), f. 80d; Hil. 12 Hy IV, pl. 5, f. 13d; Hil. 12 Hy IV, pl. 11, f. 16; Hil. 3 Hy VI, pl. 23, f. 32; Pasch. 33 Hy VI, pl. 6, f. 14d. See also J. M. W. Bean, *The Decline of English Feudalism* (1968), pp. 183 *et seq.*

Page 180. Whether death of single feoffee would attract feudal incidents. See YB. Mich. 7 Ed. IV, pl. 11, f. 16d at f. 17d *per* Markham; J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562 at p. 574.

Page 181. When grants came to be made with intention that land should remain in the hands of feoffees for some time. ". . . about the middle of the fourteenth century it becomes noticeable that feoffors in general do not seem in any great hurry to take a reconveyance"; J. L. Barton, *op. cit.* in the preceding note, p. 566. Cf. the observation about London wills in the note to p. 176, above.

Page 181. Statutes about fraudulent debtors: Stat. 50 Ed. III, c. 6 (1376); 2 Ric. II, stat. 2, c. 3 (1379); 3 Hy VII, c. 4 (1487), concerning chattels only; 13 Eliz., c. 5 (1571).

Page 181. Statute about mortmain and "uses": 15 Ric. II, c. 5 (1391).

Page 181. Uses and forfeitures for treason. Stat. 21 Ric. II, c. 3 (1398). For the lands of a particular traitor see Stats. 5 Hy IV, c. 1 (1404); 7 Hy IV, c. 5 (1406); T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), p. 581. Cf. J. M. W. Bean, *The Decline of English Feudalism* (1968), p. 139.

Page 182. Beginning of chancery intervention. See J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), p. 562 at pp. 568–569.

Page 183. Uses in the year books. See the notes attributed to Mich. 5 Ed. IV, but perhaps earlier; J. L. Barton, *op. cit.* in the preceding note, at p. 570. On feoffor dying without declaring his will see YBB. Mich. 5 Ed. IV, pl. 16, f. 7d; pl. 18, f. 7d. On his declaring his will twice see YB. Mich. 5 Ed. IV, pl. 20, f. 8; Fitzherbert, *Abridgment*, Sub pena 23 (Mich. 31 Hy VI); YB. Mich. 20 Hy

VII, pl. 20, f. 10d; Keilwey, 120–121. Cf. *Doctor and Student*, Dialogue II, c. 22 (ed. Muchall, 1874, pp. 169–170); J. L. Barton, *op. cit.*, p. 571.

Page 184. Littleton on uses: *Tenures*, ss. 462–464. For his will see the edition by E. Wambaugh (1903), p. xlvii.

Pages 184–185. Validation of conveyance by *cestui qe use*: Stat. 1 Ric. III, c. 1 (1484). For this statute and its effects see J. L. Barton, "The Medieval Use", L.Q.R., 81 (1965), at p. 574.

Page 187. Year book note about possibility of use escheating for felony: YB. Mich. 5 Ed. IV, pl. 18, f. 7d. On the date of these reports see note to p. 183, above.

Page 187. Statute of 1489 giving lord wardship on death intestate of feoffor to uses with infant heir: 4 Hy VII, c. 17. See J. M. W. Bean, *The Decline of English Feudalism* (1968), p. 242.

Page 187. Statute of 1504 extending principle to socage tenure: 19 Hy VII, c. 15.

Page 188. Statute of Uses: 27 Hy VIII, c. 10.

Page 188. Undue influence exerted on the dying. Cf. *Glanvill*, VII, 1 (ed. G. D. G. Hall, 1965, p. 70).

Page 189. Special value of wardship. On the establishment of the principle that as between subjects the lord of the oldest feoffment was entitled to wardship of the heir see T. F. T. Plucknett, *Legislation of Edward I* (1949), pp. 112 *et seq.*; G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. I, Selden Soc. vol. 55, p. 158, and *ibid.*, vol. III, Selden Soc. vol. 58, p. xx; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, pp. cxlix, clvi. It was settled by Stat. 13 Ed. I (Westminster II), c. 16. On the special position of the king with both person and land see S. E. Thorne, *Prerogativa Regis* (1949), pp. xv *et seq.*

Page 189. Leading case on collusion in the year of Statute of Uses: YB. Pasch. 27 Hy VIII, pl. 22, f. 7d. For a full discussion of the case itself, and of other materials concerning it, see J. M. W. Bean, *The Decline of English Feudalism* (1968), pp. 275 *et seq.* There can be no doubt about the importance of the case, some about the width of the principle established or sought to be established.

Page 189. Court of wards. See H. E. Bell, *The Court of Wards and Liveries* (1953); J. Hurstfield, *The Queen's Wards* (1958).

Page 190. Proposed legislation of 1529. See W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), pp. 450 *et seq.*, 572 *et seq.*; E. W. Ives, "The Genesis of the Statute of Uses", *English Historical Review*, 82 (1967), p. 673; J. M. W. Bean, *The Decline of English Feudalism* (1968), pp. 258 *et seq.*

Page 190. Statute of Wills: 32 Hy VIII, c. 1 (1540). For discussion see J. M. W. Bean, *ibid.*, pp. 293 *et seq.*; J. L. Barton, "The Statute of Uses and the Trust of Freeholds", L.Q.R., 82 (1966), p. 215, esp. at pp. 222 *et seq.*

Page 191. Adjustment of Statute of Wills: 34 & 35 Hy VIII, c. 5 (1543).

Page 191. Land Transfer Act, 1897: 60 & 61 Vict., c. 65.

Page 191. Wills Act, 1837: 7 Wm IV & 1 Vict., c. 26.

Page 191. Statute of Frauds, 1677: 29 Car. II, c. 3.

Page 191. Tenures Abolition Act, 1660: 12 Car. II, c. 24.

Page 192. *Doctor and Student* on reasons for putting land into uses: Dialogue II, c. 22 (ed. Muchall, 1874, p. 165, esp. at pp. 168–169).

Page 193. Legal exploitation of mechanics of Statute of Uses. See e.g. the very clear accounts in R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (3rd ed., 1966).

Page 194. *Doctor and Student* on bargains and agreements: Dialogue II, c. 22 (ed. Muchall, 1874, pp. 168–169).

Page 194. Statute of Enrolments: 27 Hy VIII, c. 16 (1536).

Page 194. Statute of Enrolments as proviso to Statute of Uses. See Bacon's "Reading on the Statute of Uses", in *The Works of Francis Bacon* (ed. J. Spedding, 1859), vol. VII, p. 432; quoted by W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), p. 455 n. 4. For earlier draft legislation regulating conveyances see *ibid.*, p. 582.

Page 195. *Doctor and Student* on covenant to stand seised: Dialogue II, c. 22 (ed. Muchall, 1874, p. 169).

Page 195. Effect of covenant to stand seised: *Sharington* v. *Strotton*, 1 Plowden, 298 (1565); *Callard* v. *Callard*, Cro. Eliz., 344; Popham, 47; 2 Anderson, 64.

Page 195. Bargain and sale combined with lease and release. See A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), pp. 177 *et seq.*; W. S. Holdsworth, *History of English Law*, vol. IV (3rd. ed.), p. 460 n. 1; *ibid.*, vol. VII (2nd ed.), pp. 360 *et seq.* The result was recognised in *Lutwich* v. *Mitton*, Cro. Jac., 604 (1620).

Page 195. Conveyance by Release Act, 1841: 4 & 5 Vict., c. 21. Real Property Act, 1845: 8 & 9 Vict., c. 106

Page 196. Appearance of legal executory interests. See Brooke, *Abridgment*, Feffements al uses 50 (30 Hy VIII, springing use); Feffements al uses 30 (6 Ed VI, shifting use). Cf. *Brent's Case* (1575), 2 Leonard, 14 esp. *per* Manwood J. at 16.

Page 196. *Scintilla juris.* See W. S. Holdsworth, *History of English Law*, vol. VII (2nd ed.), p. 138.

Page 197. *Doctor and Student* on reasons for putting land into uses: Dialogue II, c. 22 (ed. Muchall, 1874, p. 165. The question quoted in the text is at p. 169).

Page 198. Statute of Uses on wills made by testators dead or dying within its time limit: 27 Hy VIII, c. 10, s. 11.

Page 198. Statute of Wills: 32 Hy VIII, c. 1.

Page 199. Relationship between legal executory interests and rules governing legal remainders. See generally A. W. B. Simpson, *An Introduction to the History of the Land Law* (1961), p. 204; R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (3rd ed., 1966), pp. 187 *et seq.*

Pages 199–200. Bacon's "Reading on the Statute of Uses" in *The Works of Francis Bacon* (ed. J. Spedding, 1859), vol. VII, p. 395.

Page 200. Attempt to subject executory interests to the remainder rules: *Chudleigh's Case* (1595), 1 Co. Rep., 113b; Popham, 70; 1 Anderson, 309.

Page 200. *Purefoy* v. *Rogers* (1671), 2 Wms. Saunders, 380.

Page 200. Nineteenth-century legislation assimilating contingent remainders to executory interests. See above, p. 168 and note thereto.

Pages 201–202. Executory devises of terms. The first sign of recognition seems to be *Anon* (1568), 3 Dyer, 277b, with which compare *Anon* (1552), 1 Dyer, 74a. Validity accepted, and held indestructible, *Welcden* v. *Elkington* (1578), 3 Dyer, 358b; 2 Plowden, 516. Destructibility presumed, but perhaps only because particular tenant was also executrix, *Anon* (1573), 3 Dyer, 328b. Particular tenant compelled in chancery to give security "to let it go according to the devise", *Price* v. *Jones* (1584), Tothill, 122; *Cole* v. *Moore* (1607), Moore K. B., 806. Held indestructible, *Matthew Manning's Case* (1609), 8 Co. Rep., 94b; *Lampet's Case* (1612), 10 Co. Rep., 46b. The quotation from Coke comes from his report of *Manning's Case* at p. 96a.

Page 202. Inability to entail term of years. See *Leonard Lovies's Case* (1613), 10 Co. Rep., 78a; *Child* v. *Baylie* (1623), Cro. Jac., 459; W. Jones, 15; Palmer, 48, 333; *Leventhorpe* v. *Ashbie* (1635), 1 Rolle, *Abridgment*, 831.

Page 203. *Pells* v. *Brown* (1620), Cro. Jac., 590.

Page 204. Rise of the modern rule against perpetuities. See D. E. C. Yale, *Nottingham's Chancery Cases*, vol. I, Selden Soc. vol. 73, pp. lxxiii *et seq.*

Page 204. *Duke of Norfolk's Case* (1681–1685), 2 Swanston, 454; 3 Chan. Cas., 1. Steps extending the rule were: *Stephens* v. *Stephens* (1736), Cases temp. Talbot, 228, adding a minority; *Thellusson* v. *Woodford* (1805), 11 Ves. Jun., 112 settling that lives need not be connected with the property; *Cadell* v. *Palmer* (1833), 1 Clark & Finnelly, 372, allowing the 21 years in gross; Perpetuities and Accumulations Act, 1964, introducing "wait and see" and providing for "wait and see" what is in effect a quite different rule.

Pages 205–206. Statute of 1487 about trusts of chattels: 3 Hy VII, c. 4. For the restriction to dispositions in fraud of creditors, though the statute is wrongly attributed to Ric. III, see Brooke, *Abridgment*, Feffements al uses 60 (3 Mary): "*Sic est le preamble & intent del cest estatut.*"

Page 206. Statute of Uses not executing uses of leaseholds: *Question by the Lord Chancellor* (1580), 3 Dyer, 369a.

Page 206. Chancellors' suspicions of long terms. *Risden* v. *Tuffin* (1597), Tothill, 122: "No relief in equity touching leases of one thousand years, because they tend to defraud the crown." *Anon* (1599), Cary, 8: "... the Lord Egerton pronounced openly, that he would give none aid in Chancery for the maintenance of any perpetuities, nor of any lease for hundreds or thousands of years, made of lands holden *in capite*; because the latter be grounded upon fraud, and the former be fights against God."

Page 206. Gifts for religious and like purposes, but not within the ambit of mortmain. See Stat. 23 Hy VIII, c. 10 (1532). It would be particularly instructive to know the processes by which this statute, with its miscellaneous saving clauses, came into being.

Pages 206–207. "Active uses". Feoffees to raise money for some purpose. See Brooke, *Abridgment*, Feffements al uses 52 (36 Hy VIII): direction that J.N. shall take profits raises use in J.N.; direction that feoffees shall take profits and deliver them to J.N. does not raise use in J.N. Direction to convey. See *Humphreston's Case* (*Lane* v. *Cowper*) (1575), Moore K. B., 103; 2 Leonard, 216; note to 2 Dyer, 166a (also reported, but omitting discussion of the present point, in 3 Dyer, 337a; Owen, 64; Benloe, 29; Benloe with Dalison, 195). The gist is that if the feoffees are to make an estate, it would defeat the purpose to hold that there was a use in favour of the intended grantee which was executed by the statute. See also *Bettuan's Case* (1576), 4 Leonard, 22.

Page 207. Lord Nottingham on difference between use and trust. See D. E. C. Yale, "The Revival of Equitable Estates in the Seventeenth Century: an Explanation by Lord Nottingham", [1957] *Cambridge Law Journal*, p. 72. For the 1484 statute—1 Ric. III, c. 1—see pp. 184–185.

Page 208. Use upon a use. For the older view see e.g. W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), pp. 468 *et seq*. The accident arising out of the bargain and sale was emphasised by T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), pp. 599 *et seq*.; but see K. E. Digby, *An Introduction to the History of the Law of Real Property* (5th ed., 1897), pp. 368 *et seq*., esp. at pp. 371–372.

Page 208. *Tyrrel's Case* (1557), 2 Dyer, 155a; Benloe, 28; 1 Anderson, 37; Benloe with Dalison, 61.

Page 208. *Sambach* v. *Dalston* (1634), Tothill, 188; Nelson, 30. See J. E. Strathdene, "Sambach v. Dalston: an Unnoticed Report", L.Q.R., 74 (1958), p. 550.

Pags 209. Suggestion that the revenue interest depended upon the Statute of Wills rather than the Statute of Uses, and that the passive trust of freeholds was known by the end of the sixteenth century. See J. L. Barton, "The Statute of Uses and the Trust of Freeholds", L.Q.R., 82 (1966), p. 215. The matter requires more investigation.

Page 209. "Trust" as most often referring to active trusts. J. L. Barton, *ibid*., rejects the view of J. B. Ames, "The Origin of Trusts" in *Lectures on Legal History* (1913), p. 243, at p. 245, and in *Select Essays in Anglo-American Legal History*, vol. II (1908), p. 747, at p. 750, that the word "trust" had that meaning until after *Sir Moyle Finch's Case* (1600), 4 Inst., p. 85. But there does seem to be some linguistic correlation.

Pages 209–210. The settlor desiring to make a grant for re-grant to himself in tail with remainders over. See *Humphreston's Case* (1575) for which full references are given in the note to pp. 206–207. H. had suffered a recovery to the intent that the recoverors should make an estate to H. and his wife for life remainder to the eldest son in tail, remainders over. To whose use did the recoverors hold?

All the justices agreed that the recoverors must hold to their own use. In the words of Gawdy: "It hath been objected, that here the recovery being suffered to the intent that the recoverers should make an estate, ut supra, &c. that the use shall rise presently upon the recovery to him who suffered the recovery, and then the recoverers could not make livery to him; he held strongly, that the use and the possession should be adjudged in the recoverers, until they made the estates, &c. for they otherwise could not make the estates, &c. . . ."; 2 Leonard, 216 at 217. Cf. Southcote, J., *ibid.*: ". . . the recoverers shall be seised to their own uses, untill, &c.;" and Wray C. J., at 218: "... the recoverers shall be seised to their own use, untill they make the estate for that was the use implied . . . and he held, that the recoverers should be seised to their own use, untill, &c. and the recoverers ought to make the estates within convenient time, or otherwise the use should be revested again in him who suffered the recovery . . .". The report in Moore K. B., 103 has only: "... & en ceo touts les Justices argue que ils fueront seisy a lour use demesne per le entent del recovery, quia auterment ils ne puissoient droituralment faire estate al ceti que suffer le recovery arrear, come ils doient faire." The note in Dyer, 166a makes the same point, but adds that the estate must be made in convenient time or a use would be raised in H. In *Bettuan's Case* (1576), 4 Leonard, 22 a fine was levied to the intent that the conusees should make an estate to whomever the conusor should name, with a proviso that they should not be seised to any other use. "And the opinion of all the Justices of the Kings Bench was, that . . . the conusees are seized to their own use until the conusor hath made nomination; and if he dieth without any nomination, then the use should vest in his heir." The rest of the report shows again what importance was attached to the estate being made by the conusees.

III. OBLIGATIONS

10—*Old Personal Actions*

I

The most recent and comprehensive treatment of these actions is C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949). See also the posthumously published lectures of F. W. Maitland, *The Forms of Action at Common Law* (published with *Equity*, 1909; separately, 1936); and F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 149 *et seq.*, 184 *et seq.*, and S. F. C. Milsom's discussion in the new introduction to the reissue of 1968.

II

Page 212. Evolution of *praecipe* and *ostensurus quare* writs. See R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill*, Selden Soc. vol. 77.

Page 212. Statute of Gloucester, 1278: Stat. 6 Ed. I, c. 8. The chapter in terms applies only to actions of trespass *de bonis asportatis*, requiring a declaration of the value of the goods; but it is understood to have affirmed a general rule. The provision may have been needed because in trespass the damages would be at large.

Page 213. Covenant in local courts. See the important note by F. W. Maitland in *The Court Baron*, Selden Soc. vol. 4, p. 107, at p. 115. See also R. L. Henry, *Contracts in the Local Courts of Medieval England* (1926).

Page 214. Provisions for trial of covenant actions in Statute of Wales: Stat. 12 Ed. I, c. 10.

Pages 214–215. History of the words "covenant", "contract". Milsom, "Reason in the Development of the Common Law", L.Q.R., 81 (1965), p. 496, at p. 500.

Page 216. *Doctor and Student* on the paid bond. See Dialogue I, c. 12 (ed. Muchall, 1874, pp. 37–38).

Page 216. Conditional bonds. S. E. Thorne, "Tudor Social Transformation and Legal Change", *New York University Law Review*, 26 (1951), p. 10, at p. 19. A. W. B. Simpson, "The Penal Bond with Conditional Defeasance", L.Q.R., 82 (1966), p. 392.

Page 217. Extension of process by *capias* and outlawry: Stat. 25 Ed. III, st. 5, c. 17.

Page 219. Statute of Wales on the vendor of land making a second sale: Stat. 12 Ed. I, c. 10.

Page 220. *Non tenetur*. For the early and comprehensive form of the general issue in debt-detinue see S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at p. 266.

Pages 221–223. Separation of detinue from debt. Milsom, "Law and Fact in Legal Development", *University of Toronto Law Journal*, 17 (1967), p. 1, at p. 6.

Pages 221–222. "Debt" in *Glanvill*. See X, 3, 13 (ed. G. D. G. Hall, pp. 117, 128).

Page 222. Debt and detinue in plea rolls, "*de placito debiti*". YBB. 17 Ed. III (R.S.), p. 141; Hil. 14 Hy IV, pl. 37, f. 27d, at f. 28d.

Page 222. Debt and detinue in registers and commentaries. *Registrum Omnium Brevium* (ed. 1634), f. 139; *La Vieux Natura Brevium* (ed. 1584), ff. 60d, 63; *Le Novel Natura Brevium* (ed. 1588), ff. 119, 138.

Page 222. Specific object lent and accidentally destroyed. *Bracton*, f. 99; *Britton*, I, c. 29, 3 (ed. Nichols, vol. I, p. 157).

Page 223. Debt on a series of transactions. G. D. G. Hall, "An Assize Book of the Seventeenth Century", *American Journal of Legal History*, 7 (1963), p. 228, at pp. 236–238; S. F. C. Milsom, "Account Stated in the Action of Debt", L.Q.R., 82 (1966), p. 534.

Page 224. Actions claiming 39s. 11½d. and actions claiming 40s. H. M. Cam, *The Hundred and the Hundred Rolls* (1930), p. 182; S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at pp. 258 *et seq.* In 1601 an attempt was made to prevent evasion in the superior courts; Stat. 43 Eliz., c. 6.

Page 225. Frequency of wager or jury trial in debt. S. F. C. Milsom, *ibid.*, at p. 266.

Page 225. Pleading payment in debt. S. F. C. Milsom, *ibid.*, and "Law and Fact in Legal Development", *University of Toronto Law Journal*, 17 (1967), p. 1, at pp. 4, 16.

Page 226. *Pinnel's Case*, 5 Co. Rep., 117a. For the situation emerging on examination of one proposing to make his law see *Anon* (1588), 4 Leonard, 81.

Page 227. Early attempts to oust wager of law. S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at p. 261.

Page 228. Buyer's claim for his goods. *Ibid.*, p. 273.

Page 229. Borrower of goods pleading incapacity. See e.g. YB. 20 & 21 Ed. I (R.S.), p. 189.

Page 229. Borrower pleading accidental destruction. *Glanvill*, X, 13 (ed. Hall, p. 128); *Bracton*, f. 99; *Britton*, I, c. 29, 3 (ed. Nichols, vol. I, p. 157). For cases see *Brinkburn Cartulary*, Surtees Soc., p. 105; YBB. 8 Ed. II, Selden Soc., vol. 41, p. 136; 12 & 13 Ed. III (R.S.), p. 245; YB. 29 Lib. Ass., pl. 28, f. 163.

Pages 229–230. Liability for escaped prisoner. YB. Hil. 33 Hy VI, pl. 3, f. 1; E. G. M. Fletcher, *Carrier's Liability* (1932), p. 253.

Page 230. Relationship between bailee's liability and his right to sue. *The Winkfield*, [1902] P. 42; F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 170 *et seq.*; O. W. Holmes, *The Common Law*, Lecture V. The idea that the rights against third parties of a possessor depend upon his liability to the "owner" is elegant, and had been widely accepted before *The Winkfield*. It was expressly applied to the bailee in *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B., 422; and it provides the easiest explanation of the much-discussed judgment of Patteson, J. in *Bridges* v. *Hawkesworth* (1851), 21 L.J. Q.B. (N.S.), 75; 15 Jurist, 1079.

Page 231. *Southcote's Case* (1601), Cro. Eliz. 815; 4 Co. Rep. 83b. For the liability in case, see *Coggs* v. *Bernard* (1703), 2 Ld. Raymond, 909.

Pages 231–232. Sense of *non detinet* for bailee and finder respectively. See pp. 326–327 and note to p. 327.

Page 232. *De re adirata*. J. B. Ames, *Lectures on Legal History* (1913), p. 80; *Novae Narrationes*, Selden Soc. vol. 80, p. clxxviii; *Bracton's Note Book*, pl. 824.

Page 233. Year book note of 1294. YB. 21 & 22 Ed. I (R.S.), p. 467.

Pages 233–234. *Devenit ad manus*, count in trover, "new found haliday". YBB. Trin. 29 Ed. III, f. 38d; Trin. 33 Hy VI, pl. 12, f. 26d.

Page 235. Account. For the medieval action see generally T. F. T. Plucknett, *Legislation of Edward* I (1949), p. 151; *The Medieval Bailiff* (1954), p. 22; N. Denholm-Young, *Seignorial Administration* (1937), pp. 120 *et seq.*, esp. p. 154.

Page 236. "Equity" of accounting. YBB. 12 Ed. II, Selden Soc. vol. 70, p. 146, at p. 147; Hil. 19 Ed. II, p. 655, at p. 656.

Page 236. Power of auditors to imprison accountant. Stat. 13 Ed. I, c. 11. For the change in the fourteenth century see S. F. C. Milsom, "Account Stated in the Action of Debt", L.Q.R., 82 (1966), p. 534.

Page 237. Fictitious allegation of account. S. F. C. Milsom, *ibid.*; and Stat. 5 Hy IV, c. 8, providing for examination of plaintiffs' attorneys.

Page 237. Accountant found in credit. YBB. Hil. 19 Ed. II, p. 655; Pasch. 29 Ed. III, f. 25d; Mich. 10 Hy VI, pl. 84, f. 24d; 14 Hy VI, pl. 71, f. 24d; Mich. 38 Hy VI, pl. 14, f. 5d.

Page 239. Account against guardian in socage. Stat. 52 Hy III, c. 17.

Page 240. Account against receiver. *Novae Narrationes*, Selden Soc. vol. 80, p. clxxx; T. F. T. Plucknett, *The Medieval Bailiff* (1954), p. 24, n. 2; S. J. Stoljar, "The Transformations of Account", L.Q.R., 80 (1964), p. 203.

Pages 241–242. General issue and wager in account. S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at p. 261.

11—*The Rise of Trespass and Case*

I

The view propounded in this chapter was stated at length in S. F. C. Milsom, "Trespass from Henry III to Edward III", L.Q.R., 74 (1958), pp. 195, 407, 561; esp. at pp. 583–590 (cited in the rest of this section of notes as L.Q.R., 74 (1958)); and more shortly in "Reason in the Development of the Common Law", L.Q.R., 81 (1965), p. 496, esp. at pp. 501–505. See also G. D. G. Hall, "Some Early Writs of 'Trespass' ", L.Q.R., 73 (1957), p. 65; and S. F. C. Milsom, "Not Doing is No Trespass", [1954] *Cambridge Law Journal*, p. 105.

The older views are discussed in C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), pp. 44, 66. Case was seen as having grown out of or around trespass *vi et armis*, and trespass as having grown out of or around some earlier entity.

The view that trespass grew out of the appeal of felony was held by F. W. Maitland, *The Forms of Action* (with *Equity*, 1909; separate, 1936), pp. 48–50; "History of the Register of Original Writs", *Collected Papers* (1911), vol. II, at p. 165; and F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, p. 526. It was also held in general terms by J. B. Ames, *Lectures in Legal History* (1913), p. 56; and by O. W. Holmes, *The Common Law* (ed. 1881), pp. 3, 100. An essentially procedural connection is likely. See H. G. Richardson and G. O. Sayles, *Select Cases of Procedure without Writ*, Selden Soc. vol. 60, p. cviii. For the view that trespass derived from the assize of novel disseisin, see G. E. Woodbine, "The Origins of the Action of Trespass", *Yale Law Journal*, 33 (1924), p. 799; 34 (1925), p. 343. For the local origin of trespass, see T. F. T. Plucknett, *Concise History of the Common Law* (5th ed., 1956), pp. 366–67, 370.

The view that case derived from trespass through the *in consimili casu* clause of Stat. Westminster II, 13 Ed. I, c. 24, seems to have been prevalent at least since the sixteenth century; and it was guardedly accepted by F. W. Maitland, *The Forms of Action* (1936), p. 51. It was destroyed by T. F. T. Plucknett, "Case and the Statute of Westminster II", *Columbia Law Review*, 31 (1931), p. 778. This article was attacked by W. S. Holdsworth in a note in L.Q.R., 47 (1931), p. 334; and by P. A. Landon, "The Action on the Case and the Statute of Westminster II", L.Q.R., 52 (1936), p. 68. See Plucknett's answer to this last, "Case and Westminster II", *ibid.*, p. 220. It was then suggested that although statute had played no part, case was derived from trespass by a common law development. See E. J. Dix, "The Origins of the Action of Trespass on the Case", *Yale Law Journal*, 46 (1937), p. 1142. This view was adopted by Mr Fifoot in *History and Sources of the Common Law* (already cited).

Much valuable material about actions on the case is collected in A. K. R. Kiralfy, *The Action on the Case* (1951).

For the later relationship between the actions, see M. J. Prichard, "Trespass, Case and the Rule in *Williams* v. *Holland*", [1964] *Cambridge Law Journal*, p. 234.

II

Page 245. Sheriffs not to hear pleas of the crown. *Magna Carta*, 1215, c. 24.

Page 245. Glanvill on breach of the king's peace. *Glanvill*, I, 2; XIV, 8 (ed. G. D. G. Hall, pp. 3, 177).

Page 246. Trespass in the register. *Registrum Omnium Brevium* (ed. 1634), f. 92.

Page 247. Statute of Gloucester and trespass. Stat. 6 Ed. I, c. 8. See S. F. C. Milsom, L.Q.R., 74 (1958), esp. at pp. 575–578.

Page 247. Awkward jury of 1304 finding defendants guilty but wrong not *vi et armis*. YB. 32 & 33 Ed. I (R.S.), p. 259.

Page 248. Demise of the crown. S. F. C. Milsom, L.Q.R., 74 (1958), p. 574; Stat. 2 Ed. III, c. 13; petitions described in G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. IV, Selden Soc. vol. 74, p. xv; YB. Hil. 1 Ed. III, pl. 10, f. 2.

Page 248. *Vi et armis scilicet gladiis arcubus et segittis*. Milsom, L.Q.R., 74 (1958), p. 222. For the case of the tun of wine assailed with these weapons, see YB. 10 Ed. II, Selden Soc. vol. 54, p. 140.

Page 249. Trespass *vi et armis* against smiths, etc. S. F. C. Milsom, L.Q.R., 74 (1958), at pp. 220–221, 562–567, 585–587.

Page 250. *Farrier's Case* (1372). YB. Trin. 46 Ed. III, pl. 19, f. 19.

Page 251. Cattle trespass. Glanville Williams, *Liability for Animals* (1939), p. 127; S. F. C. Milsom, L.Q.R., 74 (1958), p. 202. For the proposal in 1953 see Cmd. 8746.

Page 251. Abduction and enticement. S. F. C. Milsom, L.Q.R., 74 (1958), pp. 210–212, 586. The tort of enticement was "invented" in 1745: *Winsmore* v. *Greenbank*, Willes 577. The note in the register about abduction of apprentices is *Registrum Omnium Brevium* (ed. 1634), f. 109.

Pages 251–252. Fire. S. F. C. Milsom, L.Q.R., 74 (1958), pp. 213–215, 586–587. The case of 1368 is YB. 42 Lib. Ass., pl. 9, f. 259d. On the liability of tenant at will, see YB. Mich. 48 Ed. III, pl. 8, f. 25.

Page 253. Justification in trespass. The case of the epileptic beaten by way of treatment is YB. 22 Lib. Ass., pl. 56, f. 98 (1348). The case of the fire-break is KB 26/201, m. 7d; cf. Dyer, 36b; *Mouse's Case* (1608), 12 Co. Rep., 63. See generally S. F. C. Milsom, L.Q.R., 74 (1958), pp. 578–583.

Pages 254–256. Accident in trespass. Milsom, *ibid.*, pp. 582–583; "Law and Fact in Legal Development", *University of Toronto Law Journal*, 17 (1967), pp. 3–4, 10–13. The case of the accidental fire in 1290 is G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. I, Selden Soc. vol. 55, p. 181. For the advice given by teachers about 1290 see *Brevia Placitata*, Selden Soc. vol. 66,

p. 207; YB. 21 & 22 Ed. I (R.S.), p. 29. The late fourteenth-century cases about fire are YBB. 42 Lib. Ass., pl. 9, f. 259d (1368); Mich. 48 Ed. III, pl. 8, f. 25 (1374).

Page 256. Later cases about accident. The two year book discussions are YBB. Mich. 6 Ed. IV, pl. 18, f. 7; Trin. 21 Hy VII, pl. 5, f. 27. The case of 1695 is *Gibbons* v. *Pepper*, 1 Ld. Raymond, 38; 2 Salkeld, 637; 4 Mod., 405.

Page 258. Repair of river walls. S. F. C. Milsom, L.Q.R., 74 (1958), pp. 430–434. The earliest known entry is in 1273, CP 40/2A, m. 23d.

Pages 258–259. Selling in fraud of a market. Milsom, L.Q.R., 74 (1958), pp. 421–423. The 1241 case is KB 26/121, mm. 27, 29.

Page 261. Frequency of actions on the case. The figures for 1564 are taken from the common pleas roll for Hilary term, CP 40/1215, and CP 40/1216.

Pages 261–262. General and special writs of trespass. For wrongs concerning markets and other franchises see S. F. C. Milsom, L.Q.R., 74 (1958), pp. 417–428.

Page 262. Estray. Later difficulty of classifying the franchise-owner's action, *ibid.*, p. 418.

Page 263. Extension of *capias* in 1352. Stat. 25 Ed. III, stat. 5, c. 17. Its extension to case in 1504, Stat. 19 Hy VII, c. 9.

Page 264. Trespass and case not separated in the register: *Registrum Omnium Brevium* (ed. 1634), ff. 92–112. Separated in Fitzherbert's *Le Novel Natura Brevium*, ff. 85, 92. Note the difficulty of the latter in accommodating both viscontiel and returnable writs and trespass and case, *ibid.*, f. 86H.

Page 264. Statute of 1504: Stat. 19 Hy VII, c. 9.

Pages 264–265. Coke's use of "trespass" and "trespasser". See e. g. 10 Co. Rep. 76a; 2 Inst. 170. The quotation is from *Pinchon's Case*, 9 Co. Rep. 86b, at 89a.

Pages 264–265. "Tort". As catch-word for replication *de injuria* see *Doctrina Placitandi* (1677), p. 343. Blackstone, *Commentaries* (5th ed., 1773), Bk. 3, p. 117.

Page 266. "We must keep up the boundaries of actions . . .". *Reynolds* v. *Clarke* (1725), 1 Strange, 634 at 635.

Page 266. The supposed statutory origin of case: Stat. 13 Ed. I, c. 24, the *in consimili casu* clause. The myth is both old and durable. It still has many believers despite the refutation by T. F. T. Plucknett in *Columbia Law Review*, 31 (1931), p. 778.

Page 267. *Scienter* and incitement of animals. S. F. C. Milsom, L.Q.R., 74 (1958), pp. 215–218.

Page 267. Classification of *scienter* actions in sixteenth and seventeenth centuries. Rastell, *Entrees* (ed. 1574), f. 558: *Trespas per misfesans de chien*, cross-reference under *Accion sur le case* at f. 3; H. Winch, *Le Beau-Pledeur. A Book of Entries*, (1680), f. 1118.

Page 268. Scope of Not Guilty in trespass. *Gibbons* v. *Pepper* (1695), 1 Ld. Raymond, 38; 2 Salkeld, 637; 4 Mod., 405.

Page 268. Horse bolting in Lincoln's Inn Fields. *Mitchil* v. *Alestree* (1676), 1 Ventris, 295; 2 Lev., 172; 3 Keb., 650. The count is given in R. Brownlow *Latine Redivivus. A Book of Entries* (1693), p. 484; it is interestingly placed under "Trespass" rather than "Action sur le Case"; but of course there is no *vi et armis* or *contra pacem*. The accident happened in Little Lincoln's Inn Fields, now New Square, where the defendant was training "*duas equas feroces & minime domitas in trahendo currum . . . improvide incaute & absque debita consideratione ineptidudinis loci illius . . .*".

Page 269. *Scott* v. *Shepherd* (1773), 2 W. Blackstone, 892.

12—*Growth of the Modern Law of Contract*

I

The view propounded in this chapter, especially for the sixteenth century and later, is tentative and certainly incomplete. To the extent that it differs from earlier accounts, it is based partly upon samplings taken from the plea rolls down to the end of the sixteenth century. For the sixteenth century, much use has been made of H. K. Lücke, "Slade's Case and the Origin of the Common Counts", L.Q.R., 81 (1965), pp. 422, 539; 82 (1966), p. 81. For the fourteenth and fifteenth centuries, see S. F. C. Milsom, "Reason in the Development of the Common Law", L.Q.R., 81 (1965), p. 496, esp. at pp. 505–513.

For earlier views see C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), pp. 330 *et seq.*; W. T. Barbour, *History of Contract in Early English Equity* (1914); J. B. Ames, *Lectures on Legal History* (1913), pp. 129 *et seq.* For what was intended to be a clearer statement of Ames's view, incorporating modern ideas on the nature of trespass, see S. F. C. Milsom, "Not Doing is No Trespass", [1954] *Cambridge Law Journal*, p. 105, esp. at pp. 108–113. The basic proposition there stated still seems more nearly true than false; but the statement was over-simplified.

Except for quasi-contract, for which see R. M. Jackson, *History of Quasi-Contract in English Law* (1936), and the works of Mr Fifoot and Mr Lücke already mentioned, very little has been done on the period since the seventeenth century. For mercantile matters, here omitted in the interest of simplicity, see C. H. S. Fifoot, *Lord Mansfield* (1936); J. M. Holden, *The History of Negotiable Instruments in English Law* (1955); and H. Potter, *Historical Introduction to English Law* (ed. A. K. R. Kiralfy, 1958), pp. 205–210.

II

Pages 271–272. *Humber Ferry Case.* YB. 22 Lib. Ass., pl. 41, f. 94; *Bulletin of Institute of Historical Research*, 13 (1936), p. 35. A translation of the report is in T. F. T. Plucknett, *Concise History of the Common Law* (5th ed. 1956), p. 470; the variant readings there given in n. 1 reflect the true sense of the report.

Page 272. The modern statute which raised problems of classification was that fixing the minimum sums to be recovered for an action in the high court to carry high court costs: Stat. 9 & 10 Vict., c. 95, s. 129, and its successors.

Page 273. Public duty of ferrymen. See e.g. *Public Works in Medieval Law*, vol. II, Selden Soc. vol. 40, pp. 306–309.

Page 274. Surgeons in London. *Calendar of Early Mayor's Court Rolls, 1298–1307*, p. 81; *Calendar of Plea and Memoranda Rolls, 1364–1381*, p. 236;

Calendar of Letter Books, Letter Book G, p. 236; H. T. Riley, *Memorials of London and London Life* (1868), p. 337.

Page 274. Surgeons in royal courts. See generally S. F. C. Milsom, "Trespass from Henry III to Edward III", L.Q.R., 74 (1958), pp. 571–572 and references there given. The earliest year book case is YB. Hil. 48 Ed. III, pl. 11, f. 6; record in A. K. R. Kiralfy, *The Action on the Case* (1951), p. 225.

Page 275. Horse doctor sued in 1369. YB. Mich 43 Ed. III, pl. 38, f. 33.

Pages 275–276. Actions on warranties. See S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257, at p. 278. The reference to *Glanvill* is X, 14 (ed. G. D. G. Hall, p. 129). The earliest reported case on a warranty of quality in common form is YB. 11 Ric. II (A.F.), p. 4. The precedents in the register are *Registrum Omnium Brevium* (ed. 1634), ff. 108, 111.

Page 277. "Invention" of tort of deceit in the eighteenth century. *Pasley* v. *Freeman* (1789), 3 T.R., 51.

Page 279. Early non-feasance cases. Entries of 1370 are CP 40/440, mm. 407d, 630d. The report of 1400 is YB. Mich. 2 Hy IV, pl. 9, f. 3d. Cf. YBB. Mich. 11 Hy IV, pl. 60, f. 33; Hil. 3 Hy VI, pl. 33, f. 36d.

Pages 279–280. Nature of early non-feasance cases: agreements for services or conveyance of land. This observation is based upon the following rolls: CP 40/440; CP 40/488; CP 40/521; KB 27/533; KB 27/572; CP 40/574; CP 40/632.

Page 280. Precedents for non-feasance in the register. *Registrum Omnium Brevium* (ed. 1634), ff. 109d (*De cruce lapidea facienda*), 112 (*De transgressione quia non posuit in seisinam*).

Page 280. Statutes of Labourers: Stat. 23 Ed. III; Stat. 25 Ed. III, st. 2. Reference to the statutes is made in the two earliest non-feasance reports, YBB. Mich. 2 Hy IV, pl. 9, f. 3d; Mich. 11 Hy IV, pl. 60, f. 33. See also the references in S. F. C. Milsom, L.Q.R., 81 (1965), p. 508, n. 25 (already mentioned). For a "plea of trespass" for refusal to work contrary to a city ordinance see *Calendar of Early Mayor's Court Rolls of the City of London, 1298–1307*, p. 106 (1301).

Page 281. The case of 1425. YB. Hil. 3 Hy VI, pl. 33, f. 36d.

Pages 282–285. *Doige's Case* (1442). YB. Trin. 20 Hy VI, pl. 4, f. 34; A. K. R. Kiralfy, *The Action on the Case* (1951), p. 227.

Pages 283–284. The case of 1401 about agreement for customary tenancy is YB. Mich. 3 Hy IV, pl. 12, f. 3. The case in London in 1382: *Calendar of Select Pleas and Memoranda of the City of London, 1381–1412*, p. 23. The case of entailed land sold as fee simple: *Calendar of Plea and Memoranda Rolls, 1364–1381*, p. 126.

Page 286. Remedy given for pure non-feasance. YBB. Mich. 20 Hy VII, pl. 18, f. 8d (also Keilwey, 69, 77); Mich. 21 Hy VII, pl. 66, f. 41.

Page 287. The common pleas rolls for Trinity terms, 1404 and 1501, are CP 40/574 and CP 40/957. The common pleas roll for Hilary term, 1564 is CP 40/1215 and CP 40/1216. The king's bench roll for Trinity term, 1557 is KB 27/1183.

Page 288. Possibility that early sixteenth-century writs for non-feasance were

taken from old precedents. See the precedents, cited in note to p. 280, in *Registrum Omnium Brevium* (ed. 1634), ff. 109d, 112.

Page 288. "If I covenant with a carpenter . . . and without payment of money in this case, no remedy", Keilwey, 77 at 78.

Page 289. Action for breach of promise, 1549. Easter term, common pleas, CP 40/1140, m. 85d.

Page 290. John Denne and Richard Fenne. See e.g. KB 27/1329 (king's bench, Easter term, 1594), mm. 305d, 306, 310. Like Doo and Roo they were familiar figures in the city courts; *London Possessory Assizes*, London Record Soc. vol. I, pp. 133 n. 2, 134 n. 4, 135 n. 3, 137 n. 4.

Page 292. Coke, ". . . it is termed *trespass* . . .", *Pinchon's Case* (1611), 9 Co. Rep. 86b at 89a. "For here no debt is to be recovered . . ." *Anon* (1574), 2 Leonard 221.

Pages 292–293. Examination and admonition of one waging his law. The terms in which this is mentioned in Coke's report of *Slade's Case*, 4 Co. Rep., 91a at 95a, suggest that it may be recent. The earliest cases noted are *Anon* (1588), 3 Leonard, 212; *Sanderson* v. *Ekins* (1590), *ibid.*, 258; and *Anon* (1588), 4 Leonard, 81. The first two are mentioned by H. K. Lücke, L.Q.R., 81 (1965), p. 425, n. 22 (already mentioned). Both disclose an *insimul computaverunt* situation; and it is possible that the whole process of examination had grown out of that provided against false surmises of account by Stat. 5 Hy IV, c. 8 (see pp. 237–238). In the third the examination directly disclosed a *Pinnel's Case* problem. Cf. Milsom, "Law and Fact in Legal Development", *University of Toronto Law Journal*, 17 (1967), p. 1, at p. 4 (written in ignorance of this case).

Page 293. *Concessit solvere*. See G. D. G. Hall, "An Assize Book of the Seventeenth Century", *American Journal of Legal History*, 7 (1963), p. 228, at p. 236; S. F. C. Milsom, "Account Stated in the Action of Debt", L.Q.R., 82 (1966), p. 534.

Page 294. Wagers; insurance contracts. Plea roll examples are: CP 40/1353, m. 627d (common pleas, Hilary term, 1578, apparently a bet); KB 27/1329, mm. 444, 476 (king's bench, Easter term, 1594, apparently bets); KB 27/1252, mm. 27, 158 (king's bench, Hilary term, 1575, marine insurance); KB 27/1329, m. 503 (king's bench, Easter term, 1594, marine insurance).

Page 295. *Slade's Case* (1602), 4 Co. Rep. 91a.

Page 296. Mythical derivation of case from trespass *vi et armis*. The principal literature is listed in the first note to the preceding chapter. For the particular application see H. K. Lücke, L.Q.R., 81 (1965), p. 422, at pp. 427–428.

Page 297. Wager of law as due process. See e.g. *Slade's Case*, 4 Co. Rep., 91a at 92b–93a: ". . . the maintenance of this action takes away the defendant's benefit of wager of law . . . which is his birthright. For peradventure the defendant has paid or satisfied the plaintiff in private betwixt them . . . and therefore it would be mischievous if he should not wage his law in such case."

Page 299. Claim in common pleas in 1549. CP 40/1140, m. 535d (Easter term); the rendering in the text has been slightly shortened in translation.

Page 300. *Slade's Case* (1602), 4 Co. Rep., 91a. This point appears only from the report of Moore K. B., 667 at 668.

Page 301. Report of 1573 expressly stating difference of practice between common pleas and king's bench: *Edwards* v. *Burre*, Dalison, 104.

Page 301. "Every contract executory is an *assumpsit* in itself" and similar statements. See A. W. B. Simpson, "The Place of Slade's Case in the History of Contract", L.Q.R., 74 (1958), p. 381, at p. 391.

Page 302. Elizabethan court of exchequer chamber. Stats. 27 Eliz., c. 8 (1585); 31 Eliz., c. 1 (1589).

Page 302. Doubt whether exchequer chamber could attack king's bench practice. See A. W. B. Simpson, L.Q.R., 74 (1958), p. 381, esp. at pp. 388 *et seq.*

Page 302. Evidence about *indebitatus assumpsit* in plea rolls about 1595. There are many cases in KB 27/1329 (king's bench, Easter term, 1594). A curiously high proportion are on the dorses of membranes; and this may suggest that it was a well-known short standard form. There is also a fair number in CP 40/1546; CP 40/1547; CP 40/1548; and CP 40/1549 (common pleas, Easter term, 1595).

Page 303. *Slade's Case* (1602), 4 Co. Rep., 91a; Yelverton, 21; Moore K.B., 433, 667. The pleadings are set out at the beginning of Coke's report. For the claim of 1549 see p. 299.

Page 304. "Every contract executory imports in itself an *assumpsit*", 4 Co. Rep., 91a at 94a.

Page 304. Damages not only "for the special loss (if any be) which he had, but also for the whole debt . . .", 4 Co. Rep., 91a at 94b.

Page 305. Formula for wager of law by executors in London. See *Borough Customs*, vol. I, Selden Soc. vol. 18, pp. 210–211. On suing in the exchequer, see YBB. 20 Ed. III (R.S.), vol. I, p. 17; Trin. 11 Hy VII, pl. 9, f. 26d; Trin. 27 Hy VIII, pl. 21, f. 23.

Page 305. *Pinchon's Case* (1611), 9 Co. Rep., 86b.

Page 306. *Slade's Case* (1602), 4 Co. Rep., 91a.

Page 306. *Concessit solvere*. See p. 293 and note thereto.

Page 306. Disapproval in *Slade's Case* of general *indebitatus* form. Moore K.B., 667 at 668.

Page 307. General *indebitatus* allegation hiding debt not answerable by wager. See especially *Read* v. *Johnson* (1590), 1 Leonard, 155–156. For the same objection to the *concessit solvere*, see G. D. G. Hall, "An Assize Book of the Seventeenth Century", *American Journal of Legal History*, 7 (1963), p. 228, at p. 237.

Page 307. The common counts. C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), p. 368; Lücke, L.Q.R., 81 (1965), pp. 422, 539, and 82 (1966), p. 81 (both already mentioned).

Pages 307–308. Claims for customary dues; special verdict denying actual promise to pay. *City of London* v. *Gorry* (1676), 2 Levinz, 174; 3 Keble, 677; 1 Ventris, 298.

Page 308. Quasi-contract. See C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), p. 363; R. M. Jackson. *History of Quasi-Contract in English Law* (1936).

Page 308. Quasi-contract; profits of office taken; special verdict denying actual promise. *Arris* v. *Stukely* (1677), 2 Mod., 260.

Page 309. Statutes enabling corporations to plead general issue. See e.g. Stat. 11 Geo. I, c. 30, s. 43. I am indebted to Mr A. M. Rowland for drawing my attention to this.

Pages 309–310. Mansfield's attempt to present consideration as a matter of evidence. See *Pillans* v. *Van Mierop* (1765), 3 Burrow, 1664; overruled by *Rann* v. *Hughes* (1778), 4 Brown P.C., 27; 7 T.R., 350 n. A legislative movement towards Lord Mansfield's position is discernible in some U.S. jurisdictions. The common law movement towards binding the gratuitous promisor is of course in the doctrine of promissory estoppel.

Page 313. The rules about consideration moving from the plaintiff and about past consideration. See S. F. C. Milsom, "Not Doing is No Trespass", [1954] *Cambridge Law Journal*, p. 105, at p. 110. The case of the warranty in 1490 is YB. Trin. 5 Hy VII, pl. 7, f. 41d. The discussion in *Doctor and Student* is Dialogue 2, c. 24 (ed. Muchall, 1874, p. 174; the specific reference to past consideration is at p. 179).

Page 315. *Lampleigh* v. *Braithwait* (1616), Hobart, 105.

Page 315. Lord Mansfield's attempt to make moral obligation a sufficient consideration. *Atkins* v. *Hill* (1775), 1 Cowper, 284; *Trueman* v. *Fenton* (1777), 2 Cowper, 544; *Hawkes* v. *Saunders* (1782), 1 Cowper, 289.

13—*Rise of the Modern Law of Torts*

I

Modern general accounts are in C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949); A. K. R. Kiralfy, *The Action on the Case* (1951).

Deceit has been supposed to enjoy a very limited past, and there is no general account except that in Kiralfy, *op. cit.*, p. 73. For writings on conversion, defamation and negligence, see respectively the notes to pp. 321, 332 and 344, below.

II

Page 317. Deceit identified with abuse of legal process. See e.g. W. S. Holdsworth, *History of English Law*, vol. II (4th ed.), p. 366; vol. III (5th ed.), p. 407. Cf. Milsom, "Reason in the Development of the Common Law", L.Q.R., 81 (1965), p. 496, at pp. 510–511. For a case in 1280 of a woman induced to part with her land by a promise of marriage, see G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. I, Selden Soc. vol. 55, p. 65; vol. II, Selden Soc. vol. 57, p. 20; vol. III, Selden Soc. vol. 58, p. xcix; vol, IV, Selden Soc. vol, 74, p. lxx; H. G. Richardson and G. O. Sayles, *Select Cases of Procedure without Writ*, Selden Soc. vol. 60, p. xlvii, n. 2. Cf. *Brevia Placitata*, Selden Soc. vol. 66, p. 122; *Casus Placitorum*, Selden Soc. vol. 69, p. 30/3; S. F. C. Milsom, *Novae Narrationes*, Selden Soc. vol. 80, p. cxxxii, n. 4. For a very early example of such inducement, see *Curia Regis Rolls*, vol. I, pp. 388–389. Because land was involved, it was inevitable that such cases came to royal courts; and a writ had to be devised, the writ of entry *causa matrimonii praelocuti*. Deceits involving chattels would hardly ever concern the king. For an instructive example see G. O. Sayles, *op. cit.*, vol. III, Selden Soc. vol. 58, p. 179.

Page 317. Deceit in local jurisdictions; "criminal" and "civil" elements. See e.g. *Calendar of Early Mayor's Court Rolls of the City of London, 1298–1307*, pp. 56 ("prosecution" for exposing for sale putrid veal, 1299–1300); 258 (probably "civil action" for selling putrid fish, 1307); 154 ("plea of trespass" for selling false and counterfeit lambskins, 1303–4); 216 ("plea of trespass" for selling false ashes of woad, 1305).

Page 317. Deceit in local jurisdictions; harnessing punitive element to victim's interest. See e.g. *Calendar of Plea and Memoranda Rolls of the City of London, 1364–1381*, p. 126 (1371); *ibid., 1381–1412*, p. 23 (1382).

Pages 317–318. For warranties of quality etc. in royal courts, see p. 275; and see S. F. C. Milsom, "Sale of Goods in the Fifteenth Century", L.Q.R., 77 (1961), p. 257 at p. 278.

Pages 318–319. Cheating at dice or cards. See Fitzherbert, *Natura Brevium*, f. 95D; *Baxter* v. *Woodyard and Orbet*, Moore K. B., 776; *Anon*, Rolle's *Abridgment*, vol. I, p. 100, pl. 9.

Page 319. The case of impersonation of intended payee is *Thomson* v. *Gardner* (1597), Moore K.B. 538. Cf. *Baily* v. *Merrell* (1615), 3 Bulstrode, 94 (harm to horses resulting from misstatement of load; opinion unfavourable to action).

Page 319. Sale without title. See YB. 42 Lib. Ass., pl. 8, f. 259d; KB 27/731, m. 82 (1444; printed L.Q.R., 77 (1961), p. 282); *Dale's Case* (1585), Cro. Eliz. 44; *Ruswell* v. *Vaughan* (1601), Gouldsborough, 123; *Roswel* v. *Vaughan* (1607), Cro. Jac. 196. For London cases see *Calendar of Plea and Memoranda Rolls, 1323–1364*, p. 260; *ibid., 1364–1381*, p. 126.

Page 320. Cat sold as rabbit. CP 40/632, m. 476d (1419; printed L.Q.R., 77 (1961), p. 279, where year book references are also given).

Pages 320–321. *Chandelor* v. *Lopus* (1603), Cro. Jac., 4. The report of the second action is printed in *Harvard Law Review*, 8 (1894–95), pp. 282–284. It is evidently the complaint in this second action that is printed in A. K. R. Kiralfy, *The Action on the Case* (1951), p. 220. The later mention is in *Southern* v. *How* (1618), Cro. Jac., 468 at 469.

Page 321. *Pasley* v. *Freeman* (1789), 3 T. R., 51. See the treatment of this case in P. H. Winfield, *Text Book of the Law of Tort* (5th ed., 1950, the last by the author himself), pp. 15, 17, 379 n. (f.), 379–380.

Page 321. Conversion. See generally J. B. Ames, *Lectures on Legal History* (1913), p. 80; S. F. C. Milsom, "Not Doing is No Trespass", [1954] *Cambridge Law Journal*, p. 105, at p. 113; A. W. B. Simpson, "The Introduction of the Action on the Case for Conversion", L.Q.R., 75 (1959), p. 364.

Page 322. Early uses of the words "convert", "conversion". See *Bracton's Note Book*, pl. 687; *Bracton*, f. 91d; YBB. Mich. 11 Hy VI, pl. 12, f. 7d; Hil. 11 Hy VI, pl. 9, f. 16; Pasch. 11 Hy VI, pl. 30, f. 35d; Mich. 34 Hy VI, pl. 42, f. 22d; Rastell, *Entrees* (ed. 1574), ff. 306–306d. The case of the loan to the abbot is YB. Hil. 20 Hy VI, pl. 19, f. 21 at f. 21d.

Page 323. Conversion of money. *Anon* (1582), Savile, 20; *Hall* v. *Wood* (1601), Owen, 131; *Anon* (1605), Noy, 12. In sixteenth-century plea rolls, specific objects are nearly always said to have been sold to persons unknown, and the money converted as in *Mounteagle* v. *Countess of Worcester* (1555), 2 Dyer, 121a.

Page 323. Chattel delivered for temporary purpose. *Registrum Omnium Brevium* (ed. 1634), f. 92d; cf. f. 106d; YBB. 5 Ed. II, Selden Soc. vol. 31, p. 215; 11 Ed. II, Selden Soc. vol. 61, p. 290.

Page 324. The case of 1472 in which the defendant had already been sued in detinue. YB. Mich. 12 Ed. IV, pl. 10, f. 13; A. W. B. Simpson, L.Q.R., 75 (1959), at p. 369 (already mentioned).

Page 324. *Coggs* v. *Bernard* (1703), 2 Ld. Raymond, 909.

Pages 324–325. Negligent keeping not a conversion. *Walgrave* v. *Ogden* (1590), 1 Leonard, 224; cf. *Anon* (1584), Savile, 74.

Page 325. *Carrier's Case* (1473), YB. Pasch. 13 Ed. IV, pl. 5, f. 9.

Page 325. Bailee sued in 1479 for breaking open containers and converting contents. YB. Hil. 18 Ed. IV, pl. 5, f. 23. See A. W. B. Simpson, L.Q.R., 75 (1959), at p. 372 (already mentioned).

Page 325. *Specificatio*. A. W. B. Simpson, *ibid.*, p. 372. Mr Simpson suggests that this is the whole origin of the tort of conversion, and (pp. 379–380) that it is also the original sense of "convert". On the latter point see above, p. 322 and note thereto.

Pages 325–326. Market overt. *Mounteagle* v. *Countess of Worcester* (1555), 2 Dyer, 121a, at 121b: "And here nothing is alleged whereby the writ of detinue is altered in its nature to an action upon the case; for no property is changed by the sale, because it was not made in market overt".

Page 326. Early sixteenth-century actions against bailees. A. W. B. Simpson, L.Q.R., 75 (1959), at p. 375 (already mentioned); Keilwey, 160 (1510). A plea roll example of 1513 is KB 27/1006, m. 27. It is a bill "*de placito decepcionis in accione super casum*" against a depositee for reward who undertook to redeliver on demand, but sold to persons unknown and converted the purchase money to his own use.

Page 327. Statement in 1535 of difference between bailee and "finder". YB. Pasch. 27 Hy VIII, pl. 35, f. 13; Brooke, *Abridgment*, Detinue de biens, 1. See *Anon* (1577), 4 Leonard, 189: ". . . if one hath goods by trover, and bails them over before any action brought against him, detinue doth not lye against him . . ., but where such a person, who hath goods by trover, bails them *quibusdam ignotis*, such an action will lye against him." Cf. *Vandrink* v. *Archer* (1590), 1 Leonard, 221 at 222: "Where goods come to one by trover, he shall not be charged in an action, but for the time he hath the possession; but that is to be intended in an action of detinue, and not in an action upon the case . . .".

Page 328. "He must be reached as a wrongdoer . . .". See the conclusion of the quotation from *Vandrink* v. *Archer* in the last note: ". . . for such action upon the case is not grounded upon the trover, but upon the mis-demeanor, that is, the conversion."

Page 328. *Mounteagle* v. *Countess of Worcester* (1555), 2 Dyer, 121a. The precedent book referred to is Rastell, *Entrees* (ed. 1566), f. 4.

Page 329. Case of pledgee in 1550. Brooke, *Abridgment*, Action sur le case 113. Examples of such pleas in the rolls are KB 27/1252, m. 366 (Hilary term, 1575); KB 27/1329, m. 328 (Easter term, 1594).

Page 329. Case of carrier in 1557. KB 27/1183, m. 193. Cf. *Owen* v. *Lewyn* (1672), 1 Ventris, 223.

Page 329. Case of 1594 in which plaintiff openly counts on a bailment. KB 27/1329, m. 369d.

Page 329. Case of 1500 in which objection is made to count on bailment. *Gumbleton* v. *Grafton*, Cro. Eliz., 781.

Page 329. *Isaack* v. *Clark* (1615), 2 Bulstrode, 306.

Page 330. Possessor having no power to make legally effective disposition. It is possible that there was a contrast with the bailee. *Anon* (1609), Godbolt, 160.

Page 330. Conversion, not failure to deliver, the gist of the action. See *La Countess de Rutland's Case* (1596), Moore K.B., 266; Owen, 156.

Page 330. Case of 1596; refusal to deliver as conversion. *Easton* v. *Newman*, Moore, K. B., 460; Gouldsborough, 152; Cro. Eliz., 495.

Page 330. Act of conversion followed by return of goods. See statement of Popham, Gouldsborough, 155.

Page 330. *Isaack* v. *Clark* (1615), 2 Bulstrode, 306.

Page 331. "Denial of title". See e.g. *Oakley* v. *Lyster* [1931] 1 K.B., 148. For the difficulty over the kind of title to be denied, see *Ward* v. *Macauley* (1791), 4 T.R., 489; *Gordon* v. *Harper* (1796), 7 T.R., 9.

Page 332. Case of 1590 in which honest re-sale was pleaded. *Vandrink* v. *Archer*, 1 Leonard, 221.

Page 332. Innocent auctioneer. *Consolidated Co.* v. *Curtis* [1892] 1 Q.B., 495. Cf. *Hollins* v. *Fowler* (1875), L.R. 7 H.L., 757.

Page 332. Defamation. See generally C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), p. 126; Van Vechten Veeder, "The History of the Law of Defamation", *Select Essays in Anglo-American Legal History*, vol. III, p. 446.

Page 333. Defamation in local courts. Examples are conveniently collected by Mr Fifoot, *op. cit.*, in the last note. Note especially the "plea of trespass" in the Bedford county court, 1333, *ibid.*, p. 139; T. F. T. Plucknett, "New Light on the Old County Court", *Harvard Law Review*, 42 (1929), p. 639, at p. 668; G. H. Fowler, *Rolls from the Office of the Sheriff of Beds. and Bucks., 1332–1334* (1929), p. 66. The London records show very clearly the various motives for repressing defamations. See e. g. *Calendar of Early Mayor's Court Rolls, 1298–1307*, p. 40 (1299, "civil action" by employer against disaffected employee who told others he would not pay); *Calendar of Plea and Memoranda Rolls, 1323–1364*, p. 69 (1328, "prosecution" for saying that the mayor was *pessimus vermis* that had come to London for twenty years); *ibid., 1381–1412*, p. 40 (1383, tailor "prosecuted" for speaking evil and shameful words of a tawyer, whence discord might have arisen between the two misteries of tailors and tawyers; he was imprisoned but released at the request of the tawyers).

Page 333. Defamation said to be a spiritual offence. YB. Trin. 12 Hy VII, pl. 2, f. 22, at f. 24d (1497).

Page 333. Statute of 1327 forbidding proceedings against indictors. Stat. 1 Ed. III, st. 2, c. 11.

Page 334. *Circumspecte Agatis*. Statutes of the Realm, vol. 1, p. 101; E. B. Graves, "*Circumspecte Agatis*", *English Historical Review*, 43 (1928), p. 1.

Page 334. Plaintiff claimed as villein. YBB. Pasch. 2 Ed. IV, pl. 10, f. 5; Trin. 15 Ed. IV, pl. 15, f. 32; Trin. 17 Ed. IV, pl. 2, f. 3. Plea roll examples are CP 40/957, mm. 320d, 442 (Trinity term, 1501).

Page 334. The entry of 1511 is KB 27/999, m. 73d.

Pages 334–335. The entry of 1508 is KB 27/988, m. 42d.

Page 335. "Heretic" or "adulterer". YB. Trin. 27 Hy VIII, pl. 4, f. 14. Cf. *Anon* (1561), Moore K.B., 29; *Parret* v. *Carpenter* (?1596), Noy, 64.

Page 335. "Witch". *Morrice* v. *Smith* (1587), Moore, 906; *Clark and Green's Case* (1588), 2 Leonard, 30; *Mutton's Case* (1609), 13 Co. Rep., 59; *Stone* v. *Roberts* (1617), Noy, 22; *Shuter* v. *Emet* (1623), Benloe, 127.

Pages 335–336. The case of the merchant declared to be excommunicated, 1513. KB 27/1006, m. 36. See S. F. C. Milsom, "Richard Hunne's Praemunire", *English Historical Review*, 76 (1961), p. 80. For a similar case in 1640 see *Barnabas* v. *Traunter*, Rolle's *Abridgment*, vol. 1, p. 37, pl. 15.

Page 336. The case of the rector said to have come to his benefice by simony, 1594. KB 27/1329, m. 56.

Page 336. The plaintiff said to have had an illegitimate child. *Davis* v. *Gardiner* (1593), 4 Co. Rep., 16b. For "whore" see *Anon* (1586), Owen, 34; *Pollard* v. *Armshaw* (1601), Gouldsborough, 173; *Elizabeth Tomson's Case* (1624), Benloe, 148.

Page 336. Slander of Women Act, 1891, 54 & 55 Vic., c. 51.

Page 337. The plaintiff of 1530 called "bondman" who lost his marriage. CP 40/1064, m. 516d.

Page 337. "Alien" (actually "Knave mungerel half a Guysian, and no meer Englishman quia a cel temps le Duke de Guyse fuit reported Comon Enemy al Realme"): *Anon* (1564), Dalison, 63. "Scot": CP 40/1064, m. 78d (1530). "Bankrupt": *Anon* (1586), Godbolt, 40; *Anon* (1588), Gouldsborough, 84; *Dotting* v. *Ford* (c. 1600), Noy, 33; *Courtney* v. *Thompson* (date unknown), Noy, 158.

Page 337. Slander of title. *Booth* v. *Trafford* (1573), Dalison, 102; *Mildmay's Case* (1582–84), 1 Co. Rep., 175a; Moore K. B., 144; *Johnson* v. *Smith* (1584), Moore K.B., 187; *Penniman* v. *Rawbanks* (1595), Moore K.B., 410; *Williams and Linford's Case* (1588), 2 Leonard, 111; *Gerard* v. *Dickenson* (1590), 4 Co. Rep., 18a. For a plea roll example see KB 27/1329, m. 273 (1594).

Page 337. "Bastard". *Anon* (1564), Dalison, 63; *Anon* (1598), Owen, 32.

Pages 337–338. Nineteenth-century statement of law of slander. See *Thorley* v. *Lord Kerry* (1812), 4 Taunton, 355; quoted in this chapter, pp. 343–344.

Page 338. "Thou art a thief and hast stollen my appletrees". *Ayres* v. *Oswall* (?1610), Noy, 135. Cf. *Norman's Case* (1587), Gouldsborough, 56; *Colt and Gilbert's Case* (1613), Godbolt, 241. Cf. also *Anon* (1591), Savile, 126.

Page 338. "Thou hast stoln by the highway side". *Brough* v. *Dennyson* (1601), Gouldsborough, 143.

Page 338. "If ever man was perjured . . ."; and the thief in Gloucester jail. *Wittam's Case* (c.1605), Noy, 116.

Page 338. "Leper". *Taylor* v. *Perkins* (c. 1605), Noy, 117.

Pages 338–339. "Pox". *James* v. *Rutlech* (1599), 4 Co. Rep., 17a; Moore K.B., 573.

Page 339. Past pox. *Anon* (1586), Owen, 34; *Smith's Case* (c. 1606), Noy, 151.

Page 339. Richard Eliot's action, 1513. KB 27/1006, m. 62. Cf. KB 27/1183, m. 189 (1557): "Denton is a false offycer to the Quene & hath deceaved the Quene and yf there were foure such as he is hanged in any quarter of Yngland one we should have a mery Yngland and I care not who tell hym."

Page 339. Roger Manwood's action, 1557. KB 27/1183, m. 190.

Page 339. Attorney "the falsest knave in England". *Anon* (1564), Moore K.B., 61; Dalison, 63. For "knave" said of a layman, see *Anon* (1561), Moore K.B., 29. For allegations of murderous intent, see *Bray* v. *Andrews* (1564), Moore K.B., 63; Dalison, 66.

Page 339. Allegations of incompetence in lawyer. *Heale* v. *Giddye* (1591), Moore K.B., 695; 2 Anderson, 40.

Page 339. Malpractice by surgeon. *Anon* (1591), 1 Anderson, 268; Savile, 126. Cf. 2 Anderson, 40 (preceding note).

Page 340. ". . . as much law as a jack-an-apes". *Palmer's Case* (1594), Owen, 17; Cro. Eliz., 342.

Page 340. "Blood-sucker". *Hilliard* v. *Constable* (1593), Moore K.B., 418; Cro. Eliz., 306.

Page 340. Defamation in star chamber in fifteenth century. See *Select Cases in Star Chamber*, vol. I, Selden Soc. vol. 16, p. 38.

Page 340. *Scandalum magnatum*. Stats. 3 Ed. I (Westminster I), c. 34 (1275); 2 Ric. II, stat. 1, c. 5 (1378); 12 Ric. II, c. 11 (1388); 1 & 2 P. & M., c. 3 (1554); 1 Eliz., c. 6 (1559).

Page 340. ". . . covetous and malicious Bishop". *Archbishop of York* v. *Markam* (1562), Dalison, 38. For other actions see *Beauchamps* v. *Croft* (1497), Keilwey, 26; *Abergavenny* v. *Cartwright* (1572), Dalison, 80. For an example of criminal proceedings see *Oldnoll's Case* (1557), Dyer, 155a.

Page 341. Action on the case for words written in letters etc. *Case of Slander* (1558), Owen, 30; *Broughton's Case* (1583), Moore K.B., 141; *Edwards* v. *Wooton* (1607), 12 Co. Rep., 35.

Page 341. "Cestuy que laugh . . .". *Lambe's Case de Libells* (1610), Moore K.B., 813; 9 Co. Rep., 59b. Cf. W. Hudson, "A Treatise of the Court of Star Chamber", *Collectanea Juridica* (ed. 1791–2), II, p. 100, at p. 102. "Therefore, to hear it sung or read, and to laugh at it, and to make merriment with it, hath ever been held a publication in law."

Page 342. *De Libellis Famosis* (1605), 5 Co. Rep., 125a.

Page 342. Anonymity of libel. See W. Hudson, "A Treatise of the Court of Star Chamber" (cited in the note to p. 341, above), at p. 102. Truthfulness is discussed at the same place.

Page 343. *King* v. *Lake* (1667), Hardres, 470.

Page 343. *Thorley* v. *Lord Kerry* (1812), 4 Taunton, 355.

Page 344. Modern preservation of distinction between libel and slander:

Defamation Act, 1952, 15 & 16 Geo. VI and 1 Eliz. II, c. 66. See also the report upon which it was based, Cmd. 7536.

Page 344. Negligence. See generally C. H. S. Fifoot, *History and Sources of the Common Law; Tort and Contract* (1949), p. 154; P. H. Winfield, "The History of Negligence in the Law of Torts", L.Q.R., 42 (1926), p. 184; *Select Legal Essays* (1952), p. 30; "Duty in Tortious Negligence", *Columbia Law Review*, 34 (1934), p. 41; *Select Legal Essays*, p. 70; P. H. Winfield and A. L. Goodhart, "Trespass and Negligence", L.Q.R., 49 (1933), p. 359; *Select Legal Essays*, p. 49; M. J. Prichard, "Trespass, Case and the Rule in *Williams* v. *Holland*", [1964] *Cambridge Law Journal*, p. 234. The present account makes much use of Mr Prichard's important article. See also Chapter 11, above.

Pages 345–346. *Contra pacem* actions against smiths, etc. See pp. 249–250.

Page 346. *Weaver* v. *Ward* (1616), Hobart, 134.

Page 347. ". . . the defendant shot the plaintiff." *Fowler* v. *Lanning* [1959] 1 Q.B., 426. Cf. *Letang* v. *Cooper* [1964] 2 Q.B., 53.

Page 347. Highway cases. P. H. Winfield and A. L. Goodhart, "Trespass and Negligence", L.Q.R., 49 (1933), p. 359; Winfield, *Select Legal Essays* (1952), p. 49.

Page 347. Separation of "trespass" and "case". See pp. 263–270.

Page 348. Case of battery in 1695; bolting horse. *Gibbons* v. *Pepper*, 1 Ld. Raymond, 38; 2 Salkeld, 637; 4 Mod., 405.

Page 348. Unbroken horse bolting in busy place, 1676. *Mitchil* v. *Alestree*, 1 Ventris, 295; 2 Levinz, 172; 3 Keble, 650. For discussion, and the comparison with *scienter*, see above, p. 268.

Page 348. *Scott* v. *Shepherd* (1773), 2 W. Blackstone, 892.

Pages 348–349. Master and servant cases. M. J. Prichard, [1964] *Cambridge Law Journal*, p. 234, esp. at p. 239, n. 30 and pp. 241 *et seq*.

Page 349. Loss of control, e.g. ship blown off course. M. J. Prichard, *ibid*., esp. at pp. 241 *et seq*.

Page 349. *Scott* v. *Shepherd* (1773), 2 W. Blackstone, 892.

Page 350. *Williams* v. *Holland* (1833), 2 L.J.C.P. (N.S.), 190; 10 Bingham, 112; 6 Car & P., 23 (at *nisi prius*). For full discussion see M. J. Prichard, [1964] *Cambridge Law Journal*, esp. at pp. 241 *et seq*.

Page 351. "Actions on the Case for Negligence" etc. in *Abridgments*. See especially P. H. Winfield, "The History of Negligence in the Law of Torts", L.Q.R., 42 (1926), p. 184, at p. 194; *Select Legal Essays* (1952), p. 30, at p. 41. Cf. e.g. Comyn's *Digest of the Laws of England* (ed. 1762,) vol. I, p. 223.

Page 352. *Donoghue* v. *Stevenson* [1932] A.C., 562. Cf. *Winterbottom* v. *Wright* (1842), 10 M. & W., 109.

IV. CRIME

14—*Criminal Administration and Law*

I

The major modern work is L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 4 vols. (1948–68). Complete histories are: J. F. Stephen, *A History of the Criminal Law in England*, 3 vols. (1883); L. O. Pike, *A History of Crime in England*, 2 vols. (1873–76).

Specialised studies of the earlier period include: C. A. F. Meekings, *Crown Pleas of the Wiltshire Eyre*, Wiltshire Archaeological Soc., Records Branch, vol. XVI; J. M. Kaye, *Placita Corone*, Selden Soc. Suppl. Series, vol. IV; R. F. Hunnisett, *The Medieval Coroner* (1961); and the editor's Introduction and T. F. T. Plucknett's Commentary in B. H. Putnam, *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, Ames Foundation (1938). For the ideas and intellectual influences at work in the earliest period see T. F. T. Plucknett, *Edward I and Criminal Law* (1960). For the jury see J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), and T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956), p. 106.

II

Page 354. Indictable trespasses. See B. H. Putnam, *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries* (1938), esp. the Commentary by T. F. T. Plucknett.

Page 355. On the difficulty concerning felony see F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. I, pp. 303–305; vol. II, pp. 464 *et seq*.

Page 356. On the second reception of actions for "trespass" from local jurisdictions, the admission of such actions even when the king's peace was not alleged to have been broken, see above, Chapter 11.

Page 356. The latest study of appeals of felony is J. M. Kaye, *Placita Corone*, Selden Soc. Suppl. Series, vol. IV. They were abolished in 1819 together with battle in the writ of right; Stat. 59 Geo. III, c. 46. For "approvers" see R. F. Hunnisett, *The Medieval Coroner* (1961), p. 69.

Page 357. Establishment of the indictment system, and the Assize of Clarendon 1166. See N. D. Hurnard, "The Jury of Presentment and the Assize of Clarendon", *English Historical Review*, 56 (1941), p. 374.

Pages 357–358. Grand juries. For the change in the nature of presenting juries

see F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II pp. 645–650. They were abolished for all but exceptional cases by Administration of Justice (Miscellaneous Provisions) Act, 1933, and finally by the Criminal Justice Act, 1948 s. 31 (3).

Pages 357–358. Preliminary examinations by justices of the peace grew out of Stats. 1 & 2 P. & M., c. 13 (1554) and 2 & 3 P. & M., c. 10 (1555). The modern system dates from Stat. 11 & 12 Vict., c. 42 (1848).

Page 359. Ending of ordeals and beginnings of trial by jury. T. F. T. Plucknett, *A Concise History of the Common Law* (5th ed., 1956), p. 118. For an account of the discussions within the Church leading up to the decision of the Lateran Council in 1215 see J. W. Baldwin, "The Intellectual Preparation for the Canon of 1215 against Ordeals", *Speculum*, 36 (1961), p. 613; H. C. Lea, *Superstition and Force* (ed. 1892), pp. 408 *et seq.* For the order of 1219 see *Patent Rolls, 1216–1225*, p. 186, and Plucknett, *op. cit.*, at p. 119.

Page 360. Prison *forte et dure*. Stat. 3 Ed. I, c. 12; J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 74. Abolished by Stat. 12 Geo. III, c. 20 (1772). Plea of Not Guilty, Stat. 7 & 8 Geo. IV, c. 28 (1827).

Page 360. Challenge of trial jurors who had been indictors. Stat. 25 Ed. III, st. 5, c. 3 (1352).

Page 360. Conduct of trial. On the information of juries generally see J. B. Thayer, *op. cit.* in last note but one. For a description of a sixteenth-century trial see Sir Thomas Smith, *De Republica Anglorum* (ed. Alston, 1906), p. 94; and for a general summary see J. F. Stephen, *A History of the Criminal Law in England* (1883), vol. 1, p. 346. Counsel was allowed in a treason trial by Stat. 7 & 8 Will. III, c. 3 (1696); and in a trial for felony by Stat. 6 & 7 Will. IV, c. 114 (1836).

Page 361. Counsel permitted in fifteenth century on indictment for felony to argue matter of law. YB. Pasch. 9 Ed. IV, pl. 4, f. 2.

Page 361. Privilege of citizens of London to be tried in eyre. H. M. Cam, *The Eyre of London, 1321*, vol. I, Selden Soc. vol. 85, pp. cxx *et seq.*, 94 *et seq.*

Page 362. Sheriffs not to hear pleas of the crown. *Magna Carta*, 1215, c. 24.

Pages 362–363. Evolution of justices of the peace. A. Harding, "Origins and Early History of the Keeper of the Peace", *Transactions of the Royal Historical Society*, 5th series, vol. 10 (1960), p. 85; B. H. Putnam, *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, Ames Foundation (1938).

Page 365. Court for crown cases reserved: Stat. 11 & 12 Vict., c. 78 (1848). Court of criminal appeal: Stat. 7 Ed. VII, c. 23 (1907).

Page 365. Incoherence of criminal law in the eighteenth century. See such manuals as R. Burn, *Justice of the Peace and Parish Officer* (1st ed. 1755).

Page 366. Star chamber. G. R. Elton, *The Tudor Constitution* (1960) and *Star Chamber Stories* (1958); W. S. Holdsworth, *History of English Law*, vol. V (2nd ed.), p. 155, esp. at p. 197; *Select Pleas in the Court of Star Chamber*, Selden Soc. vols. 16, 25.

Page 366. Attaint. J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), p. 137.

Pages 366–367. Fraud, see pp. 78, 276, 317; libel, see p. 340.

Page 367. Allegations of riot in star chamber cases. See G. R. Elton, *The Tudor Constitution* (1960), p. 170.

Page 368. Examples of statutes seeking to limit the availability of pardons. Stat. 2 Ed. III, c. 2 (1328; as to which see G. O. Sayles, *Select Cases in the Court of King's Bench*, vol. III, Selden Soc. vol. 58, p. xli); Stat. 13 Ric. II, st. 2, c. 1 (1390).

Page 368. Benefit of clergy. L. C. Gabel, *Benefit of Clergy in England in the later Middle Ages* (1929); C. R. Cheney, "The Punishment of Felonous Clerks", *English Historical Review*, 51 (1936), p. 215. Accused set free, subject to discretionary imprisonment: Stat. 18 Eliz., c. 7 (1576).

Pages 368–369. Statutory manipulation of benefit of clergy. Extension to women: Stats. 21 Jac. I, c. 6 (1624); 3 W. & M., c. 9 (1961). Branding: Stat. 4 Hy VII, c. 13 (1489). Abolition of reading test: Stat. 5 Anne, c. 6 (1706). Exclusion of certain offences: e.g. Stat. 23 Hy VIII, c. 1 (1532). Abolition of benefit: Stat. 7 & 8 Geo. IV, c. 28 (1827).

Page 370. Statute of treasons. 25 Ed. III, st. 5, c. 2 (1352).

Pages 370–371. Murder as secret killing: *Glanvill*, XIV, 3 (ed. G. D. G. Hall, p. 174). Murder fine: C. A. F. Meekings, *Crown Pleas of the Wiltshire Eyre, 1249* (1961), p. 61; abolished by Stat. 14 Ed. III, st. 1, c. 4 (1340). For the use of "murder" in justices' commissions see T. F. T. Plucknett in *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, Ames Foundation (1938), at pp. cxlvii–cxlviii. Cf. Stat. 13 Ric. II, st. 2, c. 1 (1390) concerning pardons; and Stat. 23 Hy VIII, c. 1 (1532) concerning benefit of clergy. See generally J. M. Kaye, "Early History of Malice Aforethought", L.Q.R., 83 (1967), pp. 365, 569.

Page 371. Theft in *Glanvill:* on jurisdiction, I, 2 and XIV, 8 (ed. G. D. G. Hall, pp. 4, 177); on escheat, VII, 17 (ed. Hall, p. 91). For the allegation of felony in indictments see T. F. T. Plucknett, *op. cit.* in the preceding note, at pp. cxxxix, clix.

Pages 371–372. On the distinction between grand and petty larceny see F. Pollock and F. W. Maitland, *History of English Law* (2nd ed.), vol. II, pp. 495 *et seq.*; W. S. Holdsworth, *History of English Law*, vol. III (5th ed.), p. 366. The figure of 12d. may be partly due to Stat. 3 Ed. I (Westminster I), c. 15, concerning bail.

Page 372. On the things that could not be stolen, see W. S. Holdsworth, *ibid.*, p. 367; J. F. Stephen, *History of the Criminal Law* (1883), vol. III, pp. 142 *et seq.*

Page 372. Breaking bulk. The *Carrier's Case*, YB. Pasch. 13 Ed. IV, pl. 5, f. 9; Cf. H. M. Cam, *The Eyre of London, 1321*, vol. I, Selden Soc. vol. 85, p. cxi, and vol. II, Selden Soc. vol. 86, p. 149. On the limitations of larceny generally, see W. S. Holdsworth, *op. cit.* in the preceding note, p. 360.

Pages 372–373. On early common law misdemeanours, indictable trespasses, see T. F. T. Plucknett's Commentary in *Proceedings before the Justices of the Peace*, Ames Foundation (1938), esp. at pp. cliv *et seq.*

Page 373. On the economic offences dealt with by justices see B. H. Putnam, *ibid.*, pp. cxxi *et seq.*; see also later records, e.g. H. C. Johnson, *Minutes of Proceedings in Session, 1563, 1574–1592*, Wilts. Archaeological Society, Records Branch, vol. IV. For the growth of petty offences see F. W. Maitland, *Consitutional History* (1908), p. 231; W. S. Holdsworth, *History of English Law*, vol. IV (3rd ed.), pp. 134 *et seq.*

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