2.5

CHAPTER IX.

PROCEDURE.

§ 1. *The Forms of Action.*

Our formulary system.

AFTER all that has hitherto been said, and now that we are [p. 556] nearing the end of our long course, we have yet to speak of the most distinctively English trait of our medieval law, its 'formulary system' of actions. We call it distinctively English; but it is also in a certain sense very Roman. While the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and sever our English law from all her sisters.

An English peculiarity.

The phenomenon that is before us can not be traced to any exceptional formalism in the procedure which prevailed in the England of the eleventh century. All ancient procedure is formal enough, and in all probability neither the victors nor the vanquished on the field at Hastings knew any one legal formula or legal formality that was not well known throughout many lands. No, the English peculiarity is this, that in the middle of the twelfth century the old, oral and traditional formalism is in part supplanted and in part reinforced by a new, written and authoritative formalism, for the like of which we shall look in vain elsewhere, unless we go back to a remote stage of Roman history. Our *legis actiones* give way to a formulary system. Our law passes under the dominion of a system of writs which flow from the royal chancery. What has made this possible is the exceptional vigour of the English kingship, or, if we look at

[p. 557] the other side of the facts, the exceptional malleableness of a thoroughly conquered and compactly united kingdom.

Growth of the forms.

The time has long gone by when English lawyers were tempted to speak as though their scheme of 'forms of action' had been invented in one piece by some all-wise legislator. It grew up little by little. The age of rapid growth is that which lies between 1154 and 1272[1]. During that age the chancery was doling out actions one by one. There is no solemn *Actionem dabo* proclaimed to the world, but it becomes understood that a new writ is to be had or that an old writ, which hitherto might be had as a favour, is now 'a writ of course[2].' It was an empirical process, for the supply came in response to a demand; it was not dictated by an abstract jurisprudence; it was conditioned and perturbed by fiscal and political motives; it advanced along the old Roman road which leads from experiment to experiment. Our royalism has debarred us from affixing to the various writs the names of the chancellors who first issued them or of the justices who advised their making; they have no names so picturesque as *Publiciana* or *Serviana*; but if a hundredth part of the industry that has been spent on Roman legal history were devoted to our plea rolls, we might with but few errors assign almost every writ to its proper decade[3].

Our formulary system not of Roman origin.

The similarity between these two formulary systems, the Roman and the English, is so patent that it has naturally aroused the suggestion that the one must have been the model for the other. Now it is very true that between the years 1150 and 1250 or thereabouts, the old Roman law, in the new medieval form that it took in the hands of the glossators, exercised a powerful influence not only on the growth of legal theory in England, but also on some of our English rules[4].

[1] See above, vol. i. pp. 150, 195.

[2] For an instance, see above, vol. ii. p. 64.

[3] In some of the early MS. Registers we find by way of supplement a group of new writs which are ascribed to Bracton's master, William Raleigh; Maitland, History of the Register, Harv. L. R., iii. 175–6. See also Bracton, f. 222: 'breve de constitutione de Merton secundum quod tunc provisum fuit per W. de Ralegh iusticiarium.' Ibid. f. 437 b: 'consulitur heredi per tale breve per W. de Ralegh formatum pro Radulfo de Dadescomb.'

[4] We have admitted this as regards the novel disseisin, vol. i. p. 146, vol. ii. p. 46; the livery of seisin, vol. ii. p. 89; the treatment of the termor, vol. ii. p. 114; the conception of *laesa maiestas*, vol. ii. p. 503. One of our actions, namely, the *Cessavit per biennium* was borrowed; see vol. i. p. 353. Other

But before a case of imitation can be proved, or even supposed as probable, we must do much more than discover a resemblance between an English idea or institution and some idea or institution which at one time or another had a place in the Roman scheme. We must show a resemblance between English law and that Roman law which was admired and taught in the middle ages. The medieval civilians had little knowledge of and little care for the antiquities of the system that they studied. They were not historians; they had no wish to disinter the law of the republican or of the Antonine period. They were lawyers, and the Roman law that they sought to restore was the law of Justinian's last years. That was for them the law which, unless it had been altered by some emperor of German race, was still by rights the law of the Roman world. All that Justinian or any of his predecessors had abolished was obsolete stuff which no one would think of reviving. What they knew of the formulary system was that it had been swept away by imperial wisdom[1]. Therefore their influence was all in favour of a simple system of procedure, under which a magistrate would decide all questions of fact and law without any division of labour and without any formula. If they could have had their way in this country, the procedure of our temporal would have been, like that of our spiritual courts, a libellary procedure, which had no place either for the 'original writ' with its authoritative definition of the cause of action or for the 'issue' submitted to a jury. [p. 558]

Comparison of Roman and English formulas.

But further, so soon as we begin to penetrate below the surface, the differences between the two formulary systems are at least as remarkable as the resemblances. For a moment our *cancellarius* with his *registrum brevium* looks very like the *praetor* with his *album*, but, while the *praetor* listens to both parties before he composes the formula, the chancellor when he issues the original writ has never heard the defendant's story, and in most cases the plaintiff obtains a writ 'as of course' by merely saying that he wants it and paying for it. So obvious

particulars might easily be mentioned. We have also admitted that the very idea of a science of law comes from civilians and canonists; see vol. i. pp. 131–5.

[1] Cod. 2. 57. 1: 'Iuris formulae aucupatione syllabarum insidiantes cunctorum actibus radicitus amputentur.' Contrast Bracton, f. 413 b: 'Tot erunt formulae brevium quot sunt genera actionum.' Ib. f. 188 b: 'Item procedere non debet assisa propter errorem nominis...item si erratum sit in syllaba.'

[p. 559] is this, that we are soon compelled to change our ground, to compare, not the chancellor, but the justices with the *praetor*, and to see the Roman *formula*, not in the original writ, but in the 'issue' that is sent to a jury. However, a very slight acquaintance with our own history is enough to convince us that in this direction there can be no link of imitation between the two systems. Whatever likeness we may see between the jurors, when at the end of the middle ages they are becoming 'judges of fact,' and the *iudex* to whom the *praetor* committed a cause, there is no likeness whatever (beyond common humanity) between this *iudex* and those jurors of the thirteenth century who came to bear witness of facts or rights. Between the *Iudex esto* and the *Veniat iurata ad recognoscendum* there lies an unfathomable gulf[1].

Life of the forms.

Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials. They are institutes of the law; they are—we say it without scruple—living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigour, usefulness and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are still-born, some are sterile, others live to see their children and children's children in high places. The struggle for life is keen among them and only the fittest survive[2].

Choice between the forms.

The metaphor which likens the chancery to a shop is trite; we will liken it to an armoury. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbour comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace. To drop metaphor, our

[1] If any point of contact is to be found between the jury and a Roman institution this must be sought at a remote period in the history of Gaul when Frankish kings borrow a prerogative procedure from the Roman *fiscus*. See vol. i. p. 141; also Brunner, D. R. G. ii. 525.

[2] Henceforward we shall give capital letters to the names of the forms, so that Debt will mean the form known as an action of debt.

plaintiff is not merely choosing a writ, he is choosing an action, [p. 560] and every action has its own rules[1].

Little law for actions in general.

The great difference between our medieval procedure and that modern procedure which has been substituted for it by statutes of the present century lies here:—To-day we can say much of actions in general and we can say little of any procedure that is peculiar to actions of particular kinds. On the other hand, in the middle ages one could say next to nothing about actions in general, while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended[2].

Modern and medieval procedure.

It must not escape us that a law about 'actions in general' involves the exercise by our judges of wide discretionary powers. If the rules of procedure take now-a-days a far more general shape than that which they took in the past centuries, this is because we have been persuaded that no rules of procedure can be special enough to do good justice in all particular cases. Instead of having one code for actions of trespass and another for actions of debt, we have a code for actions; but then at every turn some discretionary power over each particular case is committed to 'the court or a judge.' One illustration will be enough. We lay down rules for actions in general about the times within which litigants must do the various acts which are required of them, for example, the time within which a defendant must 'enter an appearance,' or the plaintiff must deliver his statement of claim. Such rules would not be tolerable unless they were tempered by judicial discretion, and so a short clause about 'applications for an enlargement of time[3]' takes the place of the bulkiest chapter of our old law, the chapter on essoins, or excuses for non-appearance. That law strove to define the various reasonable causes which might prevent a man from keeping his day in court—the broken bridge, the bed-sickness (*malum lecti*), the crusade, the pilgrimage to Compostella. For every cause of delay it assigned a definite period:—even

[1] Britton, i. p. 152: 'Voloms...qe chescun bref eyt sa propre nature et qe nul ne soyt pledé par autre.'

[2] During cents. xvii., xviii. much was done by fiction towards introducing an uniform procedure in the only actions that were commonly used; but the first great statutory change was made by the Uniformity of Process Act, 2 & 3 Will. IV. c. 39.

[3] Rules of the Supreme Court, O. 64, R. 7.

[p. 561] a bed-sickness will not absolve a man for more than year and day[1]. But further, it here distinguished between the various forms of action. No essoin at all will be allowed to a man who is charged with a disseisin; the long essoin for year and day can only be allowed where there is a solemn question of 'right' in dispute and the litigants are in peril of being 'abjudged' from the debatable land for ever. Now it is just because we know that such rules as these, particular though they may be, are not particular enough, that we have recourse to an exceedingly general rule tempered by judicial discretion.

No room for discretion in old procedure.

Let us not be impatient with our forefathers. 'Discretion' is not of necessity 'the law of tyrants,' and yet we may say with the great Romanist of our own day that formalism is the twin-born sister of liberty[2]. As time goes on there is always a larger room for discretion in the law of procedure; but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism. One of the best qualities of our medieval law was that in theory it left little or nothing, at all events within the sphere of procedure, to the discretion of the justices. They themselves desired that this should be so and took care that it was or seemed to be so. They would be responsible for nothing beyond an application of iron rules. Had they aimed at a different end, they would have 'received' the plausibly reasonable system of procedure which the civilians and canonists were constructing, and then the whole stream of our legal history would have been turned into a new channel. For good and ill they made their choice. The ill is but too easily seen by any one who glances at the disorderly mass of crabbed pedantry that Coke poured forth as 'institutes' of English law; the good may escape us. But when we boast of 'the rule of law' in England, or give willing ear to the German historian who tells us that our English state is a *Rechtsstaat*, we shall do well to remember that the rule of law was the rule of writs. When Ihering assures the unamiable English traveller who fights a 'battle for right' over his hotel

[1] The germs of these rules are to be found already in the earliest Germanic laws; Brunner, D. R. G. ii. 336.

[2] Ihering, Geist des römischen Rechts, ii. (2) § 45: 'Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit.'

bill, that his is the spirit that built up the Roman law[1], he [p. 562] speaks of nothing new. In the thirteenth century our justices kept to the old Roman road of strict adherence to 'word and form.' From the alien Corpus Iuris they turned aside, just because the spirit that animated them was (though they knew it not) *der Geist des römischen Rechts*[2].

The golden age of the forms.

The last years of Henry III.'s day we may regard as the golden age of the forms. We mean that this was the time in which the number of forms which were living and thriving was at its maximum. Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law's power of producing new forms was almost exhausted. Bracton can still say *Tot erunt formulae brevium quot sunt genera actionum*[3]. A little later we shall have to take the tale of writs as the fixed quantity and our maxim will be *Tot erunt genera actionum quot sunt formulae brevium*[4]. Only some slight power of varying the ancient formulas will be conceded to the chancellor; all that goes beyond this must be done by statutes, and, when Edward I. is dead, statutes will do little for our ordinary private law. The subsequent development of forms will consist almost entirely of modifications of a single action, namely, Trespass, until at length it and its progeny—Ejectment, Case, Assumpsit, Trover,—will have ousted nearly all the older actions. This process, if regarded from one point of view, represents a vigorous, though contorted, growth of our substantive law; but it is the decline and fall of the formulary system, for writs are being made to do work for which they were not originally intended, and that work they can only do by means of fiction.

Number of the forms.

How many forms of action were there? A precise answer to this simple question would require a long prefatory discourse, for we should have to draw some line between mere variations upon the one hand and the more vital differences upon the other; and after all when the line was drawn it would be an arbitrary line of our own drawing. We might easily raise the tale of forms to some hundreds, but perhaps we shall produce the right effect if we say that there were in common use

[1] Ihering, Der Kampf um's Recht (10th ed.), 45, 69.

[2] As to what happened in France when the reverence for 'word and form' disappeared, see Brunner, Wort und Form, Forschungen, pp. 272-3.

[3] Bracton, f. 413 b.

[4] See vol. i. p. 196.

[p. 563] some thirty or forty actions, between which there were large differences[1].

Statistics.

A few statistics may set this matter before our readers in a clearer light. We will therefore make an analysis of the actions that were brought before the justices who in three different years near the end of our period made an eyre in Northumberland[2], while in the fourth column we give the results of an examination to which we subjected the roll of the Common Bench for the Easter term of 1271[3].

	Eyre 1256	Eyre 1269	Eyre 1279	Easter 1271
Miscellaneous Actions for Land[4]	25	14	12	185
Writ of Right[5]	8	1	2	12
Writ of Entry[6]	18	17	22	21
Novel Disseisin[7]	39	27	19	5
Mort d'Ancestor[8]	31	26	18	7
Aiel, Besaiel, Cosinage[9]	0	7	6	8
De Rationabili Parte[10]	0	0	1	2

[1] The nature of the difficulty can be briefly explained by reference to the most important instance. We may take as a single 'form' the Writ of Entry. Or we may make Writ of Entry a genus of which, (1) *sur disseisin*, (2) *sur intrusion*, (3) *cui in vita* etc. are species, and so we may make some twelve 'forms.' Or, taking each of these species separately, we may divide it into many forms, since the writ may be (*a*) in the *per*, (*b*) in the *per* and *cui*, and (*c*) in the *post*; and again it may be (i) *sine titulo*, *i.e.* for the first person who was deprived of the land, or (ii) *cum titulo* for his heir; so that we get six 'forms' within each species and thus force up the number of 'forms' of this one genus to seventy or eighty. See above, vol. ii. pp. 63, 67. Then if we distinguish between land and incorporeals we may rapidly increase this total by permutation and combination. A more familiar example would be raised by the question, Is Debt one form, while Detinue is another, and, if so, shall we count Debt in the *debet* and Debt in the *detinet* as two forms? See above, vol. ii. pp. 173, 206.

[2] Northumberland Assize Rolls (Surtees Society).

[3] Curia Regis Roll, No. 202. It would be long to explain exactly our method of computation. We believe that in the main the picture that we draw is truthful, but stress must not be laid on details.

[4] An entry relating to one of the initial stages of an action for land (*placitum terrae*) often leaves its form undetermined. These actions will for the more part be Writs of Right or of Entry; they will not be Possessory Assizes.

[5] See above, vol. ii. p. 62.

[6] See above, vol. ii. p. 63.

[7] See above, vol. ii. p. 47. This includes the assize of nuisance. Possessory Assizes rarely came before the Bench. They were taken by justices of Assize.

[8] See above, vol. ii. p. 56.

[9] See above, vol. ii. p. 57.

[10] For partition among parceners; proprietary.

	Eyre 1256	Eyre 1269	Eyre 1279	Easter 1271
Nuper Obiit[1]	1	0	1	1
Little Writ of Right[2]	0	0	0	1
Monstraverunt[3]	0	0	0	2
Right of Advowson[4]	0	0	0	1
Darrein Presentment[5]	0	0	0	15
Quare impedit, Quod permittat presentare, Quare non admisit[6]	0	0	1	14
Assize Utrum[7]	0	0	0	6
Quare eiecit infra terminum[8]	0	1	0	3
De Rationabilibus Divisis[9]	0	1	0	0
Dower[10]	9	12	12	189
Formedon[11]	0	0	1	0
Escheat[12]	0	0	0	1
Quod permittat habere[13]	5	6	8	7
Quod permittat fugare[14]	0	0	0	1
Quod permittat prosternere[15]	0	1	3	0
Quare levavit mercatum	0	0	0	1
Quod reparari faciat stagnum	0	0	0	1
De secta ad molendinum[16]	1	0	2	0
Quo iure[17]	1	2	1	1
Quod capiat homagium[18]	2	0	0	0
Customs and Services[19]	4	4	4	15
Mesne[20]	3	0	0	17
Writs relating to wardships[21]	0	3	5	12
De nativo habendo[22]	6	12	2	10
De libertate probanda[23]	1	2	2	0
Quare non permittit se talliari[24]	0	0	0	1
Per quae servicia[25]	0	0	0	1
Warantia Cartae[26]	18	6	10	26

[1] For partition among parceners; possessory.
[2] See above, vol. i. p. 385.
[3] See above, vol. i. p. 387.
[4] See above, vol. ii. p. 137.
[5] See above, vol. ii. p. 137.
[6] See above, vol. ii. p. 139.
[7] See above, vol. i. p. 247.
[8] See above, vol. ii. p. 107.
[9] For settling a disputed boundary; proprietary.
[10] This includes several different writs.
[11] See above, vol. ii. p. 28.
[12] See above, vol. ii. p. 23.
[13] For ways, rights of common, etc.
[14] Claiming a right to hunt.
[15] For abatement of nuisances.
[16] To compel suit to a mill.
[17] Negatory of common rights; see above, vol. ii. p. 142.
[18] To compel receipt of homage.
[19] See above, vol. ii. p. 125.
[20] See above, vol. i. p. 238.
[21] There are several different writs, some possessory, some proprietary.
[22] Affirming villeinage.
[23] Negatory of villeinage.
[24] Claiming a right to tallage.
[25] Calling upon a tenant to say why he should not be attorned.
[26] Largely used for the purpose of levying fines; see above, vol. ii. p. 98.

	Eyre 1256	Eyre 1269	Eyre 1279	Easter 1271
De Fine Facto[1]	0	2	0	9
Waste[2]	0	0	0	1
Account[3]	0	0	1	8
Annuity[4]	2	5	2	18
Quare subtrahit[5]	0	0	0	1
Covenant[6]	7	10	6	35
Debt[7]	6	6	28[8]	53
Detinue[9]	2	1	3	11
Deceit[10]	0	1	0	1
Rescue[11]	0	0	2	2
Replevin[12]	1	0	0	35
Statutory Actions for unlawful distress[13]	0	0	0	11
Trespass[14]	6	3	9	85
Actions analogous to Trespass[15]	0	0	0	3
Appeal of homicide[16]	0	0	4	3
Appeal of robbery	1	0	5	4
Appeal of larceny (by approvers)	3	0	0	0
Appeal of wounds and mayhem	1	0	5	1
Appeal of rape	11	0	2	0
Appeal of imprisonment	1	0	0	1
Appeal of felony (unspecified)	4	0	0	1
Attaint[17]	1	0	3	0
Certification	0	0	1	0
False Judgment	1	0	0	6
Error	0	0	0	1
Prohibition[18]	0	0	0	11

[1] See above, vol. ii. p. 100.
[2] See above, vol. ii. p. 9.
[3] See above, vol. ii. p. 221.
[4] See above, vol. ii. p. 133.
[5] An action for a corody.
[6] See above, vol. ii. p. 216.
[7] See above, vol. ii. p. 203.
[8] Mostly due to the activity of one money lender.
[9] See above, vol. ii. p. 172.
[10] See above, vol. ii. p. 534.
[11] For unlawfully rescuing distrained beasts.
[12] See below, p. 577.
[13] Given by various sections of the Statute of Marlborough.
[14] See above, vol. ii. pp. 167, 526.
[15] For interfering with rights of chase, for interrupting a court, etc.
[16] There is no criminal business on the roll of 1269 as printed. Appeals were still being heard by the [Common] Bench section of the High Court as well as Coram Rege. An appeal against several appellees is counted here as a single appeal.
[17] We shall speak below of this and the four following items.
[18] We believe that the only very important action not mentioned here is the royal Quo Waranto for the revocation of franchises. The Novel Disseisin and Mort d'Ancestor are not fairly represented. Hundreds of them are taken every year by justices of Assize.

Differences between the forms.

Now the differences between these various forms of action were such as would be brought out by answers to the following questions. (i) What is the 'original process' appropriate to this form, or, in other words, what is the first step that must be taken when the writ has been obtained? Is the defendant to be simply summoned, or is he at once to be 'attached by gage and pledges,' that is, required to give security for his appearance? Again, will the sheriff at once empanel an assize? (ii) What is the 'mesne process,' or, in other words, what is to be done if the defendant is contumacious? Will the land that is in dispute be 'seized into the king's hand' or will the compulsion be directed against the defendant's person? In the latter case what form will the compulsion take? Can he, for example, be exacted and outlawed, or can he only be distrained? (iii) Is a judgment by default possible? Can you, that is, obtain judgment against a defendant who has not appeared? (iv) What are the delays or adjournments[1]? (v) What essoins are allowed? Is this, for instance, one of those actions in which a party can delay proceedings by betaking himself to his bed and remaining there for year and day? (vi) Can a 'view' be demanded, that is to say, can the defendant insist that the plaintiff shall, not merely describe by words, but actually point out the piece of land that is in dispute? (vii) Can a warrantor be vouched? If so, may you only vouch persons named in the writ, or may you 'vouch at large[2]'? (viii) Must there be pleading and, if so, what form will it take? (ix) What is the appropriate form of trial or proof? Can there be wager of battle? Can there be wager of law—a grand assize—a petty assize—a jury? (x) What is the relief which the judgment will give to a successful plaintiff? Will it give him a thing or sum that he has claimed, or will it give him 'damages,' or will it give him both? (xi) What is the 'final process'? By what writs can the judgment be executed; for example, can outlawry be employed? (xii) What is the punishment for the vanquished defendant? Will he be simply amerced or can he be imprisoned until he makes fine with the king?

[p. 566]

[1] Thus if an ordinary case comes before the court on the octave of Michaelmas, the next court-day to which it will be adjourned is the octave of Hilary; but an action of dower would be adjourned to a much nearer day. See Statutes, i. 208.

[2] See above, vol. ii. p. 71.

[p. 567]

Classification of forms.

If we addressed this catechism to the various actions, we might arrive at some tabular scheme of *genera* and *species*, for we should find that an answer to one of our questions would often imply an answer to others. Thus, to mention one instance, there is a connexion between trial by battle and the long essoin *de malo lecti*, so that we may argue from the former to the latter[1]. But many of these lines intersect each other, so that we must classify actions for one purpose in one manner, for another purpose in another manner. Often enough the sharpest procedural lines are drawn athwart those lines which seem to us the most natural.

Affinities between forms.

An instructive example is worth recalling. There is one small family of actions which is marked off from all others by numerous procedural distinctions. It is the family of Petty Assizes. It has but four members, namely, the Novel Disseisin, the Mort d'Ancestor, the Darrein Presentment and the Utrum[2]. The procedure in these four cases is not precisely the same; the Novel Disseisin is swifter than the others; but still they have a great deal in common. In particular they have this in common:—the original writ directs the sheriff to summon a body of recognitors who are to answer a question formulated in that writ—formulated before there has been any pleading. Now if, instead of regarding procedure, we look at the substantive purposes that these actions serve, we see in Bracton's day little enough resemblance between the Mort d'Ancestor[3] and the Utrum, which has become 'the parson's writ of right[4].' On the other hand, there is the closest possible affinity between the Mort d'Ancestor and the action of Cosinage[5]. If I claim the seisin of my uncle, I use the one; if I claim the seisin of a first cousin, I use the other. But procedurally the two stand far apart. The explanation is that the one belongs to Henry II.'s, the other to Henry III.'s day. The commonest cases are provided for by an ancient, the less common cases by a modern action. In the one place we find a round-headed, in the other a pointed arch. No theory of cathedrals in general will teach us where to look for the round-headed arches, though common sense assures us that as a general rule substructure must be older than superstructure; and so no attempt to

[1] Bracton, f. 318 b, 346 b, 347.

[2] See above, vol. i. p. 149.

[3] See above, vol. ii. p. 56.

[4] See above, vol. i. p. 247.

[5] See above, vol. ii. p. 57.

classify our actions will prevail if it neglects the element of time and the historic order of development. [p. 568]

Attempts to apply Roman classification.

It was natural and perhaps desirable that English lawyers should try to arrange these forms in the pigeon-holes provided by a cosmopolitan jurisprudence, should try to distribute them under such headings as 'criminal' and 'civil,' 'real' and 'personal,' 'possessory' and 'proprietary,' *ex contractu* and *ex delicto*. The effort was made from time to time in desultory wise, but it was never very fruitful. A few of the difficulties that it had to meet deserve notice. We see that Bracton can not make up his mind as to whether the Novel Disseisin is real or personal. On the one hand, the compulsory process in this assize is directed *in personam* and not *in rem*. In a Writ of Right or a Writ of Entry the process is directed against the thing, the land, that is in dispute. If the tenant, that is, the passive party in the litigation, will not appear when summoned, the land is 'seized into the king's hand,' and if there is continued contumacy then the land is adjudged to the demandant. In a possessory assize it is otherwise; the land is not seized before judgment. On the other hand, the plaintiff in the assize is attempting to obtain the possession of a particular thing, a piece of land, and, if he succeeds, this will be awarded to him. Bracton therefore holds that the Novel Disseisin, though *rei persecutoria*, is not *in rem* but *in personam*; it is founded on delict, while as to the Mort d'Ancestor, that is *in personam* and *quasi ex contractu*[1]. For all this, however, he speaks of the Novel Disseisin as *realis*[2]. After his day less and less is known of the Institutes; the reality of a real action is found either in the claim for possession of a particular thing, or in a judgment which awards to the plaintiff or demandant possession of a particular thing. The Possessory Assizes are accounted real actions, and at length even an action of Covenant, which surely should be *in personam* and *ex contractu*, is called real when the result of it will be that the seisin of a piece of land is awarded to the plaintiff[3].

[1] Bracton, f. 103 b, 104. [2] Bracton, f. 159 b.

[3] Even in Bracton, f. 439, Covenant is *in rem*: 'Actio...civilis...super aliqua promissione vel conventione non observata vel finis facti...ubi principaliter agitur in rem, ad aliquam rem certam mobilem vel immobilem consequendam.' The action of Covenant Real was abolished in 1833 (Stat. 3 & 4 Will. IV. c. 27, sec. 36) among the 'real and mixed actions.' The same statute spoke of Ejectment as though it were either real or mixed; but as a matter of early history Ejectment was an offshoot of Trespass and as personal as it could be. If we make the distinction turn on the form of writ and declaration, then Ejectment is personal as late as 1852 (15 & 16 Vic. c. 76, sec. 168 ff.). If, on the other hand, we look to the form of the judgment, then at the end of the middle ages Ejectment is becoming mixed, for a judgment will be given for possession of land and also for damages. So in France when the clergy protested that they could not be sued by personal action in the temporal court, the royal lawyers maintained that the Novel Disseisin was, not personal, but real. See the account of the dispute at Vincennes: Biblioth. S. Patrum, Paris, 1589, vol. iv. col. 1211. Compare Grosseteste, Epistolae, p. 222.

[p. 569] After a brief attempt to be Roman our law falls back into old Germanic habits. Old Germanic law, we are told, classifies its actions, not according to the right relied on, but according to the relief demanded. It does not ask whether the plaintiff relies upon *dominium*, upon *ius in re aliena*, upon an obligation, contract or tort; it asks the ruder question—What does the plaintiff want; is it a piece of land, a particular chattel, a sum of money[1]? Probably there is another very old line which answers to a difference between the various tones in which a man will speak when he has haled his adversary before a court of law. He comes there either to demand (Lat. *petere*, Fr. *demander*) or to complain (Lat. *queri*, Fr. *se plaindre*); he is either a demandant or a plaintiff. And so his adversary is either a tenant (Lat. *tenens*) or a defendant (Lat. *defendens*), being there either to deny (*defendere*) a charge brought against him or merely because he holds (*tenet*) what another demands. Ancient law must, we should suppose, soon notice this distinction. The *querela*, as distinct from the *petitio*, often comes from one who is with difficulty persuaded to accept money instead of vengeance, while the *petens* may have no worse to say of his opponent than that he has unfortunately purchased from one who could not give a good title. This distinction we find in our classical common law; but it cuts across the line between those actions which seek for land and those which seek for money. The active party in the Novel Disseisin is not a demandant; he is a plaintiff[2]. To have called him *petens* would have been impossible, for the Novel Disseisin is indubitably a possessory action, and it was common

Roman and English lines.

[1] Laband, Die vermögensrechtlichen Klagen, p. 5 ff. Above, vol. ii. p. 205, note 2, we have noticed Dr Heusler's assault on this doctrine.

[2] According to Bracton's usage, in the Novel Disseisin we have *querens* and *tenens*, in the Mort d'Ancestor *petens* and *tenens*, in the Darrein Presentment *querens* and *impediens* or *deforcians*. Only in abstract disquisitions are *actor* and *reus* found.

knowledge that a possessory action can not be 'petitory.' On the other hand, in early instances of the action of Debt the active party is often put before us, not as complaining, but as demanding[1], and, as we have seen, there were close affinities [p. 570] between the action of Debt and the Writ of Right, the most real and petitory of all real and petitory actions[2]. The man who sues for a debt is regarded as merely asking for his own; he ought not to speak in that angry tone which is excusable or laudable in one who has been assaulted or disseised. But then we have seen how Bracton, fixing for six centuries our use of words, denied that the action for a specific chattel is an action *in rem*, for the judgment will give the defendant a choice between surrendering the chattel and paying its value[3]. Lastly, we have seen how possessoriness is regarded as a matter of degree, how between the Possessory Assizes and the Writ of Right there arise those Writs of Entry which for some are possessory, for others proprietary, while for yet others they are 'mixed of possession and right[4].' 'Mixed' is a blessed word. The impatient student who looks down upon medieval law from the sublime heights of 'general jurisprudence' will say that most of our English actions are mixed and many of them very mixed.

Civil and criminal.

Even between civil and criminal causes it was by no means easy to draw the line, though Glanvill, under foreign influence, points to it in the first words of his treatise[5]. We must repeat once more that every cause for a civil action is an offence, and that every cause for a civil action in the king's court is an offence against the king, punishable by amercement, if not by fine and imprisonment[6]. An action based on felony and aiming at pure punishment, death or mutilation, has indeed become very distinct from all the other actions; it has a highly distinctive procedure and a name of its own; it is an Appeal (*appellum*). The active party neither 'demands' nor 'complains'; he appeals (*appellat*) his adversary. But we have seen how the action of Trespass is closely related to the Appeal, and how the outlawry process which was once characteristic of the Appeal is extended to Trespass and thence to more purely civil

[1] Note Book, pl. 52, 177, 325, 381, etc.
[2] See above, vol. ii. pp. 206–7.
[3] See above, vol. ii. p. 174.
[4] See above, vol. ii. p. 72.
[5] Glanvill, i. 1: 'Placitorum, aliud est criminale, aliud civile.'
[6] See above, vol. ii. p. 519.

actions[1]. We have also seen how in Edward I.'s day Trespass aimed at a punitive and exemplary result and how throughout the age of the Year Books men were 'punished' for their [p. 571] trespasses[2]. More native to our law was the distinction between Pleas of the Crown and Common Pleas, which was often supposed to coincide with, though really it cut, the more cosmopolitan distinction; but even this could not always be drawn with perfect neatness. Cnut's modest list of his 'rights over all men' has been wondrously expanded[3]; kings and royal justices are unwilling to close the catalogue of causes in which the crown has or may have an interest. Trespass *vi et armis*, even when in truth it had become as civil an action as civil could be, was still not for every purpose a Common Plea, for, despite Magna Carta, it might 'follow the king' and be entertained by the justices of his own, as well as by the justices of the Common Bench[4]. In these last days a statute was needed to teach us that an action of Quo Waranto is not a criminal cause[5], and even at the present moment we can hardly say that *crime* is one of the technical terms of our law[6].

Our course.

Now to describe our medieval procedure in detail would be a task easy when compared with that of stating the broad outlines of the substantive law. Much we might say, for example, of essoins, for Bracton has written much, and his every sentence might be illustrated by copious extracts from the plea rolls. In all such matters the working lawyer of the thirteenth century took a profound and professional interest of the same kind as that which his successor takes in the last new rules of court. But our reader's patience, if not our own, would soon fail if we led him into this maze. Some also of the more important and the more picturesque sides of the old procedure have been sufficiently described by others; this will determine our choice of the few topics that we shall discuss[7].

[1] See above, vol. ii. pp. 449, 466.
[2] See above, vol. ii. pp. 526, 531.
[3] See above, vol. ii. p. 453.
[4] Hale, Concerning the Courts of King's Bench and Common Bench, Hargrave's Law Tracts, p. 360. Novel Disseisin, Ejectment of Ward, and some other actions were in the same category.
[5] Stat. 47 & 48 Vic. c. 61, sec. 15.
[6] Stephen, Hist. Crim. Law, i. pp. 1–5. See also the large crop of decisions touching the meaning of 'any criminal cause or matter' in the Judicature Act, 1873, sec. 47.
[7] We shall, for example, pass backwards and forwards between civil and criminal procedure, just because most modern writers have sedulously kept them apart.

§ 2. *Self-help.*

Self-help in medieval law.

Had we to write legal history out of our own heads, we might plausibly suppose that in the beginning law expects men to help themselves when they have been wronged, and that by slow degrees it substitutes a litigatory procedure for the rude justice of revenge. There would be substantial truth in this theory. For a long time law was very weak, and as a matter of fact it could not prevent self-help of the most violent kind. Nevertheless, at a fairly early stage in its history, it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. Perhaps we may say that in its strife against violence it keeps up its courage by bold words. It will prohibit utterly what it can not regulate. [p. 572]

Rigorous prohibition of self-help.

This at all events was true of our English law in the thirteenth century. So fierce is it against self-help that it can hardly be induced to find a place even for self-defence. The man who has slain another in self-defence deserves, it is true, but he also needs a royal pardon[1]. This thought, that self-help is an enemy of law, a contempt of the king and his court, is one of those thoughts which lie at the root of that stringent protection of seisin on which we have often commented. The man who is not enjoying what he ought to enjoy should bring an action; he must not disturb an existing seisin, be it of land, of chattels, or of incorporeal things, be it of liberty, of serfage, or of the marital relationship. It would be a great mistake were we to suppose that during the later middle ages the law became stricter about this matter; it became laxer, it became prematurely lax. Some of the 'fist-right,' as the Germans call it, that was flagrant in the fifteenth century would have been impossible, if the possessory assizes of Henry II.'s day had retained their pristine vigour. In our own day our law allows an amount of quiet self-help that would have shocked Bracton. It can safely allow this, for it has mastered the sort of self-help that is lawless[2].

[1] See above, vol. ii. p. 479.

[2] We are here differing from Mr Nichols who (Britton, i. 288) sees after Bracton's day a 'rapidly growing inclination on the part of the king's court to repress the practice of recovering possession without judgment.' We see just the opposite inclination and think that the learned editor of Britton has been misled by Bracton's habit of calling four or five days *longum tempus*. The relaxation of possessory protection can not be doubted by any one who compares Bracton with Littleton. Ultimately the true owner has almost always at common law a right of entry; see The Beatitude of Seisin, L. Q. R. iv. 24, 286. Now-a-days the true owner always has a right of entry; all that he has to fear is statutes which make 'forcible entry' a crime. Yet our actual practice is not far from the ideal of the thirteenth century.

Distress.

[p. 573] What may at first seem a notable exception to this broad prohibition of self-help lies in the process of extra-judicial distress (*districtio*); but we may doubt whether this should be regarded as a real exception. The practice of distraining one's adversary, that is, of taking things from him and keeping them, so that by a desire to recover them he may be compelled to pay money or do some other act, is doubtless very ancient. But among the peoples of our own race law seems to have very soon required that in general a *nám* should not be taken until the leave of a court had been obtained and a great deal of forbearance had been shown[1]. Down one channel the extra-judicial develops into the judicial distress. The court not only licenses the process but sends an officer or party of doomsmen to see that it is lawfully performed, and at a later time the officer himself does the taking, and the beasts that are taken will be kept in the court's pound[2]. A distress without licence may perhaps be allowed when a man is found in the act of committing some minor offence which would not be a sufficient cause for a seizure of his body. In such a case you may, if you can, take his hat, his coat or the like; this may be your one chance of compelling him to appear in a court of law. In particular, however, if you find beasts doing damage on your land, you may seize them and keep them until their owner makes amends[3]. Down this channel the right becomes that carefully limited right to distrain what is 'damage feasant' (*damnum facientem*) which our law still knows in the present day[4].

[1] Sohm, Process der Lex Salica; Brunner, D. R. G. ii. 445; Viollet, Établissements, i. 185. For England, Ine, 9; Cnut, II. 19; Leg. Will. I. 44; Leg. Henr. 51, § 3: 'et nulli sine iudicio vel licentia namiare liceat alium in suo vel alterius.' As to the word *nám*, see Brunner, D. R. G. ii. 446.

[2] As to judicial distress, see Brunner, D. R. G. ii. 452.

[3] Brunner, D. R. G. ii. 531–5. In old days, however, the notion that the beast has offended and should be punished makes itself felt at this point.

[4] Bracton, f. 158; Britton, i. 141; Note Book, pl. 1080.

Distress for rent.

But the landlord's power to distrain a tenant for rents or other services that are in arrear is the one great instance of a power of distress[1]. In the thirteenth century that power is [p. 574] being freely used and it is used extra-judicially: by which we mean that no order has been made by any court before the goods are seized. However, to all appearance there are many traces of a time when the landlord could not distrain until his court or some other court had given him leave to do so[2]. As a matter of fact we sometimes see lords obtaining a judgment before they seize the goods of their tenants. In England the transition from judicial to extra-judicial distress was in this case easy, because our law admitted that every lord had a right to hold a court of and for his tenants. Probably in the twelfth century most landlords had courts of their own. Their tenants were also their justiciables. A right to distrain a man into coming before your court to answer why he has not paid his rent may in favourable circumstances become a right to distrain him for not paying his rent, and the king's justices, who professed a deep interest in this process of distress, had no love for feudal justice. Here as in so many other cases a levelling process was at work; all landlords were put on a par and the right of distress began to look like a proprietary right. But we may at least be sure that the historical root of the landlord's right to take his tenant's chattels was no 'tacit hypothec.' At every point that right still bore a justiciary or 'processual' character. It was not a right of 'self-satisfaction[3].' The lord might not sell the beasts; he might not use them. When he has taken them they are not in his possession; they are, as the phrase goes, *in custodia legis*[4]. He must be always ready to show them; he must be ready to give them up if ever the tenant tenders the arrears or offers gage and pledge that he will contest the claim in a court of law. Nor can the lord

[1] The owner of a rent-charge has a similar power, but this is given him by express bargain. See above, vol. ii. p. 129.

[2] Leg. Henr. 51, § 3: 'et nulli sine iudicio vel licentia namiare liceat alium in suo vel alterius.' See Bigelow, Hist. Procedure, 202–8, and above, vol. i. p. 353.

[3] Brunner, D. R. G. ii. 451. Observe that when words are correctly used one does not distrain a thing; one distrains a man by (*per*) a thing.

[4] In early continental law the thing taken in distress sometimes became the property of the distrainor if the debtor did not redeem it within a fixed time.

take just what he likes best among the chattels that are upon [p. 575] the tenement. On the contrary he is bound by rules, a breach of which will make him a disseisor of his tenant[1]. Some of these rules, which place chattels of a certain kind utterly beyond the reach of distress, or suffer them to be taken only when there are no others, are probably of high antiquity; but we must not pause to discuss them[2].

Replevin.

Just because the power of extra-judicial distress is originally a justiciary power, the king's courts and officers are much concerned when it is abused. If the distrainor will not deliver the beasts after gage and pledge have been offered, then it is the sheriff's duty to deliver them. For this purpose he may raise the hue, call out the whole power of the county (*posse comitatus*) and use all necessary force[3]. 'When gage and pledge fail, peace fails,' says Bracton[4]: in other words, the distraining lord is beginning a war against the state and must be crushed. The offence that he commits in retaining the beasts after gage and pledge have been tendered, is known as *vetitum namii*, or *vee de nam*[5]. It stands next door to robbery[6]; it is so royal a plea that very few of the lords of franchises have power to entertain it[7]. It is an attack on that justiciary system of which the king is the head. Disputes about the lawfulness of a distress were within the sheriff's competence. He could hear them without being ordered to do so by royal writ. But when he heard them he was acting, not as the president of the county court, but as a royal justiciar[8]. Before the end of the thirteenth century the action based upon the *vee de nam* was losing some

[1] Bracton, f. 217.

[2] Co. Lit. 47; Blackstone, Comment. iii. 7. For parallel rules on the continent, see Brunner, D. R. G. ii. 449.

[3] Bracton, f. 157; Britton, i. 137; Stat. West. I. c. 17.

[4] Bracton, f. 217 b: 'ubi deficiunt vadia et plegia deficit pax.'

[5] Blackstone, Comm. iii. 49, suggests that *de vetito namii* is a corrupt reading of *de repetito namii*. This is a needless emendation. If you refuse to give up a thing, you are said *vetare* that thing. See next note.

[6] Bracton, f. 157 b: 'cum iniusta captio et detentio contra vadium et plegium dici poterit quaedam roberia contra pacem domini Regis, etiam plus quam nova disseisina.' Ibid. f. 158 b: 'et notandum quod iniusta captio emendari poterit per vicinos, iniusta autem detentio non, quia hoc est manifeste contra pacem domini Regis et contra coronam suam.' Ibid. f. 217 b: 'si averia capta per vadium et plegium vetentur, vetitum illud non solum erit querenti iniuriosum, immo domino Regi, cum sit contra pacem suam.' Britton, i. 139.

[7] Bracton, f. 155 b. See the Earl of Warenne's case, P. Q. W. 751.

[8] Bracton, f. 155 b; Britton, i. 136.

of its terrors; either party could easily procure its removal [p. 576] from the county court to the king's court[1]. Under the name of *Replegiare* or Replevin, an action was being developed which was proving itself to be a convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigour, its rapidity, and therefore its convenience to the supposition that a serious offence had been committed against the king[2].

Distress and seisin.

One other trait in our law of distress deserves notice. The power to distrain flows from seisin, not from 'right.' On the one hand, a lord or would-be lord must not distrain unless he can allege a recent seisin of those services the arrears of which he is endeavouring to recover. On the other hand, a recent, if wrongful, seisin of those services gives him the right to distrain[3]. We may say that even the negative self-help, which consists in a refusal to continue a compliance with unjust demands, is forbidden. The man who has done services must still do them until he has gone to law and disproved his liability. He may easily be guilty of disseising his lord[4].

§ 3. *Process.*

We have now to speak of the various processes which the law employs in order to compel men to come before its courts. They vary in stringency from the polite summons to the decree of outlawry. But first we must say one word of an offshoot of outlawry, of a species of summary justice that was still useful in the thirteenth century[5].

Summary justice.

When a felony is committed, the hue and cry (*hutesium et clamor*) should be raised. If, for example, a man comes upon a dead body and omits to raise the hue, he commits an amerciable offence, besides laying himself open to ugly suspicions. Possibly the proper cry is 'Out! Out!' and therefore it is

[1] Stat. West. II. c. 2.

[2] There was a tradition among the lawyers of Edward I.'s day that the plea *de vetito namii* was not so old as Henry II.'s time (P. Q. W. 232) but was invented under John (Y. B. 30–1 Edw. I. p. 222). The replevin writ in Glanvill, xii. 15, differs in important respects from that in Bracton, f. 157, and Reg. Brev. Orig. f. 81.

[3] Bracton, f. 158.

[4] See above, vol. ii. pp. 125–6.

[5] Brunner, D. R. G. ii. 481.

[p. 577] *uthesium* or *hutesium*[1]. The neighbours should turn out with the bows, arrows, knives, that they are bound to keep[2] and, besides much shouting, there will be horn-blowing; the 'hue' will be 'horned' from vill to vill[3].

The hand-having thief.

Now if a man is overtaken by hue and cry while he has still about him the signs of his crime, he will have short shrift. Should he make any resistance, he will be cut down. But even if he submits to capture, his fate is already decided. He will be bound, and, if we suppose him a thief, the stolen goods will be bound on his back[4]. He will be brought before some court (like enough it is a court hurriedly summoned for the purpose), and without being allowed to say one word in self-defence, he will be promptly hanged, beheaded or precipitated from a cliff, and the owner of the stolen goods will perhaps act as an amateur executioner[5].

Summary justice in the king's court.

In the thirteenth century this barbaric justice is being brought under control[6]. We can see that the royal judges do not much like it, though, truth to tell, it is ridding England of more malefactors than the king's courts can hang. The old rule held good that if by hue and cry a man was captured when he was still in seisin of his crime—if he was still holding the gory knife or driving away the stolen beasts—and he was brought before a court which was competent to deal with such cases, there was no need for any accusation against him, for any appeal or any indictment, and, what is more, he could not be heard to say that he was innocent, he could not claim any sort or form of [p. 578] trial[7]. Even royal judges, if such a case is brought before them,

[1] See Brunner, D. R. G. ii. 482, as to the various cries used for this purpose. The famous Norman *Haro* seems to mean *Hither*. See also Viollet, Établissements, i. 189.

[2] See the Writ of 1252 in Select Charters.

[3] Select Pleas of the Crown, p. 69: 'et tunc cornaverunt hutes.'

[4] Bigelow, Placita, p. 260.

[5] See above, vol. ii. p. 496.

[6] Palgrave, Commonwealth, p. 212; Y. B. 30–1 Edw. I. pp. 503, 545.

[7] Bracton, f. 137: 'haec est constitutio antiqua'; Britton, i. 37, 56. Good instances of the enrolments that will be made when the king's justices come round are these:—Northumberland Assize Rolls, p. 73: 'W. Y. burgavit domum T. F. in W. et furatus fuit...septem vellera... Et homines de eadem villa secuti fuerunt ipsum et ipsum decollari fecerunt praesente ballivo domini Regis. Catalla eiusdem...ix sol. vi. d.... Et super hoc veniunt ballivi Comitis Stratherne...et dicunt quod huiusmodi catalla pertinent ad eos, eo quod ipse recepit iudicium in curia sua.' Ibid. 78; 'S. de S....captus fuit cum quodam equo furato per sectam W. T. et decollatus fuit praesente ballivo domini Regis,

act upon this rule[1]. It is not confined to cases of murder and theft. A litigant who in a civil suit produces a forged writ is hanged out of hand in a summary way without appeal or indictment, and the only chance of exculpation given him is that of naming a warrantor[2]. Even in much later days if a man was taken 'with the mainour' (*cum manuopere*), though he was suffered and compelled to submit the question of his guilt or innocence to the verdict of a jury, he could be put on his trial without any appeal or any indictment[3].

Summary justice and outlawry.

There is hardly room for doubt that this process had its origin in days when the criminal taken in the act was *ipso facto* an outlaw[4]. He is not entitled to any 'law'[5], not even to that sort of 'law' which we allow to noble beasts of the chase. Even when the process is being brought within some legal limits, this old idea survives. If there must be talk of proof, what has to be proved is, not that this man is guilty of a murder, but that he was taken red-handed by hue and cry. Our records seem to show that the kind of justice which the criminal of old times had most to dread was the kind which we now associate with the name of Mr Lynch[6].

Outlawry as process.

We may now say a few last words of outlawry[7]. It was still the law's ultimate weapon. When Bracton was writing, a tentative use of it was already being made in actions founded on trespasses committed with force and arms. This was a novelty. In the past the only persons who were outlawed were [p. 579]

et praedictus equus deliberatus fuit praedicto W. qui sequebatur pro equo illo in pleno comitatu.' See also Thayer, Evidence, 71.

[1] Gloucestershire Pleas, pl. 174 ('non potest dedicere'), 189, 394 ('non potest defendere'); Select Pleas of the Crown, pl. 106, 124, 125, 169, 195; Note Book, pl. 136 ('non potest dedicere tunicam'), 138 ('non potest defendere') 1461, 1474, 1539.

[2] Note Book, pl. 1847, cited by Bracton, f. 414.

[3] Hale, P. C. ii. 156. In Stat. Walliae, c. 14, Edward I. concedes to the Welsh that a thief taken with the mainour shall be deemed convicted.

[4] Brunner, D. R. G. ii. 483. A gloss on the Sachsenspiegel says, 'Some are declared outlaw (*friedlos*) by a judge; others make themselves outlaw, as those who break into houses by night.' With reference to the closely analogous process of excommunication, we might speak of an outlawry *lata sententia*.

[5] Ass. Clarend. c. 12: 'non habeat legem.' But under this assize the man taken with the mainour may go to the ordeal if he be not of ill fame.

[6] The Halifax Gibbet Law, described by Stephen, Hist. Crim. Law, i. 265, is a relic of this old summary justice. Observe that Lynch law is not 'self-help.'

[7] See above, vol. ii. p. 449.

those who were accused of felony either by appeal or by indictment. An Appeal was a proceeding which was normally commenced in the county court without any writ. If the appellee did not appear, the ceremony of 'exacting' or 'interrogating'[1] him was performed in four successive county courts: that is to say, a proclamation was made bidding him 'come in to the king's peace,' and if he came not, then the dread sentence was pronounced. Then again, if any one was indicted before the king's justices and was not forthcoming, they would make inquisition as to his guilt and, being assured of this, would direct that he should be exacted and outlawed in the county court. In either case he might, it will be seen, remain contumacious for some five months without being put outside the peace[2]. Outlawry was still a grave matter. It involved, not merely escheat and forfeiture, but a sentence of death. If the outlaw was captured and brought before the justices, they would send him to the gallows so soon as the mere fact of outlawry was proved[3]. Therefore an important step in constitutional history was made in the year 1234 when the outlawry of Hubert de Burgh was declared null on the ground that he had been neither indicted nor yet appealed, though he had broken prison and the king was treating him as a rebel[4]. This weapon was as clumsy as it was terrible. There were all manner of cases in which a man might be outlawed without being guilty of any crime or any intentional contumacy. The exaction might, for example, take place in a county distant from his home. There was therefore great need for royal writs [p. 580] inlawing an outlaw and many were issued; but no strict line

[1] In our records *interrogetur* = *exigatur* = let him be demanded.

[2] Old English and old Frankish law would lead us to expect but three exactions. The London custom required but three, which were made at fortnightly intervals; but in cent. xiii. this was thought too hasty. See Munim. Gildh. i. 86; ii. 333–8. What is in substance the same procedure may be said to involve three, four or five exactions; for we may or may not count what happens at the first, or what happens at the last court as an exaction. See Bracton, f. 125 b; Gross, Coroners' Rolls, p. xli.

[3] The 'minor outlawry' for 'trespasses' that was being invented did not involve sentence of death. Bracton, f. 441.

[4] Note Book, pl. 857; Mat. Par. Chron. Maj. ann. 1234. Bracton, f. 127, is thinking of this case when he says: 'Item nulla [erit utlagaria] si ad praeceptum Regis vel sectam Regis fuerit quis utlagatus, nisi prius facta inquisitione per iustitiarios, utrum ille, qui in fuga est, culpabilis sit de crimine ei imposito vel non.'

could here be drawn between acts of justice and acts of grace[1].

Arrest.

From outlawry we may pass to arrest, which in our eyes may seem to be the simplest method of securing a malefactor's presence in court. Now of the law of arrest as it was in these early days we should like to speak dogmatically, for thus we might obtain some clue to those controversies touching 'the liberty of the subject' which raged in later ages. Our guides, however, the lawyers of the time, will not give us the help that we might hope for; they seem to be much more deeply interested in the essoin *de malo lecti* and other remunerative tithes of mint and cumin than in the law of arrest which does not directly concern those decent people who pay good fees.

Law of arrest.

The law of arrest is rough and rude; it is as yet unpolished by the friction of nice cases. Before we say more of it we must call to mind two points in our criminal procedure. In the first place, any preliminary magisterial investigation, such as that which is now-a-days conducted by our justices of the peace, is still in the remote future, though the coroners are already making inquest when there is violent death. This simplifies the matter. We have but to consider two or three cases. The man whose arrest we are to discuss either will have been, or he will not have been, already accused of an offence. In the former case he will have been either appealed or indicted. Secondly, there is no professional police force. The only persons who are specially bound to arrest malefactors are the sheriff, his bailiffs and servants and the bailiffs of those lords who have the higher regalities. The constables who are becoming apparent at the end of our period are primarily military officers, though it is their duty to head the hue and cry[2].

Arrest of felons.

The main rule we think to be this, that felons ought to be summarily arrested and put in gaol. All true men ought to take part in this work and are punishable if they neglect it. We may strongly suspect, however, that in general the only persons whom it is safe to arrest are felons, and that a man leaves himself open to an action, or even an appeal, of false [p. 581]

[1] Bracton, f. 127 b: 'de iure concomitante gratia ad omnia restituendi sunt.' Ibid. 132 b: 'recepi debet...ad pacem et sine difficultate, et aliquantulum de iure.' Ibid. 133: 'facit tamen rex aliquando gratiam talibus, sed contra iustitiam.'

[2] Writ of 1252 in Select Charters.

imprisonment if he takes as a felon one who has done no felony. In other words, it seems very doubtful whether a charge of false imprisonment could have been met by an allegation that there was reasonable cause for suspicion. This was not always the case, for before the end of Henry III.'s reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause, and very probably the sheriff and his officers could always plead a justification for the caption of persons who were suspected, though not guilty, of felony[1]. The ordinary man seems to have been expected to be very active in the pursuit of malefactors and yet to 'act at his peril.' This may be one of the reasons why, as any eyre roll will show, arrests were rarely made, except where there was hot pursuit after a 'hand-having' thief[2].

Arrest of the accused.

When there had been an indictment of felony, the sheriff's duty was to arrest the indicted, and as the indictment might take place in the sheriff's turn, or some co-ordinate court which could not try felons, the arrest of some accused persons was thus secured. Then again, at the beginning of the eyre the names of those who were suspected of felony by the jurors were handed in to the justices, who ordered the sheriff to make arrests. But, as a matter of fact, those who thought that they were going to be indicted usually had an ample opportunity [p. 582] for flight and then they could only be outlawed. The law

[1] See Northumberland Assize Rolls, p. 108. In 1256 two women bring an action against Thomas of Bickerton, alleging that he arrested them and another woman, who has died in prison, as thieves and sent them to Newcastle gaol. Thomas defends himself by alleging that the three women stole a bushel of malt in his house. The jurors find that the dead woman committed the theft and that the two plaintiffs are innocent. Thomas has to make fine with the heavy sum of £40. No word is said by either party of 'probable cause.'

[2] The Assize of Clarendon, c. 2, speaks of the arrest of the indicted; it also, c. 16, orders the arrest of a waif or unknown man; even in a borough he must be arrested, if he has stayed there for more than one night. The ordinance of 1195 commands all men to arrest outlaws, robbers, thieves and the receivers of such. That of 1233, which institutes the night-watch, commands the arrest of the man who enters a vill by night and the man who goes armed. The ordinance of 1252 mentions also 'quoscunque perturbatores pacis nostrae, praedones et malefactores in parcis vel vivariis.' These documents are in the Select Charters. The oath taken by every youth (Bracton, f. 116) contained a promise, not only to join the hue and cry, but also to arrest any one who bought victuals in a vill in such wise as to found a suspicion that they were meant for the use of criminals ('et suspectus habeatur quod hoc sit ad opus malefactorum').

seems to believe much more in outlawry than in arrest. When there is an appeal of felony in the county court—and it is there that an appeal should be begun—we can see no serious effort made to catch the absent appellee. The process of 'exacting' him begins. If the fear of outlawry will not bring him in, we despair. Much had been done towards the centralization of justice; still the county boundary was a serious obstacle. The man outlawed in one shire was outlaw everywhere; but a sheriff could not pursue malefactors who had fled beyond his territory.

Mainprise.

If a man was arrested he was usually replevied (*replegiatus*) or mainprised (*manucaptus*): that is to say, he was set free so soon as some sureties (*plegii*) undertook (*manuceperunt*) or became bound for his appearance in court. It was not common to keep men in prison. This apparent leniency of our law was not due to any love of an abstract liberty. Imprisonment was costly and troublesome. Besides, any reader of the eyre rolls will be inclined to define a gaol as a place that is made to be broken, so numerous are the entries that tell of escapes[1]. The medieval dungeon was not all that romance would make it; there were many ways out of it. The mainprise of substantial men was about as good a security as a gaol. The sheriff did not want to keep prisoners; his inclination was to discharge himself of all responsibility by handing them over to their friends.

Replevisable prisoners.

The sheriffs seem to have enjoyed a discretionary power of detaining or releasing upon mainprise those who were suspected of felony; but the general rule had apparently been that, even after an appeal had been begun or an indictment had been preferred, the prisoner should be replevied unless he was charged with homicide. Glanvill seems to have regarded even this exception of homicide as one that had been introduced by ordinance, and he speaks as though a man appealed of high-treason would in the ordinary course of events be replevied[2]. The rigorous

[1] See *e.g.* Northumberland Assize Rolls, pp. 74, 76, 80, 89, 91, 96, 98.

[2] Glanvill, xiv. 1, says that one appealed of high treason is usually attached by pledges, if he can find them. 'In omnibus autem placitis de felonia solet accusatus per plegios dimitti praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est.' Munim. Gildh. i. 113: 'Secundum antiquam legem civitatis [Londoniae] semper consueverunt replegiare homines rectatos de morte hominis.' See also Ibid. i. 296. So late as 1321 (Ibid. ii. 374) the Londoners asserted this custom of replevying men indicted of homicide, but

[p. 583] forest law introduced a second exception, for those who were 'taken for the forest' were to be detained. Again, the sheriff should not set at liberty any one who was imprisoned by the special command of the king or of his chief justiciar. A writ *De homine replegiando* soon came into currency. It told the sheriff to deliver the prisoner unless he had been taken at the special command of the king or of his chief justiciar, or for the death of a man, or for some forest offence, or for some other cause which according to the law of England made him irreplevisable[1]. Such a writ could apparently be obtained 'as of course' from the chancery. As we understand the matter, it did but remind the sheriff of what had all along been his duty: in other words, he was not bound to wait for a writ. It will be observed that this precept was so penned as to throw upon him the responsibility of deciding whether 'according to the law of England' the prisoner should be kept in custody. Four cases are specially mentioned as cases in which there should be no replevin; but he is warned that the list is not exhaustive. Clearly it is not, for we may say with certainty that this 'writ of course' would not warrant the delivery of a condemned felon, or of an outlaw. But we can see that in yet other cases a sheriff might be justified in refusing mainprise. The law was gradually growing less favourable to release. In one passage Bracton repeats Glanvill's words:—If a man has been appealed or indicted of any felony, other than homicide, he is usually replevied[2]. In another passage we find a far severer doctrine:—The man who has been taken for high treason is absolutely irreplevisable; the man who has been taken for any crime which is punished by death or mutilation will hardly be able to extort from the king the privilege of being released on bail[3]. The records of practice seem to show that some sheriffs were only too glad to dismiss prisoners from

the justices treated it as an intolerable infringement of common law. The Assize of Clarendon, c. 3, provides that an indicted man is to be replevied, if within three days he is demanded by his lord, his lord's steward or his lord's men. This reminds us that in the twelfth century a feudal force was making for replevin. The lords will not approve the detention of their men.

[1] This writ is in Bracton, f. 154: 'nisi captus sit per speciale praeceptum nostrum, vel capitalis iustitiarii nostri, vel pro morte hominis, vel foresta nostra, vel pro aliquo retto quare secundum legem Angliae non sit replegiandus.'

[2] Bracton, f. 123. Compare f. 139.

[3] Bracton, f. 437. Observe that there is room for a variety of opinions.

custody[1]. Then in 1275 one of Edward I.'s momentous statutes, [p. 584] after accusing the sheriffs both of retaining those who were, and releasing those who were not, replevisable, and after admitting that the law about this matter had never been precisely determined, proceeded to lay down rules which correspond rather with Bracton's severer than with his more lenient doctrine, and these statutory rules became the law for the coming centuries[2].

Action of the king's court.

In later days our interest in 'the liberty of the subject' finds its focus in the king's courts at Westminster. Our question is: What will these courts do with those men who have not been sentenced to imprisonment but who are in prison? If we ask this question of the thirteenth century, we suppose too perfect a centralization. In theory, no doubt, the central court had a control over the whole province of criminal justice. We can see, for example, that it will sometimes direct a sheriff to send up prisoners to Westminster for trial, though this is a rare event and such mandates generally come from the chancery, not from the justices, and are to be considered rather as governmental than as judicial acts[3]. We may also believe that if a man who thought himself unlawfully imprisoned by the sheriff or by some lord of a franchise made his voice heard in the king's court, the justices had power to order that his body should be brought before them and to liberate him if they were persuaded that his detention was wrongful. But we have seen no definite machinery provided for this purpose, nor do our text-writers speak as if any such machinery was necessary. The central power for the time being seems to fear much rather that there will not be enough, than that there will be too much imprisonment of suspected malefactors, while upon merely lawless incarceration the appeal or action for false imprisonment[4] seems a sufficient check. Those famous words *Habeas corpus* are making their way into divers writs, but for any habitual use of them for the purpose of investigating

[1] See *e.g.* Gloucestershire Pleas (A.D. 1221), pl. 245: prisoners for homicide delivered by the sheriff for five marks.

[2] Stat. West. I. c. 15. For commentaries on this famous statute, see Coke, Second Instit. 185; Hale, P. C. ii. 127 and Stephen, Hist. Crim. Law, i. 233.

[3] See *e.g.* Rot. Cl. 429. Approvers are often moved about from prison to prison.

[4] See above, vol. ii. p. 488.

[p. 585] the cause of an imprisonment we must wait until a later time[1].

Royal control.

In particular, we must not as yet set the king's court in opposition to the king's will. His justices were his very obedient servants. As we have lately said[2], a memorable triumph for law over arbitrary power was won in 1234 when the royal court by the mouth of William Raleigh declared null and void that outlawry of Hubert de Burgh which the king had specially commanded. But this victory was only gained after a revolt and a change of ministry. The man committed to gaol *per mandatum domini Regis* would have found none to liberate him. The luckless Eleanor of Britanny was kept in prison to the end of her days. Her one offence was her birth; she had never been tried or sentenced; but we may safely say that none of the king's justices would have set her free[3].

The writ *de odio et atia.*

There is, however, another writ that deserves mention. We have seen how in Glanvill's time homicide was the only crime for which men were usually detained as irreplevisable. But even in this case the law of the twelfth century showed no love for imprisonment, and a writ was framed for the relief of the incarcerated appellee, the writ *de odio et atia.* Unfortunately the mention of this writ compels us to unravel a curious little node in which the history of provisional imprisonment is knotted with the history of pleading and the history of trial. We must be brief.

Origin of the writ.

In the twelfth century the only mode of bringing a felon to justice has been the appeal; the only mode of meeting an appeal has been a direct negation, and the normal mode of proof has been battle. But the king has his royal inquest-procedure for sale, and the canonists are teaching our English lawyers how to plead *exceptiones*, that is to say, pleas that are not direct negations of the charge made by the plaintiff. Now sometimes a defendant will plead such an *exceptio* and buy from the king the right to prove it by a verdict of the country.

[1] We shall see hereafter (p. 593) that a *Habeas corpus* was at one time a part of the ordinary mesne process in a personal action.

[2] See above, vol. ii. p. 581.

[3] Mat. Par. Chron. Maj. iv. 163: 'obiit Alienora filia Galfridi...in clausura diutini carceris sub arcta custodia reservata.' Coke's laborious attempt (Second Instit. 187) to make *le maundement le roy* of Stat. West. I. c. 15, mean the order of the king's court will deceive no student of history. See Stephen, Hist. Crim. Law, i. 234, note 3.

One of these 'exceptions' is the plea of spite and hate (*de odio et atia*)[1]. The appellee asserts and undertakes to prove that the appeal is, if we use modern terms, no *bona fide* appeal, but a malicious prosecution[2]. Sometimes, if not always, he alleges a particular cause for the spite and hatred[3]. He is not directly meeting the appeal by denying his guilt, he is raising a different question. This having been raised, he obtains a writ directing that an inquest shall be taken. Is he appealed of spite and hatred or is there a true, that is, a *bona fide* appeal? [p. 586]

Effect of the writ.

Such is the writ *de odio et atia*. Suppose now that the jurors testify in favour of the appellor. The appellee is not convicted; he can still meet the appeal with a direct negation and go to battle[4]; meanwhile he will remain in prison. Suppose on the other hand that the verdict is favourable to him, then the appeal will be quashed and he can obtain a writ directing the sheriff to let him out of prison. But the king is now asserting his right to have every one who is appealed of felony arraigned at his suit, even though the appeal has broken down. So our appellee will not be wholly acquitted; he will be replevied and must come before the king's justices when next they make their eyre.

Later history of the writ.

In a few years a great part of this procedure has become obsolete. Trial by jury has made further encroachments on trial by battle. The appellee has gained the right to submit, not merely special pleas, but the whole question of his guilt or innocence to a verdict of the country. Also the Great Charter has ordained that the writ *de odio et atia* shall issue as of course and that no fee shall be taken for it—so rapidly popular

[1] It seems possible that this famous formula occurred first in some fore-oath *de calumnia* which could in some instances be required of a plaintiff. See Leg. Will. I. cc. 10, 14: 'li appelur jurra...que pur haur nel fait.' The A.-S. form may have been 'ne for hete ne for hôle'; Schmid, App. x. c. 4.

[2] The question is 'Utrum appellatus sit de morte illa odio et atia, vel eo quod inde culpabilis sit.' Sometimes the contrast is between an appeal *ex odio et atia* and *verum appellum*, where *verum* implies, not the truth of the accusation, but the good faith of the accuser.

[3] Select Pleas of the Crown, pl. 84: 'Et dicit quod ipse R. facit hoc appellum...per attiam et vetus odium, unde tres causas ostendit. Quarum prima est... Alia causa... Tertia causa...' Ibid. pl. 87: 'Et dicit quod ipse W. appellat eum per odium et athiam quia ipse quaesivit versus eum dedecus et damnum ut de uxore sua.' Bracton, f. 123: 'et si de odio et atia, quo odio et qua atia.'

[4] Select Pleas of the Crown, pl. 91, 92, 93.

[p. 587] have the recent improvements in royal justice become[1]. Henceforth the writ sinks into a subordinate place. It merely enables a man, who is imprisoned on a charge of homicide, to obtain a provisional release upon bail when an inquest has found that the charge has been preferred against him 'of spite and hatred[2].'

Mainprise and bail.

We have spoken, perhaps too indifferently, of 'mainprise' and of 'bail.' There was some difference between these two institutions, but at an early time it became obscure[3]. Bail implied a more stringent, mainprise a laxer, degree of responsibility[4]. English, Norman and French tradition seem all to point to an ancient and extremely rigorous form of suretyship or hostageship which would have rendered the surety liable to suffer the punishment that was hanging over the head of the released prisoner[5]. In Normandy these sureties are compared to gaolers, and a striking phrase speaks of them as 'the Duke's living prison[6].' In England when there is a release on bail

[1] Articles of the Barons, c. 26; Charter, 1215, c. 36. We know from Bracton, f. 121 b, 123, that the writ of inquest which is to be denied to no one is the writ *de odio et atia*.

[2] The story here told is substantially that which was first told by Brunner, Entstehung der Schwurgerichte, p. 471. The publication of excerpts from the earliest plea rolls have gone far to prove the truth of his brilliant guess, which has been confirmed by Thayer, Evidence, 68. See Gloucestershire Pleas, pl. 76, 434; Select Pleas of the Crown, pl. 25, 78, 81–4–6–7–8, 91–2–3–4–5, 104, 202–3; Note Book, pl. 134, 1548. Our classical writers missed the track because they were inclined to treat trial by jury as aboriginal. As regards the later history of the writ, Foster (Crown Cases, 285) and Sir James Stephen (Hist. Crim. Law, i. 242; iii. 37) have contended that it was abolished in 1278 by Stat. Glouc. c. 9, which deals with homicide by misadventure. This doctrine can hardly be true, for the writ is mentioned as an existing institution in 1285 (Stat. West. II. c. 29) and in 1314 (Rot. Parl. i. 323). Coke, Second Instit. 43, and Hale, P. C. ii. 148, certainly supposed that the writ could be issued in their own days. Coke thought that it had been abolished by Stat. 28 Edw. III. c. 9, and restored by Stat. 42 Edw. III. c. 1. The writ with which the Statute of Gloucester deals had nothing whatever in it about *odium et atia*; it directly raised the issue 'felony or self-defence [or misadventure].' See above, p. 481. The writ *de odio* went out of use as gaol-deliveries became frequent.

[3] Hale, P. C. ii. 124.

[4] Bracton, f. 139: 'non est per plegios dimittendus, nisi hoc fuerit de gratia, et tunc per ballium, scilicet, corpus pro corpore.'

[5] Fitz. Abr. tit. *Mainprise*, pl. 12; Hale, P. C. ii. 125; Ancienne coutume, cc. 68, 75 (ed. de Gruchy, pp. 163, 180); Somma, p. 168; Esmein, Histoire de la procédure criminelle, 55.

[6] Ancienne coutume, p. 180; Somma, p. 188: 'viva prisonia Ducis Normanniae': 'la vive prison au Duc de Normendie.' On the other hand, a

the sureties are often said to be bound *corpus pro corpore*[1]. [p. 588] However, so far as we can see, whether there has been bail or whether there has been mainprise, the sureties of the thirteenth century, if they do not produce their man, escape with amercement. The undertaking to forfeit a particular sum and the formal recognizance, which afterwards become familiar, seem to be very rare in this age[2]. The strict theory seems to be that all the chattels of the sureties are at the king's mercy, while in case of bail they may have to render their own bodies to gaol. Very often the prisoner was handed over to a tithing; sometime a whole township was made responsible for his appearance[3].

Sanctuary and abjuration.

One of the commonest results of the attempt to catch a criminal was his flight to sanctuary and his abjuration of the realm. This picturesque episode of medieval justice has been so admirably described by other hands that we shall say little about it[4]. Every consecrated church was a sanctuary. If a malefactor took refuge therein, he could not be extracted; but it was the duty of the four neighbouring vills to beset the holy place, prevent his escape and send for a coroner. The coroner came and parleyed with the refugee, who had his choice between submitting to trial and abjuring the realm. If he chose the latter course, he hurried dressed in pilgrim's guise to the port that was assigned to him, and left England, being bound by his oath never to return. His lands escheated; his chattels were forfeited, and if he came back his fate was that of an outlaw. If he would neither submit to trial nor abjure the realm, then the contention of the civil power was that, at all events after he had enjoyed the right of asylum for forty days,

prison is sometimes spoken of as a pledge, *e.g.* Select Pleas of the Crown, pl. 197: 'plegius Eustachii gaola de Flete.'

[1] Bracton, f. 139. See the bail-bond for Nicholas Seagrave, Rot. Parl. i. 173.

[2] Hale, P. C. ii. 124: 'Always mainprise is a recognizance in a sum certain.' This was not so in cent. xiii. Any eyre roll will show that the regular punishment for defaulting mainpernors was amercement. Munim. Gildh. i. 92, 115: in London the mainpernor forfeited his *wer* of 100 shillings. This will be an old trait.

[3] Gloucestershire Pleas, pl. 45: 'et villata de P. cepit in manum habendi eum, et non habuit, ideo in misericordia.' Ibid. pl. 71: 'et thethinga sua cepit in manum habendi eos.' Ibid. pl. 219: 'Gaufridus...captus fuit et postea commissus Rogero de Cromwelle de Horsheie et thethingae suae... Et Rogerus et thethinga sua in misericordia pro fuga.'

[4] Réville, L'Abjuratio regni, Revue historique, vol. 50, p. 1 (1892).

he was to be starved into submission; but the clergy resented [p. 589] this interference with the peace of Holy Church. However, large numbers of our felons were induced to relieve England of their presence and were shipped off at Dover to France or Flanders[1].

Civil process.

In contrast to the procedure against felons by way of Appeal which is begun with 'fresh suit,' we have the civil procedure which is begun by Original Writ[2]. Here the original writ itself will indicate the first step that is to be taken, in other words, the 'original process'; and the subsequent steps (the 'mesne process'), which will become necessary if the defendant is contumacious, will be ordered by 'judicial' writs which the justices issue from time to time as defaults are committed. Throughout, the sheriff acts as the court's minister; he does the summoning, attaching, distraining, arresting; but his action is hampered by the existence of 'liberties' within which some lord or some borough community enjoys 'the return of writs.'

Forbearance of medieval law.

Our readers would soon be wearied if we discoursed of mesne process. Its one general characteristic is its tedious forbearance[3]. Very slowly it turns the screw which brings pressure to bear upon the defendant. Every default that is not essoined is cause for an amercement, but the law is reluctant to strike a decisive blow. If we would understand its patience, we must transport ourselves into an age when steam and electricity had not become ministers of the law, when roads were bad and when no litigant could appoint an attorney until he had appeared in court[4]. Law must be slow in order that it may be fair. Every change that takes place in

[1] For the right of asylum under the continental folk-laws see Brunner, D. R. G. ii. 610; for A.-S. law see Schmid, Gesetze, p. 584. M. Réville holds that the law of abjuration is developed from ancient English elements and passes from England to Normandy. It must have taken its permanent shape late in the twelfth century. Some leading passages are Leg. Edw. Conf. c. 5; Bracton, f. 135 b; Britton, i. 63; Fleta, p. 45; Mat. Par. Chron. Maj. vi. 357. For early cases see Select Pleas of the Crown, pl. 48, 49, 89, etc.; Gross, Coroners' Rolls *passim*.

[2] In Bracton's day men are already beginning to make appeals in the king's central courts. In this case a writ issues which directs arrest or, in some cases, attachment. Bracton, ff. 149, 439, regards criminal and civil procedure as two variations on one theme.

[3] Reeves, Hist. Engl. Law, ch. vii, has written at length of this matter.

[4] See above, vol. i. p. 213.

procedure is an acceleration[1]. Were we to say more we should have to tell of the formal summons which is made in the [p. 590] presence of witnesses, and then of the various kinds of 'attachment'—for a man may be attached 'by his body' or 'by gage and pledge'[2]—of the various kinds of distress which will take away his chattels and deprive him of the enjoyment of his land. We see much that is very old and has been common to the whole Germanic race, as for example the principle that a man is entitled to three successive summonses; but a few words as to the real and a few as to the personal actions of Bracton's day must suffice[3].

Process in real actions.

If we reduce the process in the real action to its lowest terms, it consists of Summons and *Cape* and Judgment by Default. If the tenant does not appear when summoned, then a writ (*Magnum Cape*) goes out bidding the sheriff seize the debatable land into the king's hand and summon the tenant to explain his default[4]. If at the new day that has been thus given to him he fails to appear, or fails to heal (*sanare*) his former default, then the land is adjudged to the demandant, and the tenant's only chance of recovering it will lie in a new action begun by writ of right. We have put the simplest case of pure contumacy. An almost infinite number of other cases are conceivable as we permute and combine all the possibilities of essoin and default. But the broad general idea that runs through the maze is that the land will be taken from the contumacious tenant, and, after an interval, which gives him another opportunity of submitting to justice, it will be adjudged to his adversary. But even when this has been done we see the extreme patience of medieval law. A judgment by

[1] See Stat. Marlb. c. 7 (Writs of Wardship); c. 9 (Suit of Court); c. 12 (Dower, *Quare impedit* etc.); c. 13 (general as to Essoins); c. 23 (Account).

[2] The Court Baron (Seld. Soc.), p. 79: 'duplex est attachiamentum per corpus videlicet et per manucaptores sive per plegios.' The Scottish tract *Quoniam attachiamenta* (Acts of Parl. i. 647) is full of instruction for Englishmen.

[3] For the antiquities of 'original and mesne process,' see Brunner, D. R. G. ii. 332, 452, 457, 461. In the oldest stage the summoning is done by the plaintiff himself; it is a *mannitio* as opposed to the *bannitio* of later days which proceeds from the court. In England the triple summons can be traced thus:—Æthelst. II. 20; Edg. III. 7; Cnut, II. 25; Leg. Will. I. 47; Leg. Will. III. 14; Leg. Henr. 51, § 1; Glanvill, i. 7; Select Pleas in Manorial Courts, pp. 114–5; but it was common elsewhere; Tardif, Procédure civile et criminelle, p. 53.

[4] In Glanvill's day (i. 7) three successive summonses preceded the *Cape*.

default—unless indeed the default was committed at the very last stage of the action[1]—will not preclude the defaulter from [p. 591] reopening the dispute by a proprietary writ[2].

Process in personal actions.

When there was no specific thing that could be seized and adjudged to the plaintiff as being the very thing that he demanded, the law had at its command various engines for compelling the appearance of the defendant. Bracton has drawn up a scheme which in his eyes is or should be the normal process of compulsion; but we can see both from his own text and from the plea rolls that he is aiming at generality and simplicity, and also that some questions are still open[3]. The scheme is this:—(1) Summons, (2) Attachment by pledges, (3) Attachment by better pledges, (4) *Habeas corpus*, (5) a Distraint by all goods and chattels, which however consists in the mere ceremony of taking them into the king's hand; (6) a Distraint by all goods and chattels such as to prevent the defendant from meddling with them; (7) a Distraint by all goods and chattels which will mean a real seizure of them by the sheriff, who will become answerable for the proceeds (issues, *exitus*) to the king; (8) Exaction and outlawry[4].

Outlawry in civil process.

Bracton however has to argue for the use of outlawry. He has to suggest that there can be a minor outlawry just as there can be a minor excommunication: in other words, that a form of outlawry can be employed which will not involve a sentence

[1] Bracton, f. 367.

[2] Our *Cape in manum* corresponds to the *Missio in bannum Regis* of Frankish law; Brunner, D. R. G. ii. 457; but whereas in the old Frankish procedure the land stays in the king's hand for a year and a day, in the England of Glanvill's day the period for replevying the land has already been cut down to a fortnight; Glanvill, i. 16.

[3] Bracton, f. 439–41; Reeves, Hist. Eng. Law (ed. 1814), i. 480.

[4] The Bractonian process which inserts a *Habeas corpus* between Attachment and Distress is fully illustrated by Note Book, pl. 526, 527, 1370, 1376, 1407, 1408, 1420, 1421, 1446. A little later this *Habeas corpus* seems to disappear, but the writ of Distress commands the sheriff *quod distringat etc. et habeat corpus*, see *e.g.* Northumberland Assize Rolls, pp. 51, 59, 60, 178, 199 etc. Then Stat. Marlb. c. 12 and Stat. West. I. c. 45 accelerated the procedure by cutting away all that intervened between First Attachment and Grand Distress. Thus we pass to the process described by Britton, i. 125–134. Bracton's scheme does not provide for any 'imprisonment upon mesne process'; the sheriff is not directed, as he is by the later *Capias*, to take the defendant's body and keep it safely; but the *Habeas corpus* would, we suppose, justify the sheriff in arresting the defendant when the court-day was approaching in order to bring him into court.

of death[1]. At a little later time a distinction is here drawn. In some of the forms of action, for example Trespass *vi et armis*, there can be arrest (*Capias ad respondendum*) and, failing this, there may be outlawry; in other forms 'distress infinite' is the last process[2]. At a yet later stage, partly by statute, partly under the cover of fictions, *Capias* and Outlawry became common to many forms, and 'imprisonment upon mesne process' was the weapon on which our law chiefly relied in its struggle with the contumacious[3]. [p. 592]

No judgment against the absent in a personal action.

One thing our law would not do: the obvious thing. It would exhaust its terrors in the endeavour to make the defendant appear, but it would not give judgment against him until he had appeared, and, if he was obstinate enough to endure imprisonment or outlawry, he could deprive the plaintiff of his remedy. Now this is strange, for Bracton had pointed to the true course. 'It would, so it seems, be well to distinguish between pecuniary actions arising from contract and actions arising from delict. In the former case it would be well to adjudge to the plaintiff seisin of enough chattels to satisfy the debt and damages, and also to summon the defendant; and then, if he appeared, his chattels would be restored to him and he would answer to the action, and if he did not appear the plaintiff would become their owner. And in the case of delict it would be well that the damages should be taxed by the justices and paid out of the defendant's rents and chattels[4].' Now, at all events in the case of Debt, this course had sometimes been taken in the early part of the century[5]. But Bracton was speaking to deaf ears. Our law would not give

[1] Bracton, f. 441, proposes to use outlawry in such actions as Debt and Covenant as well as in Trespass. For early cases of outlawry in Trespass, see Note Book, pl. 85, 1232.

[2] Britton, i. 132. Northumberland Assize Rolls (A.D. 1269), p. 179: in Debt the sheriff reports that the defendant has no land open to distress: 'ideo inde nichil'; there is no more to be done. Ibid. pp. 273–7–9: in 1279 we see the *Capias* in trespass.

[3] The extension of the *Capias* is best studied in Hale's tract Concerning the Courts of King's Bench and Common Pleas, printed in Hargrave's Law Tracts, p. 359. See also Blackstone, Comm. iii. 279 ff.

[4] Bracton, f. 440 b. We have abbreviated the passage.

[5] Note Book, pl. 900. For an earlier age see Laws of William (Select Charters), c. 8: 'Quarta autem vice si non venerint, reddatur de rebus hominis illius, qui venire noluerit, quod calumniatum est, quod dicitur *ceapgeld*, et insuper forisfactura Regis.'

judgment against one who had not appeared. Seemingly we have before us a respectable sentiment that has degenerated [p. 593] into stupid obstinacy. The law wants to be exceedingly fair, but is irritated by contumacy. Instead of saying to the defaulter 'I don't care whether you appear or no,' it sets its will against his will:—'But you shall appear.' To this we may add that the emergence and dominance of the semi-criminal action of Trespass prevents men from thinking of our personal actions as mere contests beween two private persons. The contumacious defendant has broken the peace, is defying justice and must be crushed. Whether the plaintiff's claim will be satisfied is a secondary question[1]. Near six centuries passed away before Bracton's advice was adopted[2].

Specific relief.

Passing by the trial of the action, in order that we may say a few words about the 'final process,' we must repeat once more that the oldest actions of the common law aim for the more part, not at 'damages,' but at what we call 'specific relief[3].' By far the greater number of the judgments that are given in favour of plaintiffs are judgments which award them seisin of land, and these judgments are executed by writs that order the sheriff to deliver seisin. But even when the source of the action is in our eyes a contractual obligation, the law tries its best to give specific relief. Thus if a lord is bound to acquit a tenant from a claim for suit of court, the judgment may enjoin him to perform this duty and may bid the sheriff distrain him into performing it from time to time[4]. In Glanvill's day the defendant in an action on a fine could be compelled to give security that for the future he would observe his pact[5]. The history of Covenant seems to show that the judgment for specific performance (*quod conventio teneatur*) is at least as old as an award of damages for breach of contract[6]. We may find a local court decreeing that a rudder is to be made in accordance with an agreement[7], and even that one man is to serve another[8]. Nor can we say that what is in substance an

[1] To this may be added that the judgment by default in Debt (Note Book, pl. 900) may be a sign that the action has been regarded as 'real.'

[2] Stat. 2 Will. IV. c. 39, sec. 16. See Co. Lit. 288 b for a curious apology.

[3] See above, vol. ii. p. 523.

[4] Note Book, pl. 837.

[5] Glanvill, viii. 5.

[6] See above, vol. ii. pp. 216–220.

[7] The Court Baron (Selden Soc.), p. 115.

[8] Select Pleas in Manorial Courts, p. 157.

'injunction' was as yet unknown. The 'prohibition' which forbids a man to continue his suit in an ecclesiastical court on pain of going to prison[1], is not unlike that weapon which the courts of common law will some day see turned against them [p. 594] by the hand of the chancellor[2]. But further, a defendant in an action of Waste could be bidden to commit no more waste upon pain of losing the land[3], and a forester or curator might be appointed to check his doings[4]. The more we read of the thirteenth century, the fewer will seem to us the new ideas that were introduced by the chancellors of the later middle ages[5]. What they did introduce was a stringent, flexible and summary method of dealing with law-breakers. The common law has excellent intentions; what impedes it is an old-fashioned dislike for extreme measures.

Final process.

When judgment has been given for a debt, the sheriff will be directed to cause the sum that is needful to be made (*fieri facias*) out of the goods and chattels of the defendant, or levied (*levari facias*) out of his goods and the fruits of his land. But our common law will not seize his land and sell it or deliver it to the creditor; seignorial claims and family claims have prevented men from treating land as an available asset for the payment of debts. A statute of 1285 bestowed upon the creditor a choice between the old writ of *fieri facias* and a new writ which would give him possession of one half of his debtor's land as a means whereby he might satisfy himself[6]. It is not a little remarkable that our common law knew no process whereby a man could pledge his body or liberty for payment of a debt, for our near cousins came very naturally by such a process, and in old times the *wíte-þeów* may often have been working out by his labours a debt that was due to his master[7].

[1] Bracton, f. 410.

[2] Of course there is this difference: a prohibition could, and still can, be sent to the judge ecclesiastical (*ne teneat placitum*) as well as to the party (*ne sequatur*), while the chancery could lay no 'injunction' on the courts of common law.

[3] Note Book, pl. 540. Such judgments as this were rendered unnecessary by Stat. Glouc. c. 5, Stat. West. II. c. 14, which enabled the plaintiff to recover the wasted land.

[4] Note Book, pl. 56; Bracton, f. 316, 316 b; Second Instit. 300.

[5] Holmes, Early English Equity, L. Q. R. i. 162.

[6] Stat. West. II. c. 18.

[7] Kohler, Shakespeare vor dem Forum der Jurisprudenz, *passim*.

Under Edward I. the tide turned. In the interest of commerce a new form of security, the so-called 'statute merchant,' was [p. 595] invented, which gave the creditor power to demand the seizure and imprisonment of his debtor's body[1].

Costs.

What some modern practitioners may think the most interesting topic of the law was as yet much neglected. We read little or nothing of 'costs.' No doubt litigation was expensive, as we know from the immortal tale which Richard of Anesty has bequeathed to us of the horses that he lost and the loans that he raised in his endeavour to get justice from Henry II.[2] It is highly probable that in some actions in which damages were claimed a successful plaintiff might often under the name of 'damages' obtain a compensation which would cover the costs of litigation as well as all other harm that he had sustained[3]; but we know that this was not so where damages were awarded in an action for land[4], and in many actions for land no damages, and therefore no costs, could be had[5]. It is only under statute that a victorious defendant can claim costs, and at the time of which we write statutes which allowed him this boon were novelties[6]. *In expensarum causa victus victori condemnandus est*[7]—this is a principle to which English, like Roman, law came but slowly.

[1] Stat. 11 Edw. I. (Acton-Burnel); 13 Edw. I.; Statutes, vol. i. pp. 53, 98. If we are to have from comparative jurisprudence any grand inductive law as to the legal treatment of debtors, it can not possibly be of that simple kind which would see everywhere a gradually diminishing severity. May not the mildness of our English law in cent. xiii. be due to its refusal to cultivate the old formal contract, the *fides facta*?

[2] Palgrave, Eng. Commonwealth, p. ix; Hall, Court Life, p. 129.

[3] Coke, Second Instit. 288; Blackstone, Comment. iii. 399. Sometimes on a compromise costs were paid *eo nomine*; Note Book, pl. 439, 1430.

[4] Stat. Glouc. c. 1. The profits of the land had been the measure of damages. In various actions this statute gave to a successful plaintiff damages which were to cover 'the costs of his writ purchased.'

[5] See above, vol. ii. p. 524.

[6] Stat. Marlb. c. 6 gives the defendant damages and costs in an action charging him with a feoffment destined to defraud his lord of a wardship.

[7] Cod. 3. 1. 6. For costs awarded in an ecclesiastical suit, see Note Book, pl. 544.

§ 4. *Pleading and Proof.*

Ancient modes of proof.

We are now to speak of what happens when two litigants of the twelfth or thirteenth century have at length met each other in court. But first we must glance at the modes of proof which those centuries have inherited from their predecessors[1]. [p. 596] In so doing we must transfer ourselves into a wholly different intellectual atmosphere from that in which we live. We must once for all discard from our thoughts that familiar picture of a trial in which judges and jurymen listen to the evidence that is produced on both sides, weigh testimony against testimony and by degrees make up their minds about the truth. The language of the law, even in Bracton's day, has no word equivalent to our *trial*. We have not to speak of trial; we have to speak of proof[2].

The ordeal.

The old modes of proof might be reduced to two, ordeals and oaths; both were appeals to the supernatural. The history of ordeals is a long chapter in the history of mankind; we must not attempt to tell it. Men of many, if not all, races have carried the red-hot iron or performed some similar feat in proof of their innocence[3]. In Western Europe, after the barbarian invasions, the church adopted and consecrated certain of the ordeals and composed rituals for them[4]. Among our

[1] See Brunner, Zeugen- und Inquisitionsbeweis (Forschungen, p. 88); Wort und Form (ibid. p. 260); Entstehung der Schwurgerichte; Bigelow, History of Procedure; Thayer, Evidence, ch. 1; Lea, Superstition and Force.

[2] See Thayer, Evidence, p. 16. Our Eng. *try* comes from Fr. *trier*. This (see Diez, s.v. *trier*) comes from a Lat. *tritare*, a frequentative from *terere*. The Fr. *trier* begins to appear in the law books of cent. xiii., chiefly in connexion with the practice of challenging jurors; the challenges are tested or *tried*. See *e.g.* Britton, i. 30. Then the Lat. forms *triare, triatio* are made from the Fr. word. In the vulgate text Bracton, f. 105, is made to say 'ubi triandae sunt actiones'; but the MSS. have the far more probable *terminandae*. A similar mistake may be suspected in Fleta, p. 236, § 4.

[3] Patetta, Le Ordalie, Turin, 1890; Lea, Superstition and Force (3rd ed.), p. 249 ff.; Brunner, D. R. G. ii. 399. In Paul's Grundriss d. german. Philol. ii. pt. 2, p. 197, von Amira has argued that the German races had no ordeals until after they had accepted Christianity. Dr Liebermann has recently discovered the ordeal of the cauldron in the laws of Ine: Sitzungsberichte der Berliner Akademie, 1896, p. 829.

[4] The rituals are collected in Zeumer, Formulae Merovingici et Karolini Aevi (Monum. Germ.), 4to. p. 638. An English ritual is given in Schmid, Gesetze, p. 416.

own forefathers the two most fashionable methods of obtaining a *iudicium Dei* were that which adjured a pool of water to receive the innocent and that which regarded a burnt hand as a proof of guilt. Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a considerable chance of escape[1]. In the England of the [p. 597] twelfth century both of the tests that we have mentioned were being freely used; but men were beginning to mistrust them. Rufus had gibed at them[2]. Henry II. had declared that when an indicted man came clean from the water, he was none the less to abjure the realm, if his repute among his neighbours was of the worst[3]. Then came a sudden change. The Lateran Council of 1215 forbad the clergy to take part in the ceremony[4]. Some wise churchmen had long protested against it; but perhaps the conflict with flagrant heresy and the consequent exacerbation of ecclesiastical law had something to do with the suppression of this old test[5]. In England this decree found a prompt obedience such as it hardly found elsewhere; the ordeal was abolished at once and for ever[6]. Flourishing in the last records of John's reign, we can not find it in any later rolls[7]. Our criminal procedure was deprived of its handiest weapon; but to this catastrophe we must return hereafter.

[1] The only statistical information that we have comes from a Hungarian monastery which kept a register of judgments in cent. xiii. This is said to show that it was about an even chance whether the ordeal of hot iron succeeded or failed. See Dareste, Études d'histoire du droit, pp. 259–264. In certain cases our English procedure gave the appellee a choice between bearing the iron and allowing the appellor to bear it. See Select Pleas of the Crown, pl. 24, and Glanvill, xiv. 6. This seems to show that the result could not be predicted with much certainty.

[2] Eadmer, Hist. Nov. 102; Bigelow, Placita, 72. Of fifty men sent to the ordeal of iron all had escaped. This certainly looks as if some bishop or clerk had preferred his own judgment to the judgment of God, and the king did well to be angry.

[3] Ass. Clarend. c. 14.

[4] Concil. Lateran. IV. c. 18.

[5] Concil. Lateran. IV. c. 3 deals with heretics; c. 8 defines the new procedure by inquisition; c. 18 abolishes the ordeal.

[6] See the letters patent of 26th Jan. 1219; Foedera, i. 154: 'cum prohibitum sit per ecclesiam Romanam iudicium ignis et aquae.' England was for the moment at the pope's foot.

[7] Rolls of the King's Court (Pipe Roll Soc.), 80, 86, 89 etc. Select Pleas of the Crown, *passim*. Note Book, pl. 592: 'quia ante guerram [1215] habuerunt iudicium ignis et aquae.' Thayer, Evidence, 37; Lea, *op. cit.* 421.

Proof by battle.

The judicial combat[1] is an ordeal, a bilateral ordeal. The church had shown less favour to it than to the unilateral ordeals, perhaps because it had involved pagan ceremonies[2]. Therefore we hear nothing of it until the Normans bring it hither. In later days English ecclesiastics had no deep dislike for it[3]. It was a sacral process. What triumphed was not brute force but truth. The combatant who was worsted was a convicted perjurer. [p. 598]

Proof by oath.

The ordeal involves or is preceded by an oath; but even when the proof is to consist merely of oaths, a supernatural element is present. The swearer satisfies human justice by taking the oath. If he has sworn falsely, he is exposed to the wrath of God and in some subsequent proceeding may perhaps be convicted of perjury; but in the meantime he has performed the task that the law set him; he has given the requisite proof. In some rare cases a defendant was allowed to swear away a charge by his own oath; usually what was required of him was an oath supported by the oaths of oath-helpers[4]. There are good reasons for believing that in the earliest period he had to find kinsmen as oath-helpers[5]. When he was denying an accusation which, if not disproved, would have been cause for a blood-feud, his kinsmen had a lively interest in the suit, and naturally they were called upon to assist him in freeing himself and them from the consequences of the imputed crime. The plaintiff, if he thought that there had been perjury, would have the satisfaction of knowing that some twelve of his enemies were devoted to divine vengeance. In course of time the law no longer required kinsmen, and we see a rationalistic tendency which would convert the oath-helpers into impartial 'witnesses to character.' Sometimes the chief swearer must choose them from among a number of men designated by the court or by his opponent; sometimes they must be his neighbours. Then again, instead of swearing positively that his oath is true, they may swear that it is true to the best of their

[1] Brunner, D. R. G. ii. 414; Lea, *op. cit.* 101 ff.; Neilson, Trial by Combat; Thayer, Evidence, 39.

[2] Brunner, D. R. G. ii. 416.

[3] See above, vol. i. pp. 50, 74. Note Book, pl. 551: in 1231 the bishop of London produces his champion. Neilson, *op. cit.* pp. 50–1.

[4] Brunner, D. R. G. ii. p. 378; for England, Schmid, Gesetze, pp. 563–7.

[5] Brunner, D. R. G. ii. p. 379; Lea, *op. cit.* ch. iv.; Leg. Henr. 64, § 4.

knowledge[1]. In some cases few, in others many helpers are demanded. A normal number is 12; but this may be reduced to 6 or 3, or raised to 24, 36, 72[2]. A punctilious regard for formalities is required of the swearers. If a wrong word is used, the oath 'bursts' and the adversary wins. In the twelfth century such elaborate forms of asseveration had been devised that, rather than attempt them, men would take their chance at the hot iron[3]. [p. 599]

Oaths of witnesses.

Besides the oaths of the litigants and their oath-helpers, the law also knew the oaths of witnesses; but apparently in the oldest period it did not often have recourse to this mode of proof, and the oaths which these witnesses proffered were radically different from the sworn testimony that is now-a-days given in our courts[4]. For one thing, it seems to have been a general rule that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to witness[5].' Secondly, when the witness was adduced, he came merely in order that he might swear to a set formula. His was no promissory oath to tell the truth in answer to questions, but an assertory oath. We shall see hereafter that the English procedure of the thirteenth century expects a plaintiff to be accompanied by a 'suit' of witnesses of this kind, witnesses who are prepared to support his oath in case the proof is awarded to him.

[1] Compare on the one hand the A.-S. oath, Schmid, Gesetze, p. 406 ('On þone Drihten, se áð is cláne and unmáne þe N. swór'), with the formula used in the London of cent. xiii. ('quod *secundum scientiam suam* iuramentum quod fecit fidele est'), Munim. Gildh. i. 105. The same change took place in the canon law and was consecrated by Innocent III.; c. 13, X. 5. 34; Lea, *op. cit.* 71–2.

[2] Brunner, D. R. G. ii. 384. The question whether when a man is said *iurare duodecima manu* he has twelve or only eleven compurgators, must, according to Dr Brunner, be answered sometimes in the one, sometimes in the other way. The inclusive reckoning seems to be the older, and is sanctioned by the Statutum Walliae, c. 9, where eleven helpers are required; but in London during cent. xiii. the other reckoning prevailed; Munim. Gildh. i. 104–5. In the last reported English case of compurgation, *King* v. *Williams* (1824), 2 Barnewall & Cresswell, 538, the court declined to aid the defendant by telling him how many helpers were needed; he produced eleven helpers, whereupon the plaintiff withdrew from his suit.

[3] Leg. Henr. 64, § 1; Brunner, Forschungen, 328.

[4] Brunner, D. R. G. ii. 391; Schmid, Gesetze, Glossar. s.v. *gewitnes*; Thayer, Evidence, 17.

[5] Brunner, D. R. G. ii. 395.

Allotment of proof.

Such being the modes of proof, we must now understand that the proof is preceded by and is an attempt to fulfil a judgment. The litigants in court debate the cause, formal assertion being met by formal negation. Of course it is possible that no proof is necessary and the action will be, as we should say, 'decided upon the pleadings.' So soon as the plaintiff has stated his claim, the defendant will perhaps declare that he is not bound to give an answer, because the plaintiff is an outlaw, or because the plaintiff has omitted some essential ceremony or sacramental phrase[1]. But if an unexceptionable assertion is met by an unexceptionable answer, then the question of proof arises. The court pronounces a judgment. It awards that one of the two litigants must prove his case, by his body in battle, or by a one-sided ordeal, or by an oath with oath-helpers, or by the oaths of witnesses. It has no desire to hear and weigh conflicting testimony. It decrees that one of the two parties shall go to the proof. It sets him a task that he must attempt[2]. If he performs it, he has won his cause. Upon this preliminary or 'medial' judgment[3] follows the wager[4]. The party to whom the proof is awarded gives gage and pledge by way of security for the fulfilment of the judgment. The doomsmen have declared for law that he must, for example, purge himself with oath-helpers; thereupon he 'wages,' that is, undertakes to fulfil or to 'make' this 'law[5].'

[p. 600]

[1] Brunner, D. R. G. ii. 346.

[2] A beautiful example of this award of the proof is given by Modbert's suit in the court of the Bishop of Bath in 1121; Bigelow, Placita, p. 114; Bath Chartularies (Somerset Rec. Soc.), pt. 1, pp. 49–51.

[3] Bigelow, History of Procedure, p. 288, has introduced the term 'medial or proof judgment' as an equivalent for the *Beweisurteil* of German writers.

[4] Brunner, D. R. G. ii. 365. Even in the present century the form of the record of an action showed the old medial judgment. Any one who for the first time saw such a record might well believe that, after the oral altercation in court was at an end, the court adjudged that proof should be made by a jury; for the record, after stating the pleadings, went on to say, 'Therefore it is commanded to the sheriff that he do cause twelve men to come etc.' In the thirteenth century this order for a jury is still regarded as a judgment. '*Consideratum est* quod inquiratur per sacramentum xii. hominum' says the record; Note Book, pl. 116.

[5] As to this use of *lex*, see Brunner, D. R. G. ii. 376. We may suppose that the judgment began with some such words as the *Nous vous dioms pur lei* of our Year Books. Then it would be easy to transfer the *lex*, *lei* or *law* to the probative task imposed by the judgment. Salmond, Essays in Jurisprudence, p. 17.

Rules for allotting proof.

A great part of the jurisprudence of the wise has consisted in rules about the allotment of the proof[1]. Their wisdom has consisted in ability to answer the question—'These being the allegations of the parties, which of them must go to the proof and to what proof must he go?' It is in the answer to this question that a nascent rationalism can make itself felt. The general rule seems to have been that the defendant must prove[2]. If the accusation against him was a charge of serious crime, he would perhaps be sent to a one-sided ordeal; but usually he would be allowed to swear off the charge with oath-helpers, unless he had been frequently accused. The difficulty of the oath or of the ordeal would vary directly with the gravity of the charge. Then again, there were some defences, in particular that of a purchase in open market, which could be proved by witnesses. Lastly, it was possible for a plaintiff to cut off the defendant from an easy mode of proof by an offer to undergo the ordeal or by a challenge to battle[3]. There were some stringent rules about these matters; still it is here, and only here, that we can see an opening for the play of reason, for an estimate of presumptions and probabilities. When once the proof has been awarded, when once a *lex* has been decreed, formalism reigns supreme.

[p. 601]

Proof in cent. xiii.

Now this old procedure was still the normal procedure in the days of Glanvill; and even in the days of Bracton, though it was being thrust into the background, it was still present to the minds of all lawyers. A new mode of proof was penetrating and dislocating it, namely, the proof given by the verdict of a sworn inquest of neighbours or proof by 'the country.' The early history of the inquest we have already endeavoured to tell when we were regarding its constitutional or political side[4]. The revolution which it worked in our legal procedure and in our notions of proof now claims our attention. First however, we should notice that the days of Glanvill and Bracton were critical days for the law of proof in other countries besides England. In many lands men were dissatisfied with the old

[1] Brunner, D. R. G. ii. 369.

[2] Brunner, D. R. G. ii. 370. Æthelr. II. 9, § 3. Fleta, p. 137: 'Et in hoc casu semper incumbit probatio neganti.'

[3] See the offers of proof in Domesday Book collected in Bigelow, Placita, pp. 37–46.

[4] See above, vol. i. pp. 138–150.

formal tests. The catholic church was dissatisfied with the ordeal and was discovering that the oath with helpers, though it had become the *purgatio canonica*, would allow many a hardy heretic to go at large. And everywhere the reformers have the same watchword—*Inquisitio*. What is peculiar to England is not the dissatisfaction with waged 'laws' and supernatural probations, nor the adoption of an 'inquisition' or 'inquest' as the core of the new procedure, but the form that the inquest takes, or rather retains. By instituting the Grand Assize and the four Petty Assizes Henry II. had placed at the disposal of [p. 602] litigants in certain actions that inquest of 'the country' which ever since the Norman Conquest had formed part of the governmental machinery of England. His reforms were effected just in time. But for them, we should indeed have known the inquest, but it would in all likelihood have been the inquest of the canon law, the *enquête* of the new French jurisprudence[1].

The plaintiff's count.

The litigants are in court. All pleading is as yet oral pleading, though when a plea has been uttered it will be recorded on the roll of the court. When the parties stand

[1] Trial by jury became in this century the theme of a large controversial literature, for the more part German. At the present time the student will hardly find occasion to pursue this debate further back than Brunner's Entstehung der Schwurgerichte (1871), and Zeugen- und Inquisitionsbeweis (Forschungen, p. 88): but much useful material was collected by Biener, Das englische Geschwornengericht (1852). In this country light began to dawn when Reeves, Hist. Engl. Law (ed. 1814, i. 249), said that the *iudicium parium* of Magna Carta does not point to trial by jury. But the decisive step was taken by Palgrave, English Commonwealth (1832), chap. VIII. Among more recent books dealing with this matter are Forsyth, History of Trial by Jury (1852), and Bigelow, History of Procedure (1880). Lately Mr J. B. Thayer has published in Harv. L. Rev. v. 249, 295, 357, three articles so full and excellent that we shall make our own sketch very brief, and insist only upon what seem to us to be the more vital or the more neglected parts of the story. We are glad to hear that Mr Thayer is about to publish his papers in a collected form. (We can now add that they are published as Part 1 of a Treatise on Evidence, Boston, 1896.) As to France, the important Ordinance of St Louis substituting for trial by battle an *enquête* of witnesses will be found in Viollet, Établissements, i. 487. It is dated in 1257–8 by J. Tardif, Nouv. rev. hist. de droit, 1887, p. 163. See also Biener, Beiträge zu der Geschichte des Inquisitions-Processes; Esmein, Histoire de la procédure criminelle en France, ch. ii. When all has been said, the almost total disappearance in France of the old *enquête du pays* in favour of the *enquête* of the canon law, at the very time when the *inquisitio patriae* is carrying all before it in England, is one of the grand problems in the comparative history of the two nations.

opposite to each other, it then behoves the plaintiff[1] to state his case by his own mouth or that of his pleader. His statement is called in Latin *narratio*, in French *conte*; probably in English it is called his *tale*[2]. It is a formal statement bristling with sacramental words, an omission of which would be fatal. [p. 603] For example, if there is to be a charge of felony, an irretrievable slip will have been made should the pleader begin with 'This showeth to you Alan, who is here,' instead of 'Alan, who is here, appeals William, who is there[3],' and again in this case the 'words of felony' will be essential. In a civil action begun by writ, the plaintiff's count must not depart by a hair's-breadth from the writ or there will be a 'variance' of which the defendant will take advantage[4]. On the other hand, the brief statement that the writ contains must be expanded by the count. Thus a writ of Debt will merely tell William that he must say why he has not paid fifty marks which he owes to Alan and unjustly detains; but the count will set forth how on a certain day came this William to this Alan and asked for a loan of fifty marks, how the loan was made and was to have been repaid on a certain day, and how, despite frequent requests, William has refused and still refuses to pay it. The count on a Writ of Right will often be an elaborate history[5]. A seisin 'as of fee and of right' with a taking of 'esplees' will be attributed to some ancestor of the demandant, and then the descent of this right will be traced down a pedigree from which no step may be omitted.

The offer of proof.

It is not enough that the plaintiff should tell his tale: he must offer to prove its truth. In an Appeal of Felony he offers proof 'by his body[6]'; in a Writ of Right he offers proof 'by the body of a certain free man of his *A. B.* by name' who, or whose father, witnessed the seisin that has been alleged; in other

[1] As we must speak very briefly, we shall use *plaintiff* to cover *appellor* and *demandant*, while *defendant* will include *appellee* and *tenant*.

[2] The book whose Latin title is *Novae Narrationes* was also known as *Les Novels Tales* (Y. B. 39 Hen. VI. f. 30). As to the use of the Roman terms *demonstratio* and *intentio*, see Pike, Introduction to Y. B. 12–3 Edw. III. pp. lxxiv–lxxxiii.

[3] Britton, i. 103.

[4] See *e.g.* Note Book, pl. 921.

[5] Bracton, f. 372 b.

[6] It is not unknown about the year 1200 that the appellor will offer proof by the body of another person; Select Pleas of the Crown, pl. 84.

cases he produces a suit (*secta*) of witnesses[1]. No one is entitled to an answer if he offers nothing but his bare assertion, his *nude parole*. The procedure in the Appeal of Felony is no real exception to this rule. The appellor alleges, and can be called upon to prove, fresh 'suit' with hue and cry, so that the neighbourhood (represented in later days by the coroner's rolls) is witness to his prompt action, to the wounds of a wounded man, to the torn garments of a ravished woman. It should not escape us that in this case, as in other cases, what the plaintiff relies on as a support for his word is 'suit.' This [p. 604] suggests that the suitors (*sectatores*) whom the plaintiff produces in a civil action have been, at least in theory, men who along with him have pursued the defendant. Be that as it may, the rule which required a suit of witnesses had been regarded as a valuable rule; in 1215 the barons demanded that no exception to it should be allowed in favour of royal officers[2].

The suit.

And now we must observe the manner in which the suitors are introduced. If Alan is bringing an action against William, his count, unless there is a provocation to battle, will end with some such words as these:—'And if William will confess this, that will seem fair to Alan: but if he will deny it, wrongfully will he deny it, for Alan has here suit good and sufficient, to wit, Ralph and Roger[3].'

Function of the suitors.

When we first obtain records from the king's court, the production of suit is beginning to lose its importance, and we know little as to what the suitors did or said when they had thus been introduced to the court. But we may gather from the Norman books that each of them in turn ought to have stepped forward and said: 'This I saw and heard and [by way of

[1] Thayer, Evidence, 10 ff. In a Writ of Right the demandant can not offer proof by his own body 'desicut non potest esse secta sui ipsius'; Note Book, pl. 1935.

[2] Articles of the Barons, c. 28; Charter, 1215, c. 38: 'Nullus ballivus ponat de cetero aliquem ad legem simplici loquela sua, sine testibus fidelibus ad hoc inductis.' In 1217 after *legem* the words *manifestam vel iuramentum* were added. See Bémont, Chartes, p. 55. Also see Fleta, p. 137. The *lex manifesta* does not necessarily point to an unilateral ordeal; it may well stand for trial by battle. See Thayer, Evidence, pp. 11, 37; Brunner, Schwurg. p. 178.

[3] Bracton, f. 297; Britton, ii. 257; The Court Baron (Seld. Soc.), pp. 20, 23; Y. B. 20–1 Edw. I. pp. 451–3. In a French book (Jostice et Plet) a similar formula occurs: 's'il le conoist, biau men est; s'il le nie, jou sui prez dou mostrer et de l'avérer': Brunner, Forschungen, p. 309.

proof] I am ready to do what the court shall award[1].' At this stage the suitors make no oath and are not questioned. They are not yet making proof; the proof will not be made until the court has spoken after hearing what the defendant has to say. And so in the Writ of Right the proffered champion will speak thus: 'This I saw and heard—or, this my father saw and heard and of this when dying he bade me bear witness[2]—and this I am ready to prove by my body when and where the court shall award.'

[p. 605] As regards the number of suitors requisite when no battle was offered, the only rule of which we find a trace is the *Testis unus, testis nullus*, which—so men thought—could be deduced from holy writ[3]. This would make two suitors sufficient; but as a matter of fact we find three, four, six, seven, ten, eleven, thirteen produced[4]. The reason for these numerically weighty suits will appear when we describe the modes of defence.

Number of the suitors.

The time has now come when the defendant must speak, and as a general rule the only plea that is open to him is a flat denial of all that the plaintiff has said. He must 'defend' all of it, and in this context to defend means to deny[5]. In the past he has been bound to 'defend' the charge word by word with painful accuracy[6]. By the end of the thirteenth century he is allowed to employ a more general form of negation. He may, for example, in an appeal of homicide say such words as these: 'William, who is here, defends against Alan, who is there, the slaying and the felony and all that is against the king's peace word by word[7].' In a writ of right

The defence.

[1] Somma, p. 157; Ancienne coutume, c. 62, ed. de Gruchy, p. 150. Compare Lyon, Dover, ii. 292.

[2] Glanvill, ii. 3. Note Book, pl. 185.

[3] Note Book, pl. 396, 790, 1603. For the history of *Testis unus, testis nullus*, see Viollet, Établissements, i. 203.

[4] Note Book, pl. 890, 1065, 265, 279, 194, 1390, 1919; Northumberland Assize Rolls, 56.

[5] See Oxford Engl. Dict. In cent. xiii. *defendere* is currently used in both its two senses (1)=protect, and (2)=deny with accusative of thing denied or with a *quod* which introduces the statement that is denied. See *e.g.* Note Book, pl. 1467: 'Et Robertus defendit *quod* nullum placitum secutus fuit...et *hoc* offert defendere...Consideratum est quod defendat *se* xii. manu.'

[6] Brunner, Forschungen, 311; Esmein, Histoire de la procédure criminelle, p. 45.

[7] Britton, i. 101–2. Note Book, pl. 1460 gives a full form including the words 'nec per ipsum fuit morti appropiatus nec a vita elongatus, nec idem

he will say: 'William, who is here, defends against Alan, who is there, his [Alan's[1]] right and the seisin of Bertram [Alan's ancestor] and all of it word by word.' In an action for trespass he will say; 'William, who is here, defends against Alan, who [p. 606] is there, and against his suit [of witnesses] the tort and the force and all that is against the peace, and the damages and all that he [Alan] surmiseth against him word by word.' Such is the 'defence[2].'

Thwert-ut-nay.

For reasons that will appear hereafter, the 'defence' is losing its old meaning. Men are beginning to regard it as a mere formal preamble which serves to introduce the more material part of the defendant's answer. They call this clause a defence of 'the words of court,' that is of the formal, technical words, and when they enrol it they make a free use of the *&c.*[3]. But it seems to tell us plainly that as a general rule all 'exceptions' or 'special pleas,' all answers which are not flat negations of the plaintiff's story are novelties[4]. In 1277 the burgesses of Leicester obtained from their lord, Earl Edmund, a charter remodelling the procedure of the borough court. One of the grievances of which they complained was this, that a defendant was treated as undefended unless, before he said anything else, he met the plaintiff's tale with a *thwert-ut-nay*,

Rogerus [*appellator*] hoc vidit.' In a case of felony the appellee must make a 'defence' before he seeks counsel and may afterwards repeat his defence more formally by the mouth of a serjeant. Munim. Gildh. i. 114: ''Roberia et pax fracta et raptus et felonia...omnia ista et talia defendenda sunt ante consilium captum et post consilium.' See Brunner, Forschungen, 319. It is clear from Britton, i. 102, that the appellee may have a serjeant to speak his defence.

[1] We are abbreviating this form. The record will say that the tenant *venit et defendit ius suum*, but as Blackstone, Comm. iii. 297, has rightly remarked, this means that he defends (=denies) the demandant's right. Note Book, pl. 86: there are two demandants; the tenant 'venit et defendit ius *eorum*.'

[2] See the forms in the Court Baron (Seld. Soc.) which are very full. On early plea rolls the words of 'defence' are but hinted at, unless in the particular case some objection was taken to them. Therefore negative inferences from these rolls should be sparingly drawn. In the Court Baron, pp. 41, 48, 84, we see a defendant vanquished because he omits the words 'and his suit.'

[3] As to the phrase *verba curiae*, *les moz* [*paroles*] *de la court*, see Y. B. 32–3 Edw. I. pp. xxxv, 105; Select Pleas in Manorial Courts, pp. 82, 113. We are not satisfied with the suggestion that the phrase should really be the *words of course*; but already in 1292 *paroles de la court* seems to mean formal words which must be used but may not be taken very seriously; Y. B. 20–1 Edw. I. p. 281.

[4] An assertion that for some reason or another one is not bound to answer *et ideo non vult inde respondere* we do not here count as an answer.

that is, a downright No. A downright No has been in the past the one possible answer; it is still the indispensable preliminary to every possible answer[1].

[p. 607] Now we will suppose for a while that our defendant really wishes to rely upon a downright No. In that case, as we understand the matter, one of the things that he may do is to demand an examination of the plaintiff's suit of witnesses[2]. Perhaps he can object that no suit at all has been produced. This in the early years of the thirteenth century is done successfully with a frequency that is somewhat curious. In such cases the defendant protests that he need not answer the 'nude parole' (*simplex dictum*, *simplex vox*) of the plaintiff[3]. If, on the other hand, a suit has been produced, the defendant may demand that it be heard[4]. We take it that in the old procedure, which was vanishing, this would have led to a formal and indisputable oath on the part of the suitors. If they had duly pronounced the requisite words, the defendant would have been vanquished, though he might perhaps have charged them with perjury and provoked them to battle[5]. But in the thirteenth century the procedure is not so formal; the suit can be 'examined.' This implies, not merely, that suitors

Examination of the plaintiff's suit.

[1] Records of the Borough of Leicester, ed. Bateson, pp. 156–8: 'E pur ceo ke usé fu avaunt ces oures quant les parties deveient pleder e le pleintif aveit dit sa querele, si le defendant taunt tost cum la parole ly fust issue de la buche ne deist *thwerthutnay* il fu tenu cum non defendu, e ceo apelerent *swareles*..... E pur ceo ke avaunt fu usé ke le defendaunt ne poeit a la pleinte le pleintif autre chose respundre for tut granter ou tut dire *thwerthutnay*.....' Mr W. H. Stevenson tells us that the forms *thwertutnay* and *swareles* [=*indefensus*, *non defendu*] seem to point to a Scandinavian [Old Norse] influence. The idea of a *thwertutnay* is preserved in our *traverse*; it is the 'defence *tut atrenche*' of our Y. BB., *e.g.* 32–3 Edw. I. pp. 3, 375. In the Scots Leges Quatuor Burgorum (Act of Parl. i. p. 338) we read that in defending 'wrong and unlaw' a *twertnay* is used. The Earl of Chester had conceded to his tenants that if any of them was impleaded by the earl's officers without a suit, 'per tweitnic [*corr.* twertnie?] se defendere poterit.' This charter is known from an *Inspeximus*, Rot. Pat. 28 Ed. I. m. 22.

[2] In Note Book, pl. 396, a defendant loses his right to object to the nullity of the plaintiff's *secta* by making a 'full defence.' See also The Court Baron (Seld. Soc.), p. 84. But other cases seem to show that a defendant had to do a good deal in the way of 'defending' even though he was going to rely on an objection of this kind. See Note Book, pl. 424, 479, 574, 1693; Northumberland Assize Rolls, p. 275.

[3] See *e.g.* Note Book, pl. 57, 494, 1868; Y. B. 20–1 Edw. I. p. 69.

[4] See *e.g.* Note Book, pl. 1693.

[5] See above, vol. ii. pp. 162–3.

can be rejected for good cause, as being villeins, interested persons or the plaintiff's attorneys[1]—this could have been done even in earlier days—but also that the court will give audience to the suitors one by one and try to discover whether they really know anything about the facts. If they break down under examination, if they know nothing, if they disagree, 'the suit is null' and the plaintiff fails[2].

The defendant's offer of proof.

But the defendant who called for an examination of the plaintiff's *secta* was, we take it, throwing away every other defensive weapon[3]. He has chosen a test and must abide by the choice. He will probably desire that 'the proof' should be awarded to him rather than to his adversary. He must therefore offer to make good his downright No. When battle has been offered, he must—for we are at present neglecting as novelties all forms of the jury—accept the offer. Having 'defended' the charge, he professes his willingness to defend it once more, in some cases by his own body, in others by the body of a certain freeman of his, *C. D.* by name, 'when and where the court shall consider that defend he ought.' When there has been no offer of battle, he will follow up his defence by the words: 'And this he is ready and willing to defend when and where he ought as the court shall consider.' In the former case the court will award a wager of battle. In the latter case the court will award to the defendant some other 'law,' to wit, an oath with helpers; he must at once wage this law, that is, find gage and pledges that he will on a later day 'make' this law by performing the task that has been set him. The court will fix the number of the compurgators that he must produce, and this may in some cases depend upon the number of suitors tendered by the plaintiff[4].

[p. 608]

[1] Note Book, pl. 740, 941, 953.

[2] Note Book, pl. 424, 479, 574, 613, 649, 761, 762, 1693, 1848.

[3] Bracton, f. 315 b, and Fleta, p. 137, allow a defendant to go to the proof with oath-helpers after there has been an 'examination' of the plaintiff's *secta*. We are inclined to regard this procedure, which goes near to 'admitting evidence on both sides,' as an innovation. The judges seem to be trying for a short while to make something reasonable out of the *secta*. Little comes of the effort, because the habit of referring questions to 'the country' is growing rapidly. At Sandwich the plaintiff in Debt seems to have been allowed to go to the proof with three suitors, even though the defendant desired to wage law. It was otherwise in Trespass. See Lyon, Dover, ii. 292–4.

[4] Bracton, f. 315 b: 'duplicatis ad minus personis iuratorum.' Fleta, p. 137, repeats this rule, but holds that twelve is the maximum number of helpers that can be required.

Special pleading.

Such have been the modes whereby a man made good his *thwert-ut-nay*. In Bracton's day they are being concealed from view by an overgrowth of special pleading and the verdicts of jurors. But the background of the law of pleading and trial still is this, that the defendant must take his stand upon a downright No, whereupon there will be a wager of battle or of some other law[1].

[p. 609]

The exception.

For some time past, however, a new idea has been at work. We have here no concern with the ancient history of the Roman *exceptio*; but must notice that in what became a classical passage Justinian used words which might well bewilder the medieval lawyer[2]. Knowing little or nothing of any system of 'equity' which could be contrasted with a system of 'law,' he could not mark off a proper sphere for

[1] In later days a defendant, even though he is going to deny the competence of the court, or the validity of the writ, or the ability of the plaintiff, is bound to begin by 'defending the wrong [or, in some cases, the force] and injury.' This is called a 'half defence.' If he defends more than this, if he makes a 'full defence,' he is apt to lose his right of raising these 'dilatory exceptions.' If, *e.g.* he 'defends the damages,' he waives all objections to the ability of the plaintiff. In course of time some of these subtleties were evaded by a formula which made use of the convenient *&c.* See Co. Lit. 127 b; 2 Wms. Saund. 209 b, note c; Stephen, Pleading (ed. 1824), 430–4. It is difficult to pursue this doctrine into Bracton's age, because the *&c.* is already being used on the roll. On very old rolls there is sometimes no 'defence' at all when a dilatory exception is pleaded. See Y. B. 21–2 Edw. I. pp. 9, 167. Sometimes, on the other hand, we see what looks like a full defence. The art of enrolling with mechanical regularity was not perfected in an hour. We have seen above (p. 609, note 2) that there was a defence even when the plaintiff produced no sufficient *secta* and the defendant was going to rely upon this defect. It seems to us that the ancient reasons for giving no answer are (under the influence of the exotic *exceptio*) being mixed up with the new kinds of answer that are being introduced. In the end the form of a defendant's plea is quaintly illogical, if we take all its words seriously. For instance, if he is going to plead in abatement, he will come and defend (=deny) the wrong and injury and then, after suggesting certain facts, will go on to ask the court whether he need answer, just as if a denial were no answer. On the whole our evidence seems to point to a time when the defendant's only choice lay between (1) refusing to answer and (2) relying on a downright No. Compare Brunner, Forschungen, pp. 316–8; D. R. G. ii. 346. The supposed rule that in Dower there is no 'defence' (Stephen, Pleading, 431–4) seems to be a mere matter of words. See *e.g.* Note Book, pl. 1383: 'Et W. venit et defendit quod non debet inde dotem habere'; but in later days *defendit* in this context gave way to *dicit*.

[2] Inst. 4. 13 pr.: 'saepe enim accidit ut, licet ipsa persecutio qua actor experitur iusta sit, tamen iniqua sit adversus eum cum quo agitur.'

exceptiones, and was apt to believe both that every kind of answer to an action was an *exceptio*, and that Roman law allowed an almost unlimited licence to the pleaders of *exceptiones*[1]. This new idea set up a ferment in England and elsewhere. When the old rigid rules had once been infringed, our records became turbid with 'exceptions,' and a century passed away before our lawyers had grasped the first principles of that system of pleading which in the future was to become the most exact, if the most occult, of the sciences[2].

Exceptions in assizes.

Now the region in which the 'exception' first obtained a [p. 610] firm footing was to all seeming one which we have been neglecting, namely, the new and statutory procedure of the Petty Assizes. These, it will be remembered, are actions in which there need not be any pleading at all; they are regarded as summary actions which touch no question of 'right.' The plaintiff obtains a writ which directs that recognitors shall be summoned to answer on oath a particular question. The recognitors appear; if they answer that question in the plaintiff's favour, he obtains seisin[3]. From the first, however, it must have been plain that in some instances a gross injustice would thus be done to the defendant. We will put a simple case. Alan brings an assize of Mort d'Ancestor on the seisin of his father Bernard against William. The question stated in the writ will be this: 'Did Bernard die seised in his demesne as of fee, and is Alan his next heir?' Now it is possible that both clauses of this question ought to receive an affirmative answer, and yet that William ought not to be turned out of possession; for the case may be that on Bernard's death Alan, his son and heir, entered and afterwards enfeoffed William. It would be scandalous if Alan, despite his own act, could now

[1] Bethmann-Hollweg, Civilprozess des gemeinen Rechts, vol. vi. p. 55; Fournier, Les officialités au moyen âge, 160–1. Azo distinguishes between a laxer and a stricter use of the term *exceptio*. 'Large ponitur pro omni defensione quae reo competit, etiamsi nulla actori competat actio.... Stricte vero ponitur et proprie pro ea defensione quae competit reo contra actionem competentem in eum.' This doctrine is repeated by later civilians and canonists; but they seem to use *exceptio* habitually in the large sense which makes it cover any and every kind of answer.

[2] The elements of this science were in its last days admirably explained by H. J. Stephen, Principles of Pleading, a book which contains some excellent historical remarks. We purposely use a copy of the first edition, which was issued in 1824, while as yet the system was unreformed.

[3] See above, vol. i. pp. 144–9; vol. ii. pp. 47, 56, 137.

recover the land; and yet he will do this if the assize proceeds. Therefore we must allow William an opportunity of asserting that for some reason or another the assize ought not to proceed (*quod non debet assisa inde fieri*)[1], and if we are justified in appropriating the Roman word *exceptio* for any English purpose, we may surely use it in this context. William will show cause against the further continuance of that procedure which the writ has ordained; this plea of his we call an *exceptio*. It is soon evident that the Mort d'Ancestor and the Darrein Presentment can often be 'elided' by 'exceptions' of this character[2].

[p. 611] But we do not stop here, for we begin to see that the assize-formulas contain words which are rapidly acquiring a technical import, such as 'disseised,' 'free tenement,' 'as of fee' and so forth. A defendant may well fear that, with such phrases before them, the jurors, though they ought to answer the question in his favour, will give his adversary a verdict. The defendant, for example, has ejected a tenant in villeinage, who forthwith brings the Novel Disseisin against him. The jurors ought to say that the plaintiff has not been disseised from a 'free tenement.' But will they do so, unless their attention is specially directed to the villein character of the tenure? So we allow the defendant to raise this point; we allow him to do so by way of an assertion that the assize should not proceed; this assertion we call an *exceptio*. Obviously our *exceptio* is becoming a very elastic term[3].

Elasticity of the exception.

[1] For an early (1194) instance of this formula, see Rolls of the King's Court (Pipe Roll Soc.), p. 68.

[2] For an early instance, see Select Civil Pleas, pl. 122. It is in this context that Glanvill, xiii. 11. 20, introduces the term *exceptio*. As to the large sphere left for exceptions by the formula of Darrein Presentment, see above, vol. ii. pp. 137–8. In course of time the justices began to require that the plaintiff in an assize should give some explanation of his case, see above, vol. ii. p. 49; but on the rolls of the early part of cent. xiii., if there is any pleading at all, the defendant begins it with *Non debet assisa inde fieri*. This is the reason why there is no 'defence' to an Assize: Stephen, Pleading, p. 434. There is nothing to deny, for the plaintiff has not spoken.

[3] See the whole of Bracton's treatment of the exceptions to assizes, ff. 187 b–210, 240–245 b, 266 b–274. The Note Book is full of examples; a single one (pl. 270) may serve to show the form of the *exceptio* and the wide scope that is given to it. The defendant *dicit quod assisa non debet inde fieri*, and states as his reason certain facts whence he concludes that the plaintiff was never seised of free tenement (*quod nullum liberum tenementum inde habere possit*). Thus in form we get from the defendant an assertion that a question

Spread of the exception.

From the province of the Petty Assizes the *exceptio* spread with great rapidity throughout the domain of the other actions[1]. For one thing, the old reasons for refusing to answer were brought under the new rubric. From of old a defendant must have had some power of urging such reasons: for example, of saying, 'I will not answer, for this court is not competent to decide this cause,' or 'I will not answer you, for you are an outlaw.' Under the influence of the romano-canonical procedure these preliminary objections were now called exceptions; they were 'temporary' or 'dilatory' exceptions. A classification of [p. 612] exceptions and a theory about the order in which they should be propounded was borrowed. First you must except to the jurisdiction of the court, then to the person of the judge, then to the writ, then to the person of the plaintiff, then to the person of the defendant, and so on[2]. About all this much might be said, and it would be interesting to trace the fortunes in England of this once outlandish learning[3]. But we must hasten to say that in a very short time we find the defendant propounding by way of exception, pleas that we can not regard as mere preliminary objections, for they are directed to the heart of the plaintiff's case; these are 'peremptory' or 'perpetual' exceptions, the 'special pleas in bar' of later law. For a while the utmost laxity prevails. Of this the best examples are to be found among the Appeals. By way of exception to an appeal of homicide the appellee is suffered to plead that the appeal is not a 'true' (that is, not a *bona fide*) appeal but is the outcome of spite and hatred (*odium et atia*)[4]. A climax seems to be reached when an appellee pleads an *alibi* by way of *exceptio*: a climax we say, for the plea of *alibi* can be nothing but an argumentative traverse of the charge that has been

ought not to be asked because it ought to be (but perhaps will not be) answered in his favour.

[1] In speaking of *exceptions* rather than of *special pleas* we are following the records of this age. The technical usage of *plea* (*placitum*) which makes it stand for the first utterance of the defendant (provided that utterance is not a demurrer) seems to be comparatively recent. That utterance is often called *responsum, response*. But throughout the Y. BB. of Edw. I. the word *excepcioun* is constantly used, and apparently stands for any first utterance of the defendant, at all events if that utterance is not a simple negation See *e.g.* Y. B. 20–1 Edw. I. p. 275, where *excepcioun* and *respounce* are contrasted.

[2] See Bracton, ff. 399 b, 400 b, 411 b, 413, 415 b, 429 b.

[3] For the ultimate form of the doctrine, see Stephen, Pleading, pp. 63, 429 and Note 78.

[4] See above, vol. ii. p. 587.

made against him, a charge that he will already have traversed in large and explicit words by his 'defence[1].' And here we may see how exotic the *exceptio* once was, though it is now flourishing but too luxuriantly in our soil:—it is always, or almost always, preceded by a *thwert-ut-nay*, that is by a flat denial of the plaintiff's assertions[2].

[p. 613] The exception may be met by a replication, the replication by a triplication and so on *ad infinitum*. We may occasionally find long debates between the parties[3]. Not only are they long, but, if judged by the standard of a later time, they are loose and irregular. The pleaders must be charged with many faults which would have shocked their successors; they habitually 'plead evidence,' they are guilty of argumentativeness and duplicity[4]. The curious rule which in later days will confine a

Laxity of pleading.

[1] Bracton, f. 148: 'Item excipere poterit quod anno et die quo hoc fieri debuit fuit alibi extra regnum vel in provincia in tam remotis partibus quod verisimile esse non poterit quod hoc quod ei imponitur fieri posset per ipsum.' Select Pleas of the Crown, pl. 84: 'Et Thomas totum defendit...et dicit quod die illo...fuit ipse...apud L....et inde ponit se super patriam.' Rec. Off. Assize Roll, No. 82 (Cambridgeshire, 45 Hen. III.) m. 32: an appellee accused of committing a crime at Cambridge, 'petit sibi allocari quod quando factum fieri debuit, si factum esset factum, fuit apud Ely et non apud Cauntebrig...et, istis sibi allocatis, ponit se super patriam, praeterquam super villam de Cauntebrig.' However, in this last case the appellee had to join battle, was vanquished and hanged. Y. B. 21–2 Edw. I. p. 391: in a civil action a litigant tries to plead an *alibi* by way of exception; but is driven to a direct traverse. Long afterwards the criminal practice of Scotland treated an *alibi* as a preliminary exception that must be disposed of before the evidence for the prosecution could be heard.

[2] See above, p. 611, note 1. Observe how a special plea is pleaded to an action of debt. Note Book, pl. 177: 'Et W. venit et defendit contra eum et contra sectam suam quod nihil ei debet. Sed verum vult dicere. Dicit quod bene potest esse quod etc.' The phrase *Sed veritatem vult dicere* is commonly used to usher in a 'confession and avoidance.' The defendant first denies everything, but then 'wishes to tell the truth,' and admits that there is some truth in the plaintiff's case.

[3] Note Book, pl. 716, cited by Bracton, f. 436, is a good specimen. Under Edward I. the answer to an *excepcion* is currently called a *replicacion*; Y. B. 21–2 Edw. I. pp. 142, 426. We have not met with *triplication* except in the text books, nor with *rejoinder* and *rebutter*, which seem to belong to a later day.

[4] Stephen, Pleading, Note 38, has remarked these faults. His examples might now be indefinitely multiplied. Under Edward I. objections to duplicity are becoming common. There is a regular formula by which what we should call evidence is pleaded: *et hoc bene patet quia*. See *e.g.* Note Book, pl. 612, 669, 979, 1565, 1616, 1663. In Northumberland Assize Rolls, pp. 12, 191, will be found two early instances of the phrase *absque hoc*, but it is not as yet a technical phrase. See also Y. B. 30–1 Edw. I. p. 199. Under Edward I. the

man to a single 'plea in bar[1]' appears already in Bracton, justified by the remark that a litigant must not use two staves to defend himself withal[2]. But this rule had not always been observed; defendants were allowed a second staff, at all events if, when using the first, they expressly reserved the right of picking up another[3].

The exception and the jury.

These men are drunk with the new wine of Romanism:— [p. 614] such may be the comment which a modern reader will make when for the first time he watches the exploits of our ancient pleaders. But we ought to see that there is an under-current of good sense running beneath their vagaries. The extension of the *exceptio* is the extension of a new mode of proof; it is the extension of a mode of proof which will become famous under the name of trial by jury.

Proof of exceptions.

He who excepts must, like a plaintiff, offer to prove his case[4]. It may be that he can rely upon the record of a court or upon a charter; but in general the modes of proof that would seem open to him would be a 'suit' of witnesses or, in appropriate cases, a single witness who is ready to do battle[5].

term *traverse* is common and we may find *demur* (Y. B. 20–1 Edw. I. p. 323; 21–2 Edw. I. p. 163), *tender an averment* (21–2 Edw. I. p. 263), *the issue of a plea* (33–5 Edw. I. 297).

[1] Stephen, Pleading, pp. 151, 290 and Note 57.

[2] Bracton, f. 400 b: 'sicut posset se pluribus baculis defendere, quod esse non debet, cum ei sufficere debeat tantum probatio unius [peremptoriae exceptionis].' Y. B. 33–5 Edw. I. p. 359: 'vous ne averez point deus bastons.' This seems an allusion to trial by battle. Bracton, f. 301 b, 302, permits a defendant in Dower to plead another plea after failing in the allegation that the husband is still living. But this point seems to have been questionable.

[3] See *e.g.* Note Book, pl. 272. Writ of Right against a prior; he first excepts on the ground of royal charters; 'et si curia consideraverit quod super hoc debeat respondere, dicet aliud.' Judgment, 'quod prior dicat aliud.' He pleads another plea, 'et si curia consideraverit quod debeat respondere super cartas sine Rege, dicet aliud.' The attempt to retain a right 'dicere aliud' is not very uncommon. The limits of the rule against two peremptory exceptions were doubtful in 1292; Y. B. 20–1 Edw. I. pp. 457, 463; 21–2 Edw. I. p. 593. At present we are inclined to think that the rule which holds a defendant to have been totally defeated if any one issue of fact is found against him is a rule which punishes a liar for having lied. See Bracton, f. 432: 'amittet rem quae petitur propter mendacium.' If so, the rule was but slowly defined, for an appellee who had been beaten on the issue of *odium et atia* was allowed to join battle. See above, vol. ii. p. 588.

[4] Bracton, f. 399 b: 'Nam qui excipit videtur agere.' Dig. 44. 1. 1: 'Agere etiam is videtur, qui exceptione utitur: nam reus in exceptione actor est.' Stephen, Pleading, Note 84.

[5] Observe how alternative proofs are offered. Note Book, pl. 95: 'et inde producit sectam, et si hoc non sufficit ponit se super iuratam patriae.' Ibid. pl. 116: 'et inde producit sectam...et si hoc non sufficit offert dirationare per corpus...' The Norman Custumal, c. 105 (100), ed. de Gruchy, p. 317, gives us much information as to the defendant's *secta* (*lex probabilis*); we shall return to it hereafter. Somma, p. 325.

Assize and jury.

At this point, however, the procedure of the Petty Assizes once more became of decisive importance. In other actions when the litigants are pleading they stand in the presence of the justices, but there are no recognitors, no representatives of 'the country' at hand. If, however, the action is a Petty Assize, then when the litigants first meet each other in court they stand in the presence of the twelve men who have been summoned to answer the formulated question. If now the defendant 'excepts,' a method of testing the truth of his 'exception' is within easy reach. The recognitors have been summoned to answer one question, but why should they not answer another? The facts alleged in the exception are as likely to be within their knowledge as the facts suggested by the plaintiff's writ. The transition is the easier because, as [p. 615] we have explained above[1], the defendant's so-called 'exception' is often a statement which, if it were true, would preclude the jurors from giving an affirmative answer to the original question. One example will suffice. The recognitors in an assize have been summoned to say whether Richard disseised John[2]; Richard asserts that the assize should not proceed, because John gave the land by feoffment to Richard's villein and the villein surrendered it to Richard, who entered by reason of this surrender. Now if this assertion is true, Richard did not disseise John. Richard, however, is desirous that the question which the jurors are to answer should be the question that he has defined. Of course if John consents to this change there is no difficulty; but further, we can say that he ought to consent, and that, if he will not, his action should be dismissed, for his case is that he was disseised by Richard, and this he can not have been if Richard's story is true. Of the verdict of twelve men as a mode of deciding this dispute the plaintiff can not complain, for he himself has invoked it. Thus it becomes common that a question raised by pleading should be answered by a jury and that a litigant should find himself

[1] See above, vol. ii. p. 613.

[2] Note Book, pl. 1256.

driven, on pain of losing his cause, to accept the offer that his opponent makes of submission to a verdict[1].

The jury and the appeal.

The offer of a verdict of the country as proof of an exception soon invades the other actions. The excipients desire that this should be so, for if they offered proof by a *secta* of witnesses, this would very properly be met by a wager of law[2]. The king also gains by the new procedure for it is a royal commodity and he sells it. Far into the thirteenth century men will sometimes offer him money if they want an inquest[3]. Very often, again, the plaintiff is quite willing that the exception should be submitted to a verdict, either because he is confident in the righteousness of his cause, or because he is by no means certain of being able to make a law. But, even if unwilling, he may be compelled to give a reluctant consent to the intervention of a jury. The exception is a novelty, and plaintiffs have in this case no traditional right to any of the antique modes of proof. [p.616]

The exception and the denial.

One last line had yet to be crossed: that, namely, which divides the exception from the mere denial. However broad this line should have been, practice had reduced it to the utmost tenuity. If to a charge of homicide the plea of an *alibi* is a proper *exceptio*, we can hardly deny the name *exceptio* to the plea 'I am not guilty.' In the department of criminal law the forces which worked in favour of the jury were at their strongest. For one thing, the king was interested in all breaches of his peace, and he trusted to inquests rather than

[1] When an *assisa* is turned into a *iurata ex consensu partium* it is often plain that the original recognitors answer the new question, for the record shows no trace of any 'jury process' subsequent to the pleading. See *e.g.* Note Book, 87, 93, 1256, 1833, 1899, 1924. Sometimes, however, a new jury will be summoned after the pleading. See pl. 205 and the marginal note, also pl. 51. This subject is discussed by Mr Pike in his Introduction to Y. B. 12–13 Edw. III. pp. xli–lxxi.

[2] Bracton, f. 400 b, § 9.

[3] See *e.g.* Note Book, 86, 90, 134, 145, 233, 241, 316, 895, etc. On the other hand in 1220 (pl. 102) William Marshall offers the enormous sum of a thousand marks for the privilege of fighting Fawkes of Breauté. Before the end of Henry III.'s reign a litigant can generally get a jury for nothing. If he makes a payment, this is for something unusual, *e.g.* a jury drawn from two counties. But even in the nineteenth century the tenant in a writ of right could purchase an advantage by tendering 6*s.* 8*d.* to the king at the proper moment. See Y. B. 20–1 Edw. I. p. 293; Littleton, sec. 514. This was actually done so late as 1833 in *Spiers* v. *Morris*, 9 Bingham, 687.

to the arms of appellors. Secondly, an appeal generally came before justices in eyre who were presiding over an assembly in which every hundred of the county was represented by a jury which had come there to answer inquiries. Indeed the justices as a general rule first heard of the appeal because it was 'presented' to them by a jury. Thirdly, the abolition of the ordeal in 1215 had left a gap. When men are appealed by women or by other non-combatants, the truth of the appeal can no longer be tested, as it once was[1], by fire or water, and the duel is out of the question, so the verdict of a jury appears as the only possible mode of proof. If then in such a case the appellee may have recourse to this test, why not in others? An objection on the part of the appellor could be met by the argument that, not he, but the king was the person primarily interested in a breach of the king's peace, and that the king wished for proof by verdict. By Bracton's day the right of the appellee to 'put himself upon his country for good and ill,' that is, to submit to a verdict the general question of his guilt, seems to have been conceded; but even Bracton is doubtful whether an accusation of poisoning, an act done in secret, could be met in this manner[2]. [p.617]

The jury and the general issue.

In civil causes also we begin to find defendants desirous of referring to a jury what in substance, if not in form, is a general negation of the plaintiff's statements. In some instances they are expected to do this. For example, when there is a charge of 'waste' by cutting down trees or the like, the court holds that a general negation should be made good by a verdict rather than by a 'law,' for it might well fall out that the formal negatory oath would be a flagrant denial of visible facts[3]. And then, in contrast to the old actions into which the

[1] Select Pleas of the Crown, pl. 4, 9, 11, 19, 24, 68.

[2] Bracton, ff. 142 b, 137 b. The practice of allowing the appellee to put himself upon the country for good and ill, if he will purchase this privilege from the king, seems to be establishing itself about the year 1200. See Select Pleas of the Crown, pl. 59, 64, 78, 81. Towards the end of Henry III.'s reign the appellor rarely has a chance of urging any theoretical right to a duel that he may have, for the justices as a matter of course quash the appeal for informality and arraign the appellee at the king's suit. We write this after perusing various unprinted eyre rolls. See also Chadwyck-Healey, Somersetshire Pleas, p. 136. In Normandy the appellor's right to a duel was more respectfully treated: Somma, p. 177; Ancienne coutume, c. 69 (ed. de Gruchy, p. 171); Brunner, Schwurgericht, 475.

[3] Bracton, f. 315 b. So far as we have observed, Waste is the first action

jury must slowly work its way, we see newer actions which, if we may so speak, are born into an atmosphere of trial by jury. Two of these are of special importance. The Writs of Entry, which look like an infringement of feudal principles, are defended by the statement that they deal with recent events well known to the neighbours[1]. The action of Trespass is a semi-criminal action in which the king has an interest, and when it comes into being men are no longer suffered to wage their law in the king's court by way of answer to a charge of breaking his peace[2]. Before the end of Henry III.'s reign it is a common incident in most kinds of litigation that the parties agree to submit to 'the country' some question that has been raised by their pleadings. The proposal is made by the one [p.618] party and accepted by the other. The one 'puts himself upon the country, and,' says the record, 'the other does the like.' In the hands of the second or third generation of professional pleaders, of serjeants at law[3], the system of pleading begins to recrystallize in a new shape. Trial by jury is now its centre, and very soon it has become so peculiarly English that legists and decretists would be able to make nothing of it. We must not explore its later history, but of its nucleus, the trial by twelve men, a few more words must be said[4].

in which a defendant habitually pleads what we should call 'the general issue' and puts himself upon a jury. See Note Book, pl. 388, 443, 485, 580, 640, 717, 718, 880, 1371. In this action the inquest procedure is specially appropriate, for usually the verdict is taken, not by the justices in court, but by the sheriff on the spot where the alleged waste was committed.

[1] See above, vol. ii. p. 65, and Bracton, f. 317 b.

[2] Stat. Walliae (1284) c. 11 (Statutes, i. 66): 'Et cum vix in placito transgressionis evadere poterit reus quin defendat se per patriam, de consensu partium inquirat veritatem iustitiarius per bonam patriam.' In the first days of Trespass a wager of law was not unknown: Somersetshire Pleas, pl. 572.

[3] See above, vol. i. p. 214.

[4] We agree with H. J. Stephen (Pleading, Note 38) that anything that could be called a formulated science of pleading is hardly to be traced beyond the time of Edward I. Our theory of the part played in earlier times by the Romanesque *exceptio* may be open to dispute. To anyone who knows only the *exceptio* of classical Roman law the statement that the English 'general issue' is in its origin an 'exception' would seem an absurd paradox. Nevertheless we believe that it would be near the truth. A plea of *alibi* was regarded by Bracton as an *exceptio*, and from *alibi* to *Not guilty* the step is of the shortest. Here we find the reason why a plea of the general issue contains a two-fold denial. Take the form that was still used in our own century: 'And the said *C.D.* comes and defends the force and injury when etc. *and says* that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in

A grand assize is composed of twelve lawful knights of the district in which the disputed tenement lies, who have been chosen in the presence of the justices by four knights, who have been chosen by the sheriff[1]. This double election is peculiar to a grand assize, a solemn process safeguarded by precautions [p.619] against the sheriff's partiality. To form a petty assize or an ordinary jury, twelve free and lawful men of the neighbourhood are summoned directly by the sheriff[2]. In the case of a jury summoned after there has been pleading, he is bidden to choose those 'through whom the truth of the matter may be best known[3].' The litigants have an opportunity of 'excepting' to or challenging the jurors, and our law has borrowed for this purpose the canonist's scheme of 'exceptions to witnesses[4].' The jurors must be free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant[5]. We must not think of them as coming into court ignorant, like their modern successors, of the cases about which they will have to speak. In every case the writ that summons them—whether it be an 'original' writ calling for an assize, or a 'judicial' writ

Composition of the jury.

manner and form as the said *A.B.* hath above complained. And of this the said *C.D.* puts himself upon the country.' To state this more briefly, *C.D.* denies that he trespassed *and says* that he did not trespass. A modern denial, suggested by the practice of excepting, is tacked on to the ancient denial, the Defence or *Thwert-ut-nay*. The rules as to the use of the three phrases 'Et hoc paratus est verificare,' 'Et de hoc ponit se super patriam' and 'Et petit quod hoc inquiratur per patriam,' are not so old as the time of which we speak. Thus *e.g.* Northumberland Assize Rolls, pp. 236, 244, a defendant 'petit quod inquiratur,' and a plaintiff 'ponit se super patriam.' An affirmative plea often ends with a 'ponit se super patriam.' The rule (Stephen, Pleading, pp. 247–8) which in later days allows the defendant to 'put himself' on the country, while the plaintiff must 'pray' for an inquiry, suggests that defendants acquired an absolute right to a jury while plaintiffs still had to pay if they wanted one; but we have failed to verify this suggestion.

[1] Glanvill, ii. 10–12; Bracton, f. 331 b. For an early case of election, see Select Civil Pleas, pl. 212. It is abundantly clear that, whatever may have been the practice at a later time, the grand assize was a body of twelve, not of sixteen knights: in other words, the four electors took no part in the verdict.

[2] For the petty assizes, see Glanvill, xiii. 3, 19, 33; Bracton, f. 179, 238, 253 b.

[3] The classical words are 'per quos rei veritas melius sciatur.' See Bracton, f. 316: 'qui melius sciant et velint veritatem dicere.'

[4] Glanvill, ii. 12.

[5] Bracton, f. 185. Jurors are often removed as being too poor; *e.g.* Select Civil Pleas, pl. 126, 253. Of the 'peremptory challenges' of our later criminal procedure we have seen nothing in this age.

issued after the litigants have ended their pleadings—will define some question about which their verdict is wanted[1].

The jurors as witnesses.

That in old times 'the jurors were the witnesses'—this doctrine has in our own days become a commonplace. For the purposes of a popular exposition it is true enough. Nevertheless it does not quite hit the truth. If once the jurors had been called *testes*, if once their *veredictum* had been brought under the rubric *testimonium*, the whole subsequent history of the jury would have been changed, and never by imperceptible degrees would the jurors have ceased to be 'witnesses' and become 'judges of fact[2].' In all probability a time would have come when the justices would have begun to treat these *testes* [p. 620] in the manner in which witnesses ought to be treated according to our ideas: each witness would have been separated from his fellows and questioned about his belief and its grounds. The court, instead of receiving the single verdict of a jury, would have set itself to discuss the divergent testimony of twelve jurors. Where there was flat contradiction it might have been puzzled; still the simple device of counting heads was open to it, and at all events it might have insisted that each juror whose testimony was received should profess a first-hand knowledge of the facts about which he spoke, for already the elementary truth that 'hearsay' is untrustworthy had been apprehended[3]. Therefore we have to explain why the history of the jury took a turn which made our jurors, not witnesses, but judges of fact, and the requisite explanation we may find in three ancient elements which are present in trial by jury so soon as that trial becomes a well-established institution. For

[1] In other words, the 'issue' will be embodied in the *Venire facias*. See for some elaborate instances, Bracton, f. 325.

[2] The verb *testari* is often used of jurors; *e.g.* Northumberland Assize Rolls, p. 72: 'et iuratores testantur quod...non sunt culpabiles.' But *recognoscere* and *dicere* are from the first the usual words. The term *recognoscere* seems to imply a calling to mind, a recalling. The Constitutions of Clarendon were a *recordatio vel recognitio* of the king's rights. We must remember, however, that in good Latin *recognoscere*, if it will stand for *recollect*, will also stand for *examine*, *investigate*. When at length English became the language of formal records, *recognoscere* was rendered by *recognize*. Any other translation of it would be dangerous; but *to find* is our best modern equivalent.

[3] See *e.g.* Select Pleas of the Crown, pl. 29 (A.D. 1202): 'Et hoc offert probare...sicut ille qui non vidit hoc sed per alios habet eum suspectum. Nullum est appellum.'

want of better names, we may call them (1) the arbitral, (2) the communal, and (3) the quasi-judicial elements.

Arbitral element in the jury.

(1) Jurors are not arbitrators. We have seen, however, that the verdict of jurors becomes a common mode of proof only because litigants 'put themselves' upon it, and that the summons of a jury (in the narrow sense of that term which opposes *iurata* to *assisa*) is always in theory the outcome of consent and submission. Both litigants have agreed to be bound by a verdict of the country. They might perhaps have chosen some other test. We may, for example, see a plaintiff and a defendant 'putting themselves' upon the two witnesses named in a charter, or upon the word of some one man[1]. Now [p. 621] in such a case neither of the litigants can quarrel with the declaration that he has invoked. He has called for it, and must accept it. So with the verdict of the country; he has asked for it, and by it he must stand or fall. It is, says Bracton, 'his own proof' and therefore he can not reprobate it[2]. If he produced as compurgators men who at the last moment refused to help him in his oath, he could not force them to give an explanation of their conduct. So with the jurors; it is not for him to ask them questions or expose their ignorance, for he has put himself upon their oath. What he can not do for himself, the court will not do for him. The justices are not tempted to analyze the process of which an unanimous verdict is the outcome; that verdict has been accepted in advance by the only persons whom it will affect[3].

[1] Note Book, pl. 255 (A.D. 1227). The question is whether Philip de Colombiers was of sound mind when he executed a charter. Two witnesses named in the charter are still living. 'Et omnes ponunt se super illos duos testes. Et ideo vicecomes...illos venire faciat...ad recognoscendum si... Philippus tempore quo fuit compos sui...cartam illam fecit vel non.' These witnesses are, like jurors, to come *ad recognoscendum*. Curia Regis Rolls [Rec. Off.] No. 140, Pasch. 34 Henr. III. m. 17: The defendant asserts that the plaintiff 'assigned' him to pay money to the Earl of Oxford. The plaintiff denies this, 'et de hoc ponit se super ipsum Comitem.' The defendant does the like. A writ is sent to the Earl. 'Et venit Comes in propria persona sua et recordatur' that the assignment was made.

[2] Bracton, f. 290 b. Therefore a *iurata* can not be attainted. When this rule was altered in 1275 (Stat. West. I. c. 38) it was already becoming evident that the consensual origin of the *iurata* was a fiction.

[3] The arbitral element is clearly seen in a case of John's day in which the Bishop of Ely and the Abbot of St Edmund's 'put themselves' upon a jury of eighteen knights, of whom six are to be chosen by each litigant, while the remaining six are named by Hubert Walter and Geoffrey Fitz Peter: Select

Communal element in the jury.

(2) The verdict of the jurors is not just the verdict of twelve men; it is the verdict of a *pays*, a 'country,' a neighbourhood, a community[1]. There is here a volatile element which we can not easily precipitate, for the thoughts of this age about the nature of communities are vague thoughts, and we can not say that 'the country' is definitely *persona ficta*. Still we may perceive what we can not handle, and, especially in criminal procedure, the voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which [p. 622] is a community. The justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.

Quasi-judicial element in the jury.

(3) Lastly, we may already detect in the verdict of the jurors an element which we can not but call quasi-judicial. Whatever theory may have prevailed[2], the parties to an action are often submitting to 'the country' questions which the twelve representatives of the country will certainly not be able to answer if they may speak only of what they have seen with their own eyes[3]. Some of the verdicts that are given must be founded upon hearsay and floating tradition[4]. Indeed it is the

Civil Pleas, pl. 183. Again, when Edward I. in his Carta Mercatoria (Munim. Gildh. ii. 207) grants that a foreign merchant may have six foreign merchants on the jury, we see the arbitral element. Already the idea is that a jury, taken as a whole, should be impartial, while its component parts should in some sort represent the interests of both litigants. Even in our own century when a jury was summoned, the sheriff was told to call in the twelve men 'because as well (*quia tam*) the said *C.D.* as the said *A.B.*, between whom the matter in variance is, have put themselves upon that jury.' This *quia tam* clause in the *Venire facias* seems almost as old as the *iurata*; Bracton, f. 325.

[1] The early submissions to a verdict vary slightly in their form. See *e.g.* Select Civil Pleas, pl. 27: as to one question a litigant 'ponit se super legale visnetum'; as to another question 'simili modo ponit se inde super iuratam patriae.' Though our Latin uses *patria*, our French uses *pays*, which descends from Latin *pagus*. The 'country' of this formula is not our father-land but 'the country-side.'

[2] According to Glanvill, ii. 17, the recognitors of a Grand Assize may base their verdict upon what their fathers have told them. But jurors (in the narrower sense) should speak 'de proprio visu et auditu'; Bracton, f. 317 b.

[3] See *e.g.* Note Book, pl. 628 (A.D. 1231): 'Et Ricardus...dicit quod omni tempore a conquestu Angliae ibi communam habuit...et inde ponit se super patriam.'

[4] See *e.g.* Note Book, pl. 798: 'Iuratores dicunt quod quaedam Margeria... praesentavit quemdam Robertum Luvel xl. annis elapsis et eo amplius.' Ibid. pl. 769: a strange tale of what happened before 1188 told in 1233. Placit. Abbrev. p. 155: in 1264 jurors speak of Richard I.'s day. Select Civil Pleas, pl. 41: in 1200 a litigant wants a verdict as to what happened before 1135; his adversary refuses to submit to a verdict 'de tam antiquo tempore.'

duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court[1]. They must collect testimony; they must weigh it and state the net result in a verdict. Bracton sees that this is so; he even, though in a loose, untechnical sense, speaks of the jurors as deliberating and 'judging,' and he speaks of the result of their deliberations, when it takes the form of a general verdict, as a 'judgment[2].'

Unanimity of the jury.

[p. 623] It is to the presence of these three elements that we may ascribe the ultimate victory of that principle of our law which requires an unanimous verdict. We can not treat this as an aboriginal principle. In the old Frankish inquests the sworn neighbours sometimes gave a single verdict, while in other cases each man's evidence was taken separately and recorded separately[3]. We have here a plastic institution, which can assume divers shapes in Normandy and England and Scotland. A little inquisitory zeal on the part of the king's commissioners might turn it into a mere examination of witnesses, whose divergent testimonies would be weighed by the court. Or again, their voices might be counted without being weighed and the verdict of the majority accepted. For a long time we see in England various ideas at work[4]. If some of the recognitors

[1] This is made plain by the writ which tells the sheriff to summon jurors to appear before the court to 'recognize' some matter, 'et se ita inde certificent quod iustitiarios nostros inde reddant certiores'; Bracton, f. 325. Britton, ii. 87: 'issint qe chescun jurour distingtement soit garni en touz pointz, sur quel point il se deit aviser avaunt soen vener en nostre court.'

[2] Bracton, f. 185 b: 'de veritate discutiant [iuratores] et iudicent.' Ibid. f. 289: 'Eodem modo potest iurator falsum facere iudicium et fatuum cum iudicare teneatur per verba in sacramento contenta... Et si iustitiarius secundum eorum [*scil.* iuratorum] iudicium pronunciaverit, falsum faciet pronunciationem.' Ibid. f. 290 b: 'Si autem iuratores factum narraverint sicut rei veritas se habuerit, et postea factum secundum narrationem suam iudicaverint, et in iudicio erraverint, iudicium potius erit fatuum quam falsum, cum credant tale iudicium sequi tale factum.' This makes it possible for men of a later age to see in the verdict of a jury the promised *iudicium parium*; see above, vol. i. p. 173. This mistake is being made already in Edward I.'s day; Y. B. 30-1 Edw. I. p. 531. A knight's demand for a *iudicium parium* is supposed to be satisfied by knights being put upon the jury.

[3] Brunner, Forschungen, 231–242; D. R. G. ii. 524.

[4] Brunner, Schwurgericht, 363–371; Gierke, D. G. R. ii. 481; Thayer, Evidence, p. 86.

profess themselves ignorant, they can be set aside and other men can be called to fill their places[1]. If there is but one dissentient juror, his words can be disregarded and he can be fined:—*Testis unus, testis nullus*[2]. In the assize of novel disseisin, which in no wise touches 'the right,' we are content with the verdict of seven men, though the other five have not appeared or have appeared and dissented[3]. But gradually all these plans are abandoned and unanimity is required. The victory is not complete until the fourteenth century is no longer young[4]; but, from the moment when our records begin, we seem to see a strong desire for unanimity. In a thousand cases the jury is put before us as speaking with a single voice, while any traces of dissent[5] or of a nescience confessed by some only of the jurors are very rare. 'You shall tell us,' says a judge in 1293, 'in other fashion how he is next heir, or you shall remain shut up without meat or drink until the morrow[6].'

Why is unanimity desired?

The arbitral and communal principles are triumphing. [p. 624] The parties to the litigation have 'put themselves' upon a certain test. That test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice: *le pays vint e dyt*[7]. In a later age this communal principle might have led to the acceptance of the majority's verdict. But as yet men had not accepted the dogma that the voice of a majority binds the community. In communal affairs they demanded unanimity; but minorities were expected to give way. Then at this point the 'quasi-judicial' position of the jurors becomes important. No doubt it would be wrong for a man to acquiesce in a verdict that he knew to be false; but in the common case—and it becomes commoner daily—many of the jurors really have no first-hand knowledge of the facts about which they speak, and there is no harm in a juror's joining in a verdict which expresses the

[1] Glanvill, ii. 17; Bracton, f. 185 b. [2] Select Civil Pleas, pl. 241.

[3] Bracton, f. 179 b, 255 b. Britton, i. 31, speaking of criminal cases, says that if the majority of the jurors know the facts and the minority know nothing, judgment shall be given in accordance with the voice of the majority.

[4] Y. B. 41 Edw. III. f. 31 (Mich. pl. 36).

[5] Note Book, pl. 376, 524; Placit. Abbrev. 279, Kanc.; 286, Norf. See the important records in the note to Hale, P. C. ii. 297.

[6] Y. B. 21–2 Edw. I. p. 273.

[7] Y. B. 21–2 Edw. I. p. 225. This is a rare phrase; but *assisa venit* and *iurata venit* are from the first the proper phrases, and they put before us the body of twelve men as a single entity.

belief of those of his fellows who do know something. Thus a professed unanimity is, as our rolls show, very easily produced. Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal or successfully made his law, the due proof would have been given; no one could have questioned the dictum of Omniscience. The *veredictum patriae* is assimilated to the *iudicium Dei*[1]. English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble. We shall hardly explain the shape that trial by jury very soon assumed unless we take to heart the words of an illustrious judge of our own day:—'It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner[2].' It saved the judges of the middle [p. 625] ages not only from this moral responsibility, but also from enmities and feuds. Likewise it saved them from that as yet unattempted task, a critical dissection of testimony. An age which accepts every miracle and takes for sober history any tale of Brutus or Arthur that anyone invents must shrink from that task. If our judges had attempted it, they would soon have been hearing the evidence in secret[3].

Verdict and evidence.

As to the manner in which the jurors came to their verdict, we know that as a general rule they had ample notice of the question which was to be addressed to them. At the least a fortnight had been given them in which to 'certify themselves' of the facts[4]. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants; indeed it was their duty to discover the truth. Then, when the day of trial had come, we take it that the parties to the cause had an opportunity of addressing the jurors

[1] This comes out in the phrase 'to put oneself on God and the grand assize,' which is as old as 1293 (Y. B. 21–2 Edw. I. p. 217) but not, so far as we know, much older. Compare too the prisoner's statement that he will be tried 'by God and his country,' of which, however, we can not give any early example. The idea persists that somehow or another an appeal to God must be allowed.

[2] Stephen, Hist. Crim. Law, i. 573.

[3] This happened in France. Viollet, Établissements, i. 274: 'les baillis avaient fait triompher le système commode pour eux de la procédure occulte.'

[4] Britton, ii. 87.

collectively[1]. In our very first Year Books we see that documents can be put in 'to inform the jury,' and it is to documents thus used that, so far as we are aware, the term 'evidence' was first applied[2]. Again, we know of no rule of law which would have prohibited the jurors from listening in court to persons whom the litigants produced and who were capable of giving information, though we do not think that as yet such persons were sworn[3]. It is difficult to discover the truth about this matter, because, even in the nineteenth century, the formal 'record' will say no word of any witnesses and will speak as though the jurors had agreed on a verdict before they came into court. But certain it is that already under Henry III. a jury would often describe in detail events that took place long ago and acts that were not done in public. Separately or collectively, in court or out of court, they have listened to [p. 626] somebody's story and believed it. This renders possible that slow process which gives us the trial by jury of modern times. We may say, if we will, that the old jurors were witnesses; but even in the early years of the thirteenth century they were not, and were hardly supposed to be, eye-witnesses.

Jurors and witnesses.

Great importance has been attributed by modern historians to the peculiar procedure that prevailed when the genuineness of a charter was denied[4]. The witnesses whose names stood at its foot were summoned along with a body of neighbours. These *testes* and these *iuratores* were to join in a verdict. The appropriateness of this procedure we shall understand if we observe that the question submitted to this composite body was in the oldest days very rarely the simple question whether a certain man had set his seal to a certain parchment; it was generally the more complex question whether he had made a 'gift' of land, and the verdict spoke of seisin[5]. A similar

[1] Y. B. 20–1 Edw. I. p. 243: 'dites ceo en evidence de lassise.' Placit. Abbrev. 145 (A.D. 1258): jurors in an assize say that they know nothing about the alleged pedigree of Maud the plaintiff 'nisi tantum ex relatu attornati ipsius Matillidis.'

[2] Y. B. 20–1 Edw. I. pp. 17, 21; 21–2 Edw. I. p. 451: 'la chartre put estre boté avant en evidence de ceo a la grant assyse.' This practice may perhaps go back as far as 1200; see Jocelin of Brakelond (Camd. Soc.), p. 91.

[3] In old collections of oaths (*e.g.* Court Baron, p. 77) we find a witness's oath to tell truth in answer to questions.

[4] This is admirably described by Thayer, Evidence, p. 97.

[5] See the early case, Select Civil Pleas, pl. 59: 'And John puts himself upon the witnesses of the charters and upon the neighbourhood, as to whether

composite body was sometimes called in when the dispute was as to the manner in which a woman had been endowed at the church door[1]. We are very far from denying that this practice of calling the *testes* of a deed to assist in the trial played a considerable part in the transformation of the jury. It brings out in an emphatic manner the contrast between *testes* and *iuratores*. But this procedure was adapted only to a small class of disputes, and would have exercised no general influence if the jurors in other cases had been steadily regarded as first-hand witnesses[2].

[p. 627] The principle that the jurors are to speak only about matter of fact and are not concerned with matter of law is present from the first. They are not judges, not doomsmen; their function is not to 'find the doom' as the suitors do in the old courts, but to 'recognize,' to speak the truth (*veritatem dicere*). Still this principle long remains latent and tacit. A plain utterance of it would imply an analysis of concrete disputes that was foreign to the old procedure[3]. That procedure would, for example, have allowed a defendant to swear to the statement 'I do not owe you penny or penny's-worth,' a statement which, to our thinking, can not be of pure fact. The recognitors in a grand assize were called upon to say

Fact and law.

Jollan had any entry into that land, except through Alice, whom he had in ward.' Note Book, pl. 188, 205, 222, 250, 269, 332, etc. So clean an issue as *Non est factum* was rare in the first days of special pleading.

[1] Note Book, pl. 91, 154, 631, 1603, 1707. Thayer, Evidence, p. 98.

[2] The theory which saw an historical link between the modern witness who testifies before a jury and the plaintiff's *secta* has been sufficiently disproved. See Brunner, Schwurgericht, p. 428. The *secta* and the jury never come into contact. The *secta*, if produced at all, is produced in court before any question for a jury is raised or any summons for a jury issued. Curia Regis Roll, No. 140 (Pasch. 34 Hen. III.), m. 10, gives an interesting case from Huntingdonshire. Ten jurors and seven charter-witnesses appear; the jurors say that a feoffor, Simon by name, was *non compos sui*; the witnesses say *compos*. One litigant offers the king twenty marks that eight jurors of Northamptonshire and eight of Huntingdonshire 'qui habuerunt notitiam de praedicto Simone' may be added. The other litigant offers ten marks for eight jurors from Bedfordshire and eight from Buckinghamshire. The four sheriffs are ordered to send eight jurors apiece.

[3] The famous maxim 'ad quaestionem iuris respondent iudices, ad quaestionem facti iuratores,' seems to have been attributed by Coke to Bracton. It has not been traced beyond Coke, who, as Mr Thayer says, 'seems to have spawned Latin maxims freely.' See Thayer, Law and Fact, Harv. L. Rev. iv. 148–9.

whether the demandant had greater right than the tenant, and in so doing they had an opportunity of giving effect to their own opinions as to many a nice point of law[1]. To all appearance they usually gave their answer in two or three words; they declared that the *mere dreit* was with the one party or with the other, and they proffered no reason for their belief[2]. We must not suppose that in such a case they followed the ruling of the justices. The justices were powerless to help them. The demandant, it is true, had set forth the title on which he relied; but the tenant had contented himself with a sweeping denial. The recognitors, being his neighbours, might know something about his case and were morally bound to investigate it; the justices knew no more than he had told them, and he had told them nothing[3].

Special verdicts.

Perhaps when the Possessory Assizes were first instituted the questions that were formulated in their writs were regarded as questions of pure fact, for example the question whether one [p. 628] man was the next heir of another. Heirship may at one time have seemed to be a simple physical fact, just as sonship may appear as a simple physical fact, until we have perceived that the only sonship with which the law is, as a general rule, concerned involves a definition of marriage. Very soon, however, the separation of matter of fact from matter of law had begun. Sometimes the jurors felt that, though they knew all that had happened in the world of sense, they yet could not answer the question that the writ put to them. They knew that Ralph had ejected Roger, they knew what services Roger had been performing, and yet they would not take upon themselves to say whether Ralph had 'disseised' Roger from his 'free tenement.' So, with the terrors of an attaint before their eyes, they asked the aid of the justices and, as we should say, returned a 'special verdict[4].'

[1] They might, however, state pure facts and these might be a sufficient foundation for a judgment. Glanvill, ii. 18.

[2] For verdicts of a Grand Assize with reasons, see Note Book, pl. 769, 960, 1701.

[3] Bracton, f. 185 b, says that when a Petty Assize is taken without pleading the justices are to give no instruction to the jurors.

[4] Special verdicts in Petty Assizes are found at an early time. For an example from John's reign, see Select Civil Pleas, pl. 179: 'Iuratores dicunt quod rei veritatem inde dicent, et audita rei veritate, iudicent iustitiarii.' See also Note Book, pl. 144, 339, 1032, 1033, 1193, 1258. In pl. 1792 [A.D. 1222] the jurors after stating facts 'dicunt quod nesciunt quis eorum fuit in seisina.'

Justices and jurors.

The once popular doctrine which represents the justices as encroaching on the province that belonged to the jurors will not commend itself to students of the thirteenth century. Neither jurors nor justices had any wish to decide dubious questions. The complaint is, not that the justices are unwilling to receive a monosyllabic verdict, but that special verdicts are rejected:—they force the jurors into statements which explicitly answer the words of the writ, and thereby in effect require an oath about matter of law. The statute of 1285 forbids them to do this, while at the same time it allows the jurors to return general verdicts if they choose to risk their goods and their liberty[1]. When the jurors gave a special verdict they often had to answer a long string of questions [p. 629] addressed to them by the justices. The questions and the answers are recorded[2]. The justices desire to obtain all the relevant facts. On the other hand, they seem never to question the jurors as to their means of knowledge, though it is obvious enough that the twelve men can not have seen with their own eyes all the events that they relate.

Popularity of the jury.

We very much doubt whether in the thirteenth century Englishmen were proud of trial by jury, whether they would have boasted of it in the faces of foreigners, whether they regarded it as a check upon the king. We must wait for Sir John Fortescue to sing the lauds of the trial by twelve men. Jury service was oppressive. The richer freeholders obtained charters which exempted them from it, until in 1258 men said that in some counties there were not knights enough to make up a Grand Assize[3]. The poorer freeholders groaned under a duty which consumed their time and exposed them to the enmity of powerful neighbours. Edward I. relieved those

A common practice was that the jurors should state facts and add that therefore there was (or was not) a disseisin. See *e.g.* pl. 318: 'iuratores dicunt quod...et ideo dicunt quod idem *A.* eum iniuste disseisivit sicut breve dicit.' By a verdict in this form the jurors might escape the punishment ordained for perjury, though they would perhaps be amerced for a 'fatuous' oath if they drew a wrong inference of law. See Bracton, f. 290 b. But general verdicts in Petty Assizes were still common in Edward I.'s day. Occasionally a special verdict was given even in a Grand Assize; Note Book, pl. 251, 1865–6.

[1] Stat. West. II. c. 30.

[2] A good example of the way in which the jurors were catechized will be found in Northumberland Assize Rolls, p. 254.

[3] Oxford Petition, c. 28; Prov. West. c. 8; Stat. Marlb. c. 14.

whose lands were not worth twenty shillings a year[1]. None the less, it was seen that Henry II.'s Possessory Assizes had admirably done their appointed work, and the procedure which they had introduced was extended from case to case as men lost faith in the older kinds of proof. Much was at stake during those wakeful nights in which the Novel Disseisin was being fashioned[2]. Thenceforth the inquest, which might only have been known as an engine of fiscal tyranny, was associated with the protection of the weak against the strong, the maintenance of peace and seisin[3]. We may say that it suited Englishmen well; it became a cherished institution and was connected in their minds with all those liberties that they held dear; but what made it possible was the subjection of the England of the Angevin time to a strong central government, [p. 630] the like of which was to be found in no other land[4].

Fate of the older proofs.

We have been turning our faces towards the rising sun, and must now glance back at the fate of those institutions which trial by jury displaced[5].

Trial by battle.

Before the accession of Edward I. the judicial combat was already confined to that sphere over which its ghost reigned until the year 1819[6]. The prosecutor in the Appeal of Felony, the demandant in the Writ of Right[7], offered battle, the one by his own, the other by his champion's body, and the defendant might accept the offer, though by this time he could, if he pleased, have recourse to a verdict of his neighbours instead of staking his cause on a combat. Even in the Norman days 'battle did not lie' if there was no charge of crime and less

[1] Stat. West. II. c. 38. There was further legislation in 1293; Statutes, vol. i. p. 113.

[2] Bracton, f. 164 b: 'de beneficio principis succurritur ei per recognitionem assisae novae disseisinae multis vigiliis excogitatam et inventam.'

[3] In the Très ancien coutumier, pp. 17–18, the person against whom the jury is demanded is represented as some 'comes vel baro vel aliquis potens homo' who desires to grab land from his tenants or neighbours, while the plaintiff is an 'impotens homo.' 'Potens vero...in misericordia remanebit et impotens suam habebit terram.'

[4] The inquest procedure of the Karolingian times seems to have been exceedingly unpopular. Brunner, D. R. G. ii. 526.

[5] Thayer, The Older Modes of Trial, Harv. L. Rev. v. 45.

[6] 59 Geo. III. c. 46.

[7] Writ of Right must here be taken to include Customs and Services (Note Book, pl. 895), and *De rationabilibus divisis*, but not Writ of Right of Dower. See Bracton, f. 347.

than ten shillingsworth of property was in dispute[1]. As a means of proving debts[2] and 'levying' would-be swearers from the oath[3] it disappeared soon after Glanvill's day. That the oath of the demandant's witness and champion was almost always false was notorious, though we have met with a man who at the last moment refused to take it[4]. Does this induce our legislators to abolish the battle? No, it induces them to abolish the material words in the oath that made the champion a witness[5]. We see one hireling losing his foot for entering into warranty in an *actio furti*[6]; but for civil causes professional pugilists were shamelessly employed. Apparently there were men who let out champions for hire. Richard of Newnham, whose services were highly valued about the year 1220, might be retained through his 'master' William of [p. 631] Cookham[7]. We doubt whether in Bracton's day the annual average of battles exceeded twenty. There was much talk of fighting, but it generally came to nothing. The commonest cause for a combat was the appeal of an 'approver' (*probator*): that is, of a convicted criminal who had obtained a pardon conditional on his ridding the world of some half-dozen of his associates by his appeals. Decent people, however, who were in frankpledge and would put themselves upon a jury were not compelled to answer his accusations[8].

Rules of the duel.

The rules of the duel have been so well described by others that we shall say little of them[9]. The combatants' arms of offence are described as *baculi cornuti, bastons cornuz*. It has

[1] Leg. Henr. 59, § 16; compare Brunner, D. R. G. 418; Viollet, Établissements, i. 184.

[2] Glanvill, x. 12; above, vol. ii. pp. 204–206.

[3] See above, vol. ii. p. 162.

[4] Note Book, pl. 980.

[5] Stat. West. I. c. 41: 'pur ceo que rarement avient que le champion al demandaunt ne seit perjurs.'

[6] Select Pleas of the Crown, pl. 192.

[7] Note Book, pl. 185, 400, 551. The names of Stephen the Englishman, Duncan the Scot and William Champneys occur from time to time as those of 'witnesses' who have seen a great deal. For contracts with champions, see Neilson, Trial by Combat, pp. 50–4; also Chron. de Melsa, ii. 100; Winchcombe, Landboc, i. 49–50. As to the champion's homage—for in theory he must be his employer's 'man'—see Bracton, f. 79 b.

[8] Bracton, f. 152–3; Select Pleas of the Crown, pl. 109, 140, 190, 198, 199; Note Book, pl. 1159, 1431, 1447, 1472, 1517.

[9] In particular, see Neilson, Trial by Combat, where most of the English stories are collected.

been commonly assumed that this means staffs 'tipped with horn'; but Dr Brunner has lately argued that the weapon thus described was really the old national weapon of the Franks, the war-axe (*francisca, bipennis*) which in its day had conquered Gaul[1]. The burden of the proof was on the combatant who fought for an affirmative proposition[2]; his adversary won if the stars appeared before the fight was over.

Wager of law.

The oath with oath-helpers[3], though it had been driven out of many fields, was by no means uncommon. The perdurance into modern times of this antique procedure as a special peculiarity of the two actions of Debt and Detinue has suggested rationalistic attempts to discover characteristics of those actions which make them unfit for submission to a jury. The simple truth is that they are old actions, older than trial by jury. In [p. 632] Bracton's day wager of law still appears as a normal mode of defence, and the charge that is thus denied is often one which in our eyes could easily be decided by 'the country.' In particular it is the common method of proving that one has never been summoned to appear in court[4], that one has not sued in court Christian after receipt of a royal prohibition[5], that one is not detaining a ward from his guardian[6], that one has not broken a final concord, or a covenant[7], that one has not detained beasts against gage and pledge[8]; we may even see it used in an action of trespass[9]. Nor is it always the defendant who wages his law; if the defendant pleads an affirmative plea, the plaintiff will deny it and prove the denial with oath-helpers[10]. However, the argument that you can not wage your law about facts that are manifest is beginning to prevail.

[1] Brunner, D. R. G. ii. 417. The evidence consists in part of the well-known sketch drawn on an English plea roll and reproduced, not for the first time, as a frontispiece for Select Pleas of the Crown, and a very similar picture found in the Berlin MS. of Beaumanoir. In a very late case the weapon had 'a horn of yryn i-made lyke unto a rammys horne'; Neilson, *op. cit.* 155.

[2] Generally the plaintiff must prove, but *Reus in exceptione actor est.* See Select Pleas of the Crown, pl. 87, where an appellee is ready either to deny the charge or to prove an exception, and offers different champions for the two purposes.

[3] Thayer, Harv. L. Rev. v. 57.

[4] Note Book, pl. 7, 1436; Bracton, f. 366.

[5] Note Book, pl. 143, 536, 629, 788, 799, 1467, etc.; Bracton, f. 410.

[6] Note Book, pl. 731, 742, 763, 1125, 1151.

[7] Note Book, pl. 396, 1097, 1101, 1457, 1579.

[8] Note Book, pl. 477, 741; Bracton, f. 156.

[9] Somersetshire Pleas, pl. 572.

[10] Note Book, pl. 184, 1549, 1574.

There has, for example, been doubt as to whether the commission of waste can be thus disproved. Bracton holds that it can not; otherwise the oath of the swearers would prevail against the evidence of our senses[1]. In the seignorial courts trespasses as well as debts are denied with wager of law[2]; indeed the lords have very little lawful power of compelling free men to serve as jurors.

Oath-helpers in criminal cases.

In the city of London and in some other towns which enjoyed a chartered immunity from change, we find that even against accusations of felony the citizens still purge themselves with oath-helpers. They do this in the thirteenth, they talk about doing it in the fourteenth century. The London custom knew three 'laws': the great law for homicide, the middle law for mayhem, the third law for the smaller deeds of violence[3]. The great law required the accused to swear six times, each oath being supported by six helpers, so that in all thirty-seven persons swore. Three oaths, each backed by six compurgators, satisfied the middle law, while a single oath with six helpers [p. 633] was all that the third law required. This third law was sufficient even in a case of homicide if there was no appeal and the accused was being subjected to trial merely at the king's suit[4]. The accused did not choose his own helpers; they were chosen for him in his absence by the mayor and aldermen, or the mayor and citizens in the folkmoot, but he had an opportunity of rejecting for reasonable cause any of the persons who were thus selected. If the chief swearer was to escape, then each of the helpers swore that to the best of his knowledge and belief his principal's exculpatory oath was true. It is evident that 'the great law' must have been a severe, though a capricious test. In course of time a mitigation seems to have been introduced, and the accused was allowed to give a single oath at the head of his six-and-thirty backers, instead of swearing six times at the head of six groups[5]; but still he would be hanged if any one of the six-and-thirty refused his testimony. The Londoners probably discovered that they

[1] Bracton, f. 315 b; Note Book, pl. 580.

[2] Select Pleas in Manorial Courts, pp. 7, 8, 9, etc.; The Court Baron, pp. 21, 26, 28, etc.

[3] Mun. Gild. i. 56–9, 90–2, 102–4–6–7, 110–1: ii. 321. For Lincoln, see Select Pleas of the Crown, p. 39.

[4] Mun. Gild. i. 91.

[5] Contrast Mun. Gild. i. 57 with Ibid. i. 111.

had made a mistake in adhering to this ancient custom and that the despised foreigner, who was tried by a jury of forty-two citizens chosen from the three wards nearest to the scene of the supposed crime, had a better chance of escape than had the privileged burgher[1]. In the fourteenth century it was said that the citizen had his choice between 'the great law' and a jury of twelve[2].

Decay of the trial by oath.

We see in this instance that the old set task of making a law might be very difficult. In the king's court and the seignorial courts the swearer was allowed to choose his own assistants—usually eleven or five—and the process fell into bad repute[3]. The concentration of justice at Westminster did much to debase the wager of law by giving employment for a [p. 634] race of professional swearers. In the village courts, on the other hand, it would not be easy for a man of bad repute to produce helpers; his neighbours would be afraid or ashamed to back his negations. And so we seem to see that many defendants in these courts prefer to put themselves upon a jury rather than to wage a law. The compurgatory process was still the means by which guilt was disproved in our English ecclesiastical courts; we have seen above that they allowed it to become a farce[4].

The decisory oath.

The practice of 'deferring' and 'referring' a 'decisory oath' was widely received on the Continent as a part of the Roman procedure. Bracton had heard of it; but it never struck root in our common law[5]. However, at a later day we find that in

[1] Mun. Gild. i. 102, 106–7. It is to be regretted that the learned editor of this book has confused wager of law and trial by jury. The text distinguishes them sharply. The foreigner 'ponit se super veredictum' and the jurors swear 'de veritate dicenda.'

[2] Mun. Gild. ii. 321. Apparently wager of law in Trespass was abolished in the civic courts by Edward I. during the time when the city was in his hands. Ibid. i. 294. In 1270 the Earl of Warenne or his men slew Alan de la Zouche in Westminster Hall before the justices; he was allowed to escape with *wer* and *wite* (to use the old terms) after swearing with twenty-five knights as compurgators that the deed was not done of malice aforethought or in contempt of the king; Ann. Wint. 109; Wykes, 234. Purgation with thirty-six oath-helpers in criminal causes was allowed at Winchelsea in the fifteenth century; Palgrave, Engl. Commonwealth, p. cxvii. See also the custumals in Lyon's Dover, ii. 300, 315, etc.

[3] Records of Leicester, ed. Bateson, p. 158. In Leicester so late as 1277 the defendant has to choose his helpers from among the plaintiff's nominees. This is abolished as too onerous a task.

[4] See above, vol. i. pp. 443–4; vol. ii. pp. 395–6.

[5] Bracton, f. 290 b. We have seen no instance on any plea roll.

the London civic courts the defendant can call upon the plaintiff to swear to his cause of action, or the plaintiff can call upon the defendant to swear to an affirmative plea that he has pleaded, and in either case the oath, if sworn, is 'peremptory,' that is, it gives victory to the swearer[1]. The oath *de calumnia* is another institution that we refuse to borrow, though to all seeming the fore-oath of the Anglo-Saxon dooms, which we allowed to perish, was a kindred institution[2].

Trial by witnesses.

One other mode of trial remains to be mentioned. For a moment it threatened to be a serious rival of trial by jury. The common law of a later day admits in a few cases what it calls a trial by witnesses; we should now-a-days call it a trial by judge without jury[3]. How did it arise and why did it become very unimportant?

The excipient's suit.

We have seen that a plaintiff had to produce a suit of witnesses, and that a defendant might call for an examination of these suitors. Now when the 'exception' was yet new, it seems to have been thought—and this was very natural—that, if the defendant pleaded an affirmative plea, he might offer to prove by a suit the facts on which he relied[4]. And so, again, [p. 635] the plaintiff will sometimes offer suitors for the support of a replication[5]. In the parallel law of Normandy we see as a flourishing institution this production by the defendant of backers for the proof of an affirmative exception. If, for example, a plaintiff demands a debt, and the defendant pleads that he has paid it, the latter can prove his affirmative plea by a formal oath supported by four fellow-swearers[6]. In England the defendant's offer of suit soon begins to give way to a vaguer offer of 'verification,' which leads to a proof by jury. If his offer of suit had been accepted, there would, we take it, have been here, as in Normandy, a purely unilateral test:—the defendant would

[1] Munim. Gildh. i. 217–8.

[2] See the oath in Schmid, Gesetze, App. x. c. 4; Brunner, D. R. G. ii. 344.

[3] Thayer, Evidence, p. 17; Blackstone, Comment. iii. 336.

[4] Bracton, f. 301 b; Note Book, pl. 68, 79, 233, 613, 882, 1002, 1311, 1863. In pl. 233 [A.D. 1224] a defendant who produces no suit for his affirmative plea is allowed to purchase a jury, as the plaintiff does not object.

[5] Note Book, pl. 123.

[6] Somma, p. 325: Ancienne coutume, c. 125 (122), ed. de Gruchy, pp. 317–22. In Normandy an affirmative plea is proved by a *lex probabilis*, a negative plea by a *deraisnia* equivalent to our wager of law. See Bigelow, Hist. Procedure, p. 304. It is curious that, while in Normandy *disrationare* or *derationare* is applied to disproof, in England it generally points to affirmative proof.

have sworn, his suitors would have sworn and he would have gone quit.

Rival suits.

But we see the English court occasionally adopting a more rational procedure. There is a bilateral production of witnesses. In 1234 a curious cause was evoked from the hundred of Sonning. A stray mare had been arrested; one William claimed it, and produced sufficient suit; it was delivered to him on his finding security to produce it if any other claim was made within year and day. Then one Wakelin appeared, claimed the mare and produced suit. The hundred court did not know to whom the proof should be awarded; so the matter was removed into the king's court. That court heard both suits and examined the witnesses one by one. Wakelin's men told a consistent, William's an inconsistent story, and the case was remitted to the hundred with an intimation that William's suit proved nothing[1]. Again, in one very common kind of action, namely, the action for dower, we repeatedly find suit produced against suit, both when the defence is that the would-be widow's husband is still alive and when it is asserted that she was endowed in some mode other than that which she has described. In these cases the court seems to think that each party is urging an affirmative allegation, that the two sets of witnesses should be examined, and that the more convincing testimony should prevail[2].

Fate of trial by witnesses.

But, for some reason or another, this mode of trial did not [p. 636] flourish in England. Very soon it seems to be confined to one small class of cases, namely, that in which a would-be widow is met by the plea that her husband is still alive[3]. Witnesses are produced on the one side to prove his death, on the other to prove his life, and the weightier or more numerous suit carries the day. A reason for the survival of this 'trial by witnesses' within these narrow bounds we may find perhaps in the idea that widows are entitled to a specially speedy justice, or perhaps in the difficulty of submitting to any English 'country' the question whether a man, who might have gone beyond the seas, was still alive. But any such explanation will

[1] Note Book, pl. 1115; Thayer, Evidence, p. 21.

[2] Bracton, f. 301 b, 304; Note Book, pl. 265, 279, 345, 356, 457, 518, 545, 898, 1065, 1102, 1307, 1586, 1595, 1604, 1919. See also the procedure in Replevin described by Bracton, f. 159. Records of Leicester, ed. Bateson, p. 159: in 1277 it is established that the plaintiff's suit is to be examined.

[3] Thayer, Evidence, p. 23.

leave us facing a serious problem, namely, why this rational procedure, this procedure which might easily have been converted into such an *enquête* of witnesses as Saint Louis ordained, soon fell out of the race. In Bracton's book it looks like a serious rival of trial by jury, while in later books and records we read of it only as of an anomaly. At this point some would say much of national character; we prefer to fall back once more on the antiquity and popularity of the Possessory Assizes. Henry II. lived before Saint Louis and before Innocent III. The reformation of procedure begins in England at a very early time, while the canon law is still trusting the old formal probations. The main institute of our new procedure is the 'inquest of the country.' This has taken possession of England before people have thought of balancing the evidence given by two sets of witnesses. For a moment 'trial by witnesses' gains a foot-hold in this country under the influence of men like Bracton, who have heard of the new canonical inquest and who would make something rational out of the ancient *secta*; but the ground is already occupied. English judges have by this time fashioned a procedure which is far less troublesome to them, and which has already won a splendid success in the protection of every freeholder's seisin. In a few years they will be regarding the plaintiff's production of a *secta* as a mere formality and one which may be safely neglected; they will not allow the defendant to object that no *secta* has been tendered, and so the phrase 'and thereof he produces suit,' though [p. 637] men will be writing it in the nineteenth century, becomes a mere falsehood[1].

Other proofs.

A few miscellaneous 'proofs' there were. Certain questions were decided by the certificate of the bishop, such as the question whether a church was 'full,' that is, whether it had a properly constituted parson[2], and the question whether two people were lawfully married, or whether a child was legitimate[3]. If it was asserted that a litigant was not of full age, the justices would sometimes trust their own eyes; if they doubted, he made his proof by a suit of twelve witnesses, some of whom

[1] Y. B. Edw. II. f. 242, 582; 17 Edw. III. f. 48 (Mich. pl. 14); Thayer, Evidence, p. 14.

[2] Note Book, pl. 111, 173, 296, 1428, etc.; Bracton, f. 241 b.

[3] See above, vol. ii. p. 367.

were his kinsmen and some his neighbours[1]. In the chancery when a youth, who has been in ward to the king, goes to sue for possession of his lands, the witnesses whom he adduces to prove his full age are examined: that is to say, they are asked how they come to remember the time of his birth, and they answer with talk of coincidences[2]. This rational examination of witnesses is of some interest to those who explore the early history of the chancery. Sometimes about a small and incidental question the justices also will hear witnesses one by one and contrast their testimony; but this is rare[3]. Lastly, one can only prove that a man is a villein by producing kinsmen of his who are self-confessed villeins[4]. This is a procedure favourable to freedom; the man whose liberty is at stake should not be driven to put himself upon a verdict of the 'free and lawful.'

Questions of law.

Of course in many cases there is no need for any proof. In the language of a somewhat later age the parties have 'demurred[5]'; the relevant facts are admitted and there is between them only a question of law. Very often the defendant raises some 'dilatory exception' to the writ, or to the person of the plaintiff and craves a judgment (*petit iudicium*) as to whether he need give any answer[6]. More rarely the defendant [p. 638] pleads facts which attack the core of the plaintiff's case, and the plaintiff, though unable to deny those facts, still asserts that he is entitled to a judgment. Here a judgment must be given 'on the count counted and the plea pleaded' (*par counte counté et ple pledé*)[7]. The first class of cases which brings this procedure to the front seems to be that in which two kinsmen are disputing about an inheritance but have

[1] Bracton, f. 424 b; Note Book, pl. 46, 687, 1131, 1362; Northumberland Assize Rolls, p. 230. The oath of these witnesses is a formal assertory oath, very like that of a Norman *lex probabilis*.

[2] See *e.g.* Calend. Geneal. pp. 184, 197, 203.

[3] Note Book, pl. 10: Men who profess that they summoned a litigant are examined separately and contradict each other.

[4] See above, vol. i. p. 426.

[5] For early occurrences of this word, see Y. B. 20–1 Edw. I. p. 323; 21–2 Edw. I. p. 163.

[6] Select Civil Pleas, pl. 24 [A.D. 1201]: 'petunt considerationem curiae utrum debeant respondere.' For a long time, however, anything that could be called a regular 'joinder in demurrer,' which involves an express statement by both pleaders of their desire for a judgment, is, to say the least, very rare upon the rolls.

[7] Bracton, f. 279. Note Book, pl. 1383: 'ita quod per narrationem narrare et responsum dare recuperavit...seisinam.'

admitted each other's pedigrees. Here there is a pure question of law for the court[1]. But, as already said[2], the contrast between matter of law and matter of fact is as yet by no means sharp. Between men who have not admitted each other's pedigrees or who do not trace descent from a common stock, the whole question of 'greater right' will be left to a grand assize.

Victory of the jury.

When Henry III. died, the verdicts of jurors were rapidly expelling all the older proofs. We have analyzed the trials of civil causes which took place before the justices in eyre at Newcastle in the years 1256, 1269 and 1279 with this result:—

Verdicts of Grand Assizes	1	Wagers of Battle	0
Verdicts of Petty Assizes	57	Wagers of Law	1
Verdicts of *Iuratae*	22	Trials *per parentes*[3]	1
Verdicts of Attaint Juries	1		

Very little remained to be done, and between 1272 and 1819 (when the battle was abolished)[4], very little was done to remove the remaining archaisms. The justices ceased, as we have lately said, to pay any heed to the production of 'suit.' Wager of law was driven out of a few actions in which it would [p. 639] still have been permitted in Bracton's time, while the two actions to which it clung until 1833[5], namely, Debt and Detinue, were slowly supplanted for practical purposes by the progeny of Trespass. Meanwhile, as is well known, the whole nature of trial by jury was changed. There was real change, but there was formal permanence. If we read the enrolled words which describe a trial by jury of Blackstone's or of a much later day, we are reading a bald translation of a record of Edward I.'s time. When a legal formula serves fifteen or twenty generations it has not been unsuccessful.

The presenting jury.

It remains that we should speak of a form of criminal procedure which had the future before it, that, namely, which

[1] Glanvill, ii. 6: 'per verba [=*counte counté*] placitabitur et terminabitur in curia ipsa.'

[2] See above, vol. ii. p. 629.

[3] Northumberland Assize Rolls, p. 196. This trial took place in the county court.

[4] Stat. 59 Geo. III. c. 46.

[5] Stat. 3 & 4 Will. IV. c. 42, sec. 13; Thayer, Evidence, p. 25.

is initiated by a presentment or indictment. We have seen above how the old Frankish inquest was put to this among other uses; it could be employed for the collection of a *fama publica* which would send those whom it tainted to the ordeal. We have seen that the Frankish church had adopted this process in its synodal courts[1]. We have said—but this must still be a matter of doubt—that it may have been occasionally used in England before the year 1166 when Henry II. issued his Assize of Clarendon[2]. That ordinance must now be our starting point.

Fama publica.

Let us first ask what it is that the king desires to collect from the oaths of jurors. Does he want accusations of crime? Not exactly accusations. A man who has an accusation to bring can bring it; it will be called an Appeal. Does he then want testimony against criminals? Not exactly testimony. The jurors will not have to swear that *A. B.* has committed a theft, nor even that they believe him to be guilty. No, they are to give up the names of those who are defamed by common repute of theft or of certain other crimes, of those who are *publicati, diffamati, rettati, malecrediti* of crimes. This is of some importance. The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute[3].

Composition of the presenting jury.

The machinery that Henry II. set in motion for this purpose [p. 640] was not invented by him. It involved the oath of twelve knights, or, failing knights, twelve good and lawful men, of every hundred, and the oath of four lawful men of every vill. This is in the main the same machinery that the Conqueror employed when Domesday Book was to be made. About every matter there are to be two sets of swearers, certain men of higher rank who represent a hundred, certain men of lower

[1] See above, vol. i. p. 142.

[2] See above, vol. i. pp. 151–3.

[3] The word *rettatus* is common on the early rolls as describing the position of one against whom the jurors make a presentment, while the charge against him seems to be a *rettum*. A little later *rettatus* degenerates into *rectatus*, the notion being that the person against whom the charge is made is 'brought to right,' made to 'stand to right.' Diez thinks that *rettatus* (Fr. *retté*) comes from *reputatus*. Le très ancien coutumier (p. 43) gives *reptatus*, and also (pp. 53–4) uses the active *reptare* to describe the action of an accuser. In our English documents *rettatus, publicatus, diffamatus, malecreditus* seem to be approximately equivalent.

rank who represent a vill or several vills[1]. Upon the working of this scheme some light is thrown by what we see the sheriff doing at a later time. Henry's ordinances, if they instituted the procedure which takes place before the justices in eyre, also instituted the accusatory procedure of the sheriff's turn[2]. Now in the thirteenth century we find in the sheriff's turn a procedure by way of double presentment, and we may see it often, though not always, when a coroner is holding an inquest over the body of a dead man[3]. The *fama publica* is twice distilled. The representatives of the vills make presentments to a jury of twelve freeholders which represents the hundred, and then such of these presentments as the twelve jurors are willing to 'avow,' or make their own, are presented by them to the sheriff[4]. This duplex process will, if we think it over, seem appropriate to the matter in hand. The highly respectable knights or freeholders of the hundred are not likely to know at first hand much about the crimes that have been committed among the peasantry or of the good or ill repute of this or that villein. On the other hand, it is not to be tolerated that free men should be sent to the ordeal merely by the oaths of the unfree, and undoubtedly in the thirteenth century many or most of the representatives of the vills were men whom the lawyers called serfs. This is of some importance when we trace the pedigree of the indictment. From the very first the legal forefathers of our grand jurors are not in the majority of cases supposed to be reporting crimes that they have witnessed, or even to be the originators of the *fama publica*. We should be [p. 641] guilty of an anachronism if we spoke of them as 'endorsing a bill' that is 'preferred' to them; but still they are handing on and 'avowing' as their own a rumour that has been reported to them by others[5].

The coroner's inquest.

Then early in the thirteenth century, if not before the end of the twelfth, we have the coroners also making inquests by

[1] D. B. iv. 497 (Liber Eliensis); Ass. Clarend. c. 1; Ass. Northampt. c. 1.

[2] Ass. Clarend. c. 1: 'Et hoc inquirant iustitiae coram se et vicecomites coram se.'

[3] Gross, Coroners' Rolls, pp. xxx ff., and cases there cited.

[4] Britton, i. 178–182.

[5] See in Reg. Brev. Orig. f. 99 a writ whence we learn that in cent. xiv. or xv. the reeve and four men of the vill were still charged with the duty of 'informing the jurors.'

means of some four or six vills or townships. This they do whenever there is a sudden death, and, if the sworn representatives of the vills declare that some one is guilty of homicide, he is arrested and put in gaol. The results of these inquests are recorded on the coroner's roll, and that roll will be before the justices when next they make their eyre. Also we must notice that it is the coroner's duty to secure by 'attachment' the presence before the justices in eyre of the persons who found the dead body and of those who were in any house where a violent death occurred[1].

Presentments and ordeal.

But we must turn to the doings of the justices in eyre. When we first see them at their work they have before them a jury of twelve hundredors, and if this jury presents a crime, or rather a reputation of crime, then the justices turn to the representatives of the four vills that are nearest to the scene of the misdeed and take their oath. Why reference should be made to just four vills we can not say. Perhaps the underlying notion is that they are the four quarters, east, west, north and south of the neighbourhood[2]. Almost always the townships agree with the hundredors, probably because the hundredors have derived their information from the townships. The result of such agreement is that the defamed man goes to the ordeal[3].

Practice of the eyres.

If we are to understand the working of this procedure when [p. 642] the ordeal is no more, we must draw some exacter picture of a session of the justices in eyre. In the first half of the thirteenth century almost all the high criminal justice that was being done was being done at such sessions. True that an appeal of felony was sometimes begun before or evoked to the Bench[4];

[1] The apocryphal statute *De officio coronatoris* ascribed to 4 Edw. I. (Statutes, i. p. 40) seems to be an extract from Bracton's treatise, f. 121, slightly altered; it is very possible, however, that Bracton made use of some ordinance or set of official instructions. See Gross, Coroners' Rolls (Selden Soc.), where the duties of the coroner are fully and learnedly discussed and illustrated.

[2] Leg. Edw. 24 (22) § 1; Leg. Will. I. 6, 21 § 2; Gross, Coroners' Rolls, p. xl.

[3] One entry from the roll of the Cornish eyre of 1201 (Select Pleas of the Crown, pl. 5) will suffice as an example. 'Hundredus de Estwivelisira. Iuratores dicunt quod malecredunt W. F. de morte A. de C. ita quod die praecedente minatus fuit ei de corpore et catallis suis. Et iiij. villatae iuratae proximae malecredunt eum inde. Consideratum est quod purget se per aquam per assisam.'

[4] Bracton, f. 149; Select Pleas of the Crown, pp. 38–81, 120–140.

but the central court had little to do with indictments. True also that, as time went on, justices were sent with ever increasing regularity to deliver the gaols; but the work of gaol-delivery seems to have been light—for few men were kept in prison—and it was regarded as easy work which might be entrusted to knights of the shire[1]. Bracton's treatise *De Corona* is a treatise on the proceedings of justices in eyre.

The jury and the articles.

When the justices begin their session[2] they have before them the sheriff, the coroners, and the bailiffs of the hundreds and liberties. They have before them what is in theory 'the whole county,' that is to say, all the suitors of the county court who have neither sent excuse nor failed in their duty[3]. They have before them a jury of twelve men representing each hundred; the boroughs, and some privileged manors, also send juries. The process whereby these juries were selected was this: the bailiff of the hundred chose two or four knights who chose the twelve[4]. There are also present the reeve and four men from every township. Thereupon the juries of the various hundreds are sworn. The oath that they take obliges them to say the truth in answer to such questions as shall be [p. 643] addressed to them on the king's behalf and to obey orders. Then the articles of the eyre[5] are delivered to them in writing and days are given them for bringing in their verdicts[6]. The justices are opening what will be a prolonged session; it may

[1] See above, vol. i. p. 200. For modern doctrine as to the powers given by a commission of gaol delivery, see Hale, P. C. ii. 34–5. We suspect that those powers were gradually enlarged by interpretation. At any rate it is plain that in Henry III.'s reign, despite gaol deliveries, the main part of the criminal work fell on the justices in eyre. See Munim. Gildh. i. 296–7. The inferior position of the justices of gaol delivery is vividly illustrated by a writ of 1292; Rot. Parl. i. 86.

[2] Writs of summons will be found in Rot. Cl. i. 380, 476 (A.D. 1218–21); Select Charters (A.D. 1231); Bracton, f. 109; Y. B. 30–1 Edw. I. p. lv.

[3] For the defaulters at the Northumbrian eyre of 1279 (*Edmundus frater Regis* is among them) see Northumberland Assize Rolls, 326, 356.

[4] In the eyre of 1194 four knights elected by the county elect two knights of the hundred who choose ten others to serve with them; see the writ in Select Charters. In later days the electors are named by the bailiffs; Bracton, f. 116; Fleta, p. 23; Britton, i. 22; Statutes of the Realm, i. 232; Northumberland Assize Rolls, 128, 395; Y. B. 30–1 Edw. I. p. lviii.

[5] See above, vol. ii. p. 520.

[6] Bracton, f. 116; Britton, i. 22. We are right in saying 'verdicts.' The answers to the articles are often called *veredicta*.

well last for a month and more[1]. Some of these juries will not be wanted again for many days[2]. They have also been told in private that they are to hand in to the justices a schedule of the suspects, the *malecrediti*, in order that the justices may order their arrest. We have some evidence that such a schedule, a *rotulus de privatis*[3], was delivered to the justices at once, so that the *malecrediti* might be captured before the jurors returned to answer the articles.

Presentments in the eyre.

We will now suppose that a jury is ready to answer. Unless we are mistaken, it will have put its answer into writing and will deliver this writing to the justices; but none the less it will have to make an oral reply to every article, and any variance between what it has written and what it says will bring down an amercement upon it[4]. The justices already know a great deal touching the matters about which the jurors should speak, for they have in their possession the sheriff's rolls and the coroners' rolls, which tell of appeals begun in the local courts and of inquests held on the bodies of dead men. The catechization of the jurors is a curious process. We are reminded of a schoolmaster before whom stands a class of boys saying their lesson. He knows when they go wrong, for he has the book. Every slip is cause for an imposition unless his pupils have purchased a favourable audience. In the fourteenth century, when eyres were becoming rare, this practice had degenerated into an extortionate absurdity. In 1321 a ward-jury of the city of London was expected to recite all the crimes that had been committed during the last forty-four years and to know [p. 644] the value of every homicide's chattels. If it disagreed with the coroners' rolls, it was amerced, and yet it had given the justices and clerks five marks, more or less, for a breakfast[5].

[1] Bracton, f. 116. In 1321 the eyre in the city of London dragged on its slow length for twenty-four weeks and then was brought to a premature end; Munim. Gildh. ii. p. c.

[2] Gloucestershire Pleas, p. xxvi.

[3] Gloucestershire Pleas, p. 60. In the Kentish eyre of 1278 the jurors had one day in which to deliver their *privetez* and a longer time for providing an answer to the articles; Y. B. 30–1 Edw. I. p. lx. In the sheriff's turn the presentments of felony are made privily, other presentments openly; Britton, i. 182.

[4] Select Pleas of the Crown, pl. 62, 71; Somersetshire Pleas, pl. 950; Britton, i. 23, gloss from the Cambridge MS.; Munim. Gildh. ii. 370.

[5] Munim. Gildh. ii. 370.

But, even in earlier times, when the eyres were more frequent, the jurors often had to speak of misdeeds and misadventures that were seven years old.

Among the miscellaneous mass of presentments that they make about the doings of unknown or fugitive malefactors, about accidental deaths which give rise to a deodand, about purprestures, about the usurpation of franchises and so forth, there will usually be a few, but only a few, which we can call indictments for felony of persons who can be brought before the court. What happens in these cases? Before the abolition of the ordeal in 1215 the justices, having received the statement of the hundred-jurors, turn to the representatives of the four neighbouring vills, who at this point are sworn to make true answer. If these *villani* agree with the hundredors in declaring that the person in question is suspected of a felony, then he goes to the water[1]. We can not be quite so certain as to what happens in Henry III.'s time, for about this point there has been in our own day some difference of opinion. The man against whom the presentment is directed will be asked how he will acquit himself of the charge. By this time there is but one mode of trial or proof open to him, namely, a verdict of the country. His choice lies between consenting and refusing to put himself for good and ill upon the oath of his neighbours. This is a test to which in 1215 appellees and defendants are frequently submitting their *exceptiones*. We will suppose then that our suspect thinks that a trial is the least of two evils and puts himself upon his country. Now as we read the rolls[2] and Bracton's text[3] what normally happens is this:—The hundred jury without being again sworn,—it has already taken a general oath to answer questions truly—is asked to say in so many words whether this man is guilty or [p. 645] no. If it finds him guilty, then 'the four townships' are sworn and answer the same question. If they agree with the hundredors, sentence is passed. This we believe to have been

Indictments for felony.

[1] Select Pleas of the Crown, pl. 5, 6, 10 etc.

[2] Besides the Gloucestershire Pleas (1221), the Northumberland Assize Rolls (1256, 1279) and the Somersetshire Pleas which are in print, we have looked through various unprinted rolls, in particular Assize Rolls, Nos. 82 (Cambridgeshire eyre of 45 Hen. III.), 912 (Sussex eyre of 47 Hen. III.), 569 (Norfolk eyre of 53 Hen. III.).

[3] The critical passages are on f. 116, 143, 143 b.

the normal trial. But there were many juries about, for every hundred had sent one, and upon occasion the justices would turn from one to another and take its opinion about the guilt of the accused. By the end of Henry III.'s reign it is common that the question of guilt or innocence should be submitted to the presenting jury, to the jury of another hundred and to the four vills. They are put before us as forming a single body which delivers an unanimous verdict[1].

The second jury.

It may seem unfair that a man should be expected to put himself upon the oath of those who have already sworn to his guilt. But this is not exactly what the jurors have done. They have not sworn that he is guilty, they have not even sworn that they suspect him, they have only sworn that he is suspected (*rettatus, malecreditus*). They would have exposed themselves to an amercement had they said nothing of his ill fame, for this would very possibly have come to the ears of the justices through other channels; and yet, when asked to say [p.646]

[1] Thus *e.g.* Northumberland Assize Rolls, 106, 115. The county is divided into two wards, viz. North of Coquet and South of Coquet. 'Balliva de Northekoket venit per duodecim.....Ricardus de C. captus pro morte G. F.... ponit se super patriam. Et iuratores ex parte australi de Koket et similiter iuratores ex parte boriali de Koket simul cum villatis propinquioribus dicunt... quod culpabilis est; ideo etc.' Select Pleas of the Crown, pl. 179. Gloucestershire Pleas, pl. 52: the juries of three hundreds find a man not guilty. We could give numerous examples of this from unprinted rolls; a few must suffice. Assize Roll, No. 82 (45 Hen. III.), m. 23. 'Hundredum de Chileford venit per duodecim...J. O. rettatus de morte W....ponit se super patriam...Et xii. iuratores istius hundredi et de hundredis de R. et W. una cum villatis de eisdem hundredis dicunt super sacramentum suum quod...in nullo est culpabilis.' Ibid. m. 28 d: 'Et duodecim iuratores de hundredo de R. in quo praedicta transgressio fieri debuit, et similiter xii. iuratores de hundredo de C. ex habundanti de officio iustitiariorum super hoc requisiti, dicunt....' Ibid. m. 33 d: 'Et xii. iuratores istius hundredi [de F.] simul cum iuratoribus de C. et S. et quatuor villatis propinquioribus dicunt...' Assize Roll, No. 912 (47 Hen. III.) m. 36: 'P. de K. captus fuit per indictamentum xii. iuratorum hundredi de S. et modo venit et...ponit se super xii. istius hundredi de S. Et xii. iuratores simul cum xii. de H. et quatuor villatae propinquiores dicunt super sacramentum suum...' Ibid. m. 43 d: 'Et offerunt dom. Regi i. marcam pro habenda inquisicione hundredi propinquioris simul cum isto hundredo.' Assize Roll, No. 569: 'Et per sic quod hundreda de C. et S. adiciantur isti hundredo offert dom. Regi x. libras, et recipiuntur.' See also Somersetshire Pleas, p. 27. It seems to us that at the end of the reign when the jury of a second hundred is called up, this is still regarded as a favour granted to the accused. But it is often granted and is not always purchased with money. See Gross, Coroners' Rolls, p. xxxi.

directly (*praecise dicere*) whether he is guilty or no, they may acquit him. However, the notion is growing that a man's 'indictors' will not be impartial when they try him. Britton allows the accused, in case of felony, to challenge jurors who are his indictors[1]. As a complement to this, we find jurors, in case of misdemeanour, amerced for denying in what we should call their verdict a statement of the guilt of the accused contained in what we should call their indictment of him[2]. In 1352 a statute was necessary to establish the general principle that a man's indictors are not to be put upon the inquest which tries him, be it for felony or for trespass[3]. Another change was going on. Just at the time when the accused was acquiring a right to challenge his indictors, 'the four townships' were ceasing to perform their old function. We see them in full activity on some of the latest eyre rolls of Henry III.'s reign, while on some of the rolls of his son's time they are no longer mentioned as part of that *patria* which says that men are guilty or not guilty[4]. A great deal yet remained to be done before that process of indictment by a 'grand jury' and trial by a 'petty jury' with which we are all familiar would have been established. The details of this process will never be known until large piles of records have been systematically perused. This task we must leave for [p.647] the historian of the fourteenth century. Apparently the

[1] Britton, i. 30. The challenge is only allowed where there is 'peril de mort.'

[2] Assize Roll, No. 915 (Sussex eyre of 7 Edw. I.) m. 13 d: 'Hundredum de E. venit per xii...Iuratores praesentant quod W.' committed an assault and battery. 'Postea venit W. et...ponit se super patriam. Et xii. iuratores dicunt super sacramentum suum quod...non est culpabilis... Ideo inde quietus. Et quia xii. iuratores modo dedicunt id quod prius dixerunt, in misericordia.' A similar case stands on m. 29. Another will be found in Palgrave, Commonwealth, p. clxxxviii. None of these are cases of felony, and we believe that, while the hundredors were expected to present all public suspicions of felonies, they were deemed to pledge their oaths to the truth of any charges of 'trespass' to which they gave utterance.

[3] Stat. 25 Edw. III. stat. 5, c. 3; Rolls of Parliament, ii. 239.

[4] We have looked at Assize Rolls, Nos. 621 (Northampton, 13 Edw. I.) and 915 (Sussex, 7 Edw. I.) without discovering cases in which the *villatae proximae* were spoken of as an element in the body that tries the accused. At present we do not think that 'the four townships' can be said to become the petty jury of later days. See Gross, Coroners' Rolls, p. xxxii. The practice of swearing in these villagers seems to be abandoned as the accused acquires his right to a second jury of free and lawful men.

change was intimately connected with the discontinuance of those cumbrous old eyres which brought 'the whole county' and every hundred and vill in it before the eyes of the justices[1].

Refusal of trial.

But what if the suspect would not put himself upon the country? It is clear that for a long time after 1215 the law did not know what to do with him. The abolition of the ordeal had disturbed all its arrangements. We take it that under the old procedure a man who refused to go to the ordeal to which he had been sent might have been put to death, though rather perhaps as an outlaw than as a convict:—he had renounced the 'law' declared by the court. It was a different thing to sentence a man who had been allowed no chance of proving his innocence by any of the world-old sacral processes. 'No one is to be convicted of a capital crime by testimony,' said the author of the *Leges Henrici*[2]. These words represent a strong feeling: mere human testimony is not enough to send a man to the gallows. In 1219, when the first eyre of Henry III.'s reign was in progress, the king's council was compelled to meet the needs of the moment by instructions sent to the justices[3]. A man charged with one of the gravest crimes is to be kept in prison for safe custody, but the imprisonment is not to endanger life or member. If the crime is of a middle sort and the accused would under the old law have gone to the ordeal, then he may abjure the realm. If the crime is light, then he may find pledge to keep the peace. Not one word is said about compelling people to abide a trial, or of trying by jury men who have not put themselves upon the country. All details are expressly left to the discretion of the justices[4].

[1] The practice of putting men upon their trial to answer indictments preferred in the sheriff's turn and inquisitions taken by the coroners seems to play a part in the transforming process. In the old eyres the hundred-juries were expected to 're-present' all these presentments of felony.

[2] Leg. Henr. 31 § 5: 'Et nemo de capitalibus placitis testimonio convincatur.'

[3] Foedera, i. 154, from the Patent Roll.

[4] As to this important document, see Palgrave, Commonwealth, p. 207 and Thayer, Harv. L. Rev., v. 265. Palgrave thinks that 'the royal advisers may even have meditated the introduction of proceedings analogous to those of the Civil and Canon Law.' Happily in 1219 the canonical *inquisitio* was yet in its infancy.

[p. 648] *Peine forte et dure.*

One expedient which occurred to some of the justices was that of taking the verdict of an exceptionally strong jury and condemning the prisoner, if found guilty, even though he had refused to stand the test. Martin Pateshull twice took this course in the Warwickshire eyre of 1221. The prisoner refused trial, but the twelve hundredors and twenty-four other knights having sworn to his guilt, he was hanged[1]. This procedure seems to have been in advance of the age. In the next year the court at Westminster merely committed to prison a man accused of receiving felons, though the townships and the knights of the shire had declared him guilty[2]. Bracton does not like to speak out plainly about this matter. He talks of compelling a man to put himself upon the country and of deeming him undefended and quasi-convict if he refuses[3]. The parallel Norman custumal betrays the same difficulty. In Normandy, if a man is defamed of murder, he is kept in fast prison for year and day with little enough to eat or drink, unless in the meanwhile he will submit to an inquest of the country[4]. A similar expedient was adopted in England, but probably there was for many years much doubt as to the exact nature of the means that were to be employed in order to extort the requisite submission. On such of the rolls of Henry III.'s last years as we have searched we see all the suspects putting themselves upon the country with an exemplary regularity which can only be the result of some powerful motive. In 1275 Edward I. found it necessary to declare that notorious felons who were openly of ill fame and would not put themselves upon inquests should be kept in strong and hard prison as refusing to stand to the common law of the land[5]. Soon

[1] Select Pleas of the Crown, pl. 153, 157. See the note to Hale, P. C. ii. 322.

[2] Note Book, pl. 136. At the same time it sent another man to the gallows; but he had been taken with the mainour, *seisitus de latrocinio*. See also pl. 67, 918, 1724, and Gloucestershire Pleas, p. xxxix.

[3] Bracton, f. 142 b, 143 b.

[4] Ancienne coutume, c. 68 (ed. de Gruchy, p. 167): 'per iustitiarium debet arrestari et firmo carcere debet observari usque ad diem et annum cum penuria victus et potus (*à peu de menger et de boire*) nisi interim super hoc patriae inquisitionem se offerat sustinere.' Somma, p. 172. At a later time torture was used; Brunner, Schwurgericht, p. 474.

[5] Stat. West. I. c. 12: 'seient remis en la prison forte et dure.' Compare the *firmo carcere* of the Norman custom. But in England we do not see the limit of year and day. Ann. Dunstapl. 377 (A.D. 1293): 'Et aliqui milites et

afterwards we learn that their imprisonment is to be of the most rigorous kind; they are ironed, they lie on the ground in the prison's worst place, they have a little bread one day, a little water the next[1]. A few years later we hear that the prisoner is to be laden with as much iron as he can bear[2], and thus in course of time the hideous *peine forte et dure* was developed[3]. [p. 649]

Presentments of minor offences.

We have been speaking of indictments or presentments of felony[4]. So far as we can see, if the justices in eyre receive a presentment of any of the minor offences, they give the incriminated person no chance of denying his guilt, but at once declare him to be 'in mercy.' If, for example, the jurors present that *J. S.* has broken the assize of wine, then *J. S.* is put in mercy; and so if he is said to have 'fled for' a crime of which he was not guilty, a forfeiture of his chattels is decreed. It is thus that the justices raise hundreds of pounds by thousands of amercements[5]. This also is the procedure of the local courts, the turns and leets. In them, for example, the jurors will often begin with the stereotyped presentment that 'all the ale-wives have broken the assize'; the women are not suffered to deny this charge. So it is if the village jury presents that a man has drawn blood or used 'villein words.' In all these cases when the punishment will be only an amercement, the presentment is treated, not as an accusation, but as testimony and conclusive testimony. We believe that in Henry III.'s day anything that we could call the trial of a

nobiles sunt suspensi; quidam autem, eligentes poenitentiam secundum statutum, miserabiliter defecerunt.'

[1] Britton, i. 26; Fleta, p. 51, does not mention the irons.

[2] Y. B. 30–1 Edw. I. p. 511 (Cornish eyre of 1302). See also Ibid. pp. 499, 503, 531.

[3] Palgrave, Commonwealth, pp. 268, clxxxix; Thayer, Evidence, 70–81; Stephen, Hist. Crim. Law, i. 299–300; Pike, Hist. of Crime, i. 468. We do not think it proved that under Henry III. the man who refused trial suffered worse than a rigorous imprisonment. In 1293 a prisoner is spoken of as undergoing *poena statuti* because of his refusal to put himself upon the country; Staffordshire Collections, vol. vi. pt. i. p. 260.

[4] Hale, P. C. ii. 152: '*Presentment* is a more comprehensive term than *indictment*.' All the answers given by jurors to the articles of the eyre or of the turn are presentments. The usage of Bracton's day seems to restrict the term *indictati* to those who are presented as *malecrediti* of some *felonia*. It will be remembered that at the present day every *indictment* is a presentment. The grand jurors 'upon their oaths present that etc.'

[5] See above, vol. ii. p. 557.

[p. 650] man upon an indictment for misdemeanour was exceedingly rare[1]. Slowly, when the procedure in cases of felony was well established, the doctrine gained ground that the person charged with an offence punishable by imprisonment might traverse the presentment of the jurors and 'put himself' upon the country[2]; but, so long as many of the minor misdeeds were punished by amercement in the old local courts, there were many presentments that were not traversable[3].

The nature of the trial.

We must return for a moment to indictments of felony. We would fain describe what happened when the accused had put himself upon the country. The curt brevity of our records allows us to say but little. An appellee might make his answer by the mouth of a professional pleader; but no counsel was allowed to one who was arraigned at the king's suit[4]. A man who confessed a felony in court or before a coroner was condemned upon his confession, and the coroner's record of his confession was indisputable. We have found upon the rolls a good many recorded confessions of crime, and it may have been considered the justices' duty to urge the accused to tell the truth[5]; but when a prisoner had acknowledged his guilt before a coroner, and afterwards protested that his self-accusation was won from him by duress, we may see

[1] See above, vol. ii. p. 522.

[2] An example from 1279 will be found in Northumberland Assize Rolls, p. 340. A presentment has been made that a coroner took money for not doing his duty. He puts himself on a jury and is acquitted. Some other cases are referred to above, vol. ii. p. 649, note 2.

[3] The later doctrine of presentments will be found in Hale, P. C. pt. 2, ch. 19: 'Regularly all presentments or indictments before justices of the peace, *oyer* and *terminer*, gaol-delivery, etc. are traversable... If a presentment be made *super visum corporis* that *A* killed *B* and fled, this presentment of the flight is held not traversable... If before justices in eyre...an escape be presented upon a vill...this is held to be not traversable... A presentment in a leet of bloodshed or the like' [is not traversable, unless it] 'concerns the freehold, as presentments of nuisances, or such matters as charge the freehold.' Hale's 'or the like' would in cent. xiii. cover a wide field of petty misdemeanours. Palgrave, Commonwealth, 268: 'The presentment or declaration of those offences which fell within the cognizance of the Hundred Jury or the Leet Jury...was final and conclusive; no traverse or trial by a second Jury, in the nature of a Petty Jury, being allowed.'

[4] Britton, i. 102; Y. B. 30–1 Edw. I. p. 530; cf. Leg. Henr. 46–9; 61 § 18, 19.

[5] The Court Baron (Seld. Soc.) p. 64. This appears also in a manual describing the practice of the king's justices: Camb. Univ. Lib. Mm. 1. 27, f. 128.

the justices sending for his gaoler and some of his fellow [p. 651] prisoners and taking their evidence as to the alleged extortion[1]. Probably no fixed principle prevented the justices from questioning the accused; but there are no signs of their having done this habitually[2]. We may take it that he could address the jurors collectively. Sometimes, before putting himself upon their oath, he will have urged an *alibi* and have prayed that his submission to a verdict may be subject to this plea[3]. It is by no means impossible that if there were at hand men who could speak of facts telling in his favour, they would have been permitted to say their say before the jury, though they would not have been sworn[4]. A special verdict in a criminal case, unless it deals with homicide by misadventure or in self-defence, is a great rarity; but we have before now given an instance in which the jurors found the bare facts and left the justices to decide whether there had been larceny[5]. Another great rarity is a case in which any difference of opinion among the jurors is recorded. In entry after entry they are reported to say unanimously that the man is guilty or is not guilty, and this although the trying body often consists of no less than forty-four men, that is to say, of two hundred-juries and of the five representatives of each of four vills. This unanimity is no doubt somewhat fictitious. If some of the jurors have a clear opinion and others know nothing about the matter, probably the latter give way and an unanimous verdict is recorded. The justices would sometimes lecture the jurors about the gravity of their duties[6], but were not in a position to give them much advice or assistance;

[1] Y. B. 30–1 Edw. I. p. 543. This is a notable instance of the justices hearing evidence. See Thayer, Harv. L. Rev. iv. 148.

[2] Sometimes (*e.g.* Select Pleas of the Crown, pl. 197) an appellee is questioned, in order to see whether the case is one which should be tried by battle. Cole, Documents, p. 312: a Jew charged with forgery is questioned. For this case see above, vol. ii. p. 540.

[3] The form is this: 'Petit sibi allocari quod fuit apud B.....et, hoc allocato, ponit se super patriam.' We have given one example above, vol. ii. p. 498, note 7, and have seen others.

[4] See above, vol. ii. p. 627. We agree with Mr Thayer (Evidence, p. 13) in thinking that the case (Gloucestershire Pleas, pl. 394) on which Sir James Stephen relied (Hist. Crim. Law, i. 259) to show that witnesses were called in criminal trials is not a case of trial at all. It is an example of the procedure against a hand-having malefactor who refuses trial.

[5] See above, vol. ii. p. 498, note 7.

[6] Y. B. 30–1 Edw. I. p. 528.

[p. 652] nor, despite what Bracton says[1], do the justices seem to have been at pains to interrogate the jurors as to their knowledge and means of knowledge. The prisoner had put himself upon the oath of the jurors; a professedly unanimous verdict would satisfy the justices; it was the test that the prisoner had chosen. On the whole, trial by jury must have been in the main a trial by general repute. That in quiet times it pressed hardly on the accused, we do not believe; acquittals seem to have been much commoner than convictions in the last days of Henry III.

Difficulties of trial by jury.

Now and again there would be scandal, panic, hasty hanging. Matthew Paris tells how in 1249 the parts of Winchester had become a den of thieves, who robbed the merchants of Brabant, attacked the king's own baggage train and made themselves drunk with the king's own wine. A royal justice could get no indictments; the jurors were in league with the criminals. The king came to Winchester, assembled the freeholders of the county in the castle, raged and stormed against them: he would try the whole county for treason by all the other counties of England. William Raleigh, once a justice but now a bishop, thundered the anathema. The gates of the castle were suddenly closed. A jury of twelve was sworn in and deliberated long. The jurors made a most inadequate presentment. They were forthwith committed to prison under sentence of death as manifest perjurers. Another jury was sworn in. After a lengthy and secret confabulation, the string of their tongues was loosened and in mortal terror they denounced many rich and theretofore respected folk and even some members of the king's household. From thirty to a hundred men were hanged. One William Pope turned approver and by six successful battles ridded the world of six of his associates. An indelible mark of infamy was set upon the county, says Paris[2].

The collection of evidence.

Such events as these must at times have tempted the king and his advisers to think that the inquest of twelve was a clumsy machine and to look abroad and see what was being done in France. Was not an inquest of a quite other kind possible? Our king was a frequent, if unwilling, litigant in

[1] Bracton, f. 143.

[2] Mat. Par. Chron. Maj. v. 56–60; Historia Anglorum, iii. 46–7.

the court of his sovereign lord[1]. Certainly upon a grand [p. 653] occasion some endeavour would be made to collect the evidence of individual witnesses touching a crime. This we learn from a valuable document that has come down to us among the rolls of the king's court. In 1235 one Henry Clement, who had come over to England as an envoy to the king sent by some of the Irish nobles, was slain in the neighbourhood of the palace at Westminster. He had bragged, so it was said, of having brought about the death of Richard Marshall, and suspicion fell on the Marshalls and their adherents. On the roll in question we find the evidence given—in at least some cases it was given upon oath—by a large number of witnesses. They tell what they saw; they tell how Clement had said that his life was threatened; they know very little, but there is some vague testimony against William de Marisco. Then twenty-four jurors from the parts of Westminster, Charing and Tothill say that they know nothing and have heard nothing. The immediate effect of this proceeding seems to have been a decree of outlawry against William de Marisco and others. He took to open piracy, held Lundy Island against all comers and in the end was hanged, drawn and quartered as a traitor, for among other charges against him was that of having sent an assassin to kill the king[2]. Now had inquests of this kind become common, inquests in which witnesses were separately examined, indictment and trial by jury would have had to struggle for existence and would very possibly have been worsted in the conflict. Happily the jury was by this time firmly rooted in our civil procedure.

The canonical inquisition.

It is not a little remarkable that a criminal procedure which makes use of two 'inquests' or 'inquisitions,' one for the purpose of indictment, another for the purpose of trial, appears in the end as the most emphatic contrast that Europe can show to all that publicists mean when they speak of an 'inquisitory' procedure. Let us glance for a moment at its one great rival. The normal criminal procedure of the classical Roman law was accusatory, and for a long time the normal criminal procedure of the canon law was accusatory. It was not unduly favourable

[1] Olim, i. p. 521: in 1269 our king has got the worst of an *inquesta* about a disseisin, and is condemned to pay 830 pounds. See also ibid. p. 559.

[2] Curia Regis Roll, No. 115 (18–9 Henry III.) m. 33 d; E. H. R. x. 294.

[p. 654] to accusers; on the contrary, the accuser bound himself to undergo the *poena talionis* in the event of his failing to furnish a complete proof of the guilt of the accused, and the law's conception of a complete proof was narrow and rigorous[1]. In course of time other modes of procedure were placed beside the *accusatio*. The ecclesiastical judge might proceed *ex officio* against those who were defamed by general report and compel them to submit to the *purgatio canonica*, that is to say, to swear away the charge with oath-helpers. Again, he might send to the ordeal (*purgatio vulgaris*) persons who were charged with offences by the synodal jurors[2]. Here for a moment, as we have already seen[3], the history of the canon law comes into close contact with the history of our English temporal procedure. But in the twelfth century all these methods were breaking down. Innocent III. introduced a new procedure, the inquisition. The judge proceeds *ex officio* either of his own mere motion, or on the suggestion of a promoter (*inquisitio cum promovente*); he collects testimony against the suspect, testimony which the suspect does not hear; it is put in writing[4]. But even this weapon was too feeble for that warfare against heresy in which the church was by this time engaged. The work of suppressing this crime was committed to the friars, more especially to the Dominicans, and the procedure by way of inquisition soon assumed in their hands all its worst characteristics. Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction. This procedure, inquisitory and secret, gradually forced its way into the temporal courts; we may almost say that the common law of Western Europe adopted it[5]. When in the eighteenth century French philosophers and jurists rebelled against it and looked about them for an accusatory, contradictory, public procedure, a procedure which knew no torture,

[1] Tanon, Histoire des tribunaux de l'inquisition, 255–263; Fournier, Les officialités au moyen âge, 233–251.

[2] Tanon, *op. cit.* 264–281; Fournier, *op. cit.* 262.

[3] See above, vol. i. pp. 141, 151.

[4] Tanon, *op. cit.* 281–290; Fournier, *op. cit.* 266 ff.; Biener, Beiträge zu der Geschichte des Inquisitions-Processes, 38 ff. The two decretals which organize the new procedure come from the years 1199 and 1206. The latter was reissued as Concil. Lat. IV. c. 8.

[5] Esmein, Histoire de la procédure criminelle en France, 284, 315.

they looked to ancient Rome and modern England[1]. Fortunate [p. 655] in her unblemished orthodoxy, England at the critical moment had escaped the taint of the *inquisitio haereticae pravitatis*[2].

English and foreign inquisitions.

The escape was narrow. In England, as elsewhere, a system which left the prosecution of offences to 'the party grieved' was showing its insufficiency. A new procedure was placed by the side of the old, and the new was in name an inquisitory procedure. It is to 'inquire of,' as well as to 'hear and determine' criminal causes that the king's justices are sent through the shires. They 'make' or they 'take' inquests or inquisitions (*inquisitiones*). We may even represent them as collecting testimony behind the backs of those whe are defamed. Happily, however, the reforms of Henry II. were effected before the days of Innocent III. Our new procedure seems to hesitate for a while at the meeting of two roads. A small external impulse might have sent it down that too easy path which the church chose and which led to the everlasting bonfire[3]. All that was necessary was that the sworn declarations of the hundredors should be treated as testimony. As regards some matters of small importance this was done. There were, as we have lately seen, some 'presentments' that were not 'traversable': in other words, a man was convicted upon the testimony of jurors taken behind his back and was allowed no opportunity of denying the charge. But where the imputation is grave, the words of the jurors are treated not as testimony but as a mere accusation[4]. The new procedure becomes as accusatory as the old; the Appeal and the Indictment are regarded as institutions of the same order. The English judge who is instructed to 'inquire of' felonies discharges himself of this duty by collecting accusations, not testimony. Then when, having 'inquired,' he proceeds to 'hear and determine,' he treats the jury as a whole

[1] Esmein, *op. cit.* 359.

[2] Tanon, *op. cit.* p. ii.: 'Les traits généraux que nous relevons dans la justice inquisitoriale sont ceux que revêt la procédure criminelle commune, non seulement en France, mais dans les principaux groupes des nations européennes au moyen âge, l'Italie, l'Espagne, l'Allemagne, les Pays-Bas. Un seul pays fait exception: c'est l'Angleterre... Or l'Angleterre est précisément le seul de ces pays dans lequel l'inquisition ne se soit pas établie, et qui ait ainsi échappé à la contagion de ses tribunaux.'

[3] Fortescue de Laudibus, c. 22: 'Semita ipsa est ad gehennam.'

[4] Rot. Parl. i. 75: 'inquisitio talis est inquisitio ex officio et quasi quoddam accusamentum.'

[p. 656] that can not be broken up. Even now he is not going to weigh testimony; he is going to take a verdict.

The inquest in Normandy.

How narrow the escape was we may see from that Norman custumal which is the next of kin to our English law books[1]. There, when the man defamed of murder has been induced to submit himself to an inquest, the judge causes twenty-four men who may be supposed to know the facts to come before him. He does this suddenly, without telling them why they are wanted, lest the kinsmen of the suspect should tamper with them. Then he takes each of them apart before four impartial knights, examines him as to what he knows and his answer is put in writing. Then the suspect is given his chance of challenging these men and striking them off the 'jury.' Then in public session the evidence that was taken in secret is read aloud; each witness is asked whether he abides by his testimony, and, if there are twenty who say that the suspect is guilty, he is condemned. This, it will be seen, is by no means a stringent procedure; it would have been far from satisfying a Dominican inquisitor; still the suddenness of the inquest, the separate and secret examination of the jurors, we do not find in England, and we may learn how the *iurea patriae* was at one time a plastic institution which might take different forms in two sister lands.

Torture and the law of evidence.

We escaped secrecy and torture; but we were not very far from torture in the days when the *peine forte et dure* was invented. Prominent enough in the late Roman law books, it had made its way into those of the Germanic folk-laws that were most deeply tinged by Romanism, though in general they only applied it to slaves. After this, little is heard of it for a very long time until the renewed study of the classical jurisprudence unearthed and sanctioned it[2]. Then it stole into the courts both temporal and ecclesiastical. The appearance of heresy, a crime committed, not by deed nor by word, but by thought, provided for it an all too ample field. It came to the relief of a law of evidence which made conviction well-nigh impossible. The canonists were evolving a law, and a rigorous law, of evidence. 'Full proof' consists of the accordant testimony of two unexceptionable witnesses who have themselves

[1] Somma, p. 174; Ancienne coutume, c. 68 (ed. de Gruchy, p. 167).

[2] Lea, Superstition and Force, pt. iv. Esmein, Histoire de la procédure criminelle en France, 93–100.

seen the crime committed. At all events in the case of serious [p. 657] crimes, full proof, proof clearer than the noon-day sun, is requisite. Such proof was rarely to be had, more especially as large classes of mankind were incapable of testifying. One must eke out a 'half proof' by the confession of the accused, and to obtain this torture is used[1]. Luckily for England neither the stringent rules of legal proof nor the cruel and stupid subterfuge became endemic here. Whether we may ascribe to our ancestors any unusual degree of humanity or enlightenment is very doubtful. During the anarchy of Stephen's reign the 'devils' who lived in the castles had shown an ingenuity in the invention of torments which would have won praise from the inquisitors of a later age; but those 'devils' were extorting money, not evidence[2]. The *peine forte et dure* was barbarous enough and clumsy enough. But our ancestors had not been corrupted by the persecution of heretics. Foreign criminalists in the middle ages and in later times are for ever dwelling on the weakness of the law, on the difficulty of obtaining convictions unless the state takes to itself every advantage in its struggle with the prisoner. Of this we hear little in England, though we can see that an enormous quantity of crime went unpunished[3]. Our law seems to think itself quite strong enough. This difference was in a great measure due to the absence of any 'theory of legal proofs' such as that which hampered our neighbours. Our criminal procedure took permanent shape at an early time and had hardly any place for a law of evidence. It had emancipated itself from the old formulated oaths, and it trusted for a while to the rough verdict of the countryside, without caring to investigate the

[1] Tanon, Histoire des tribunaux de l'inquisition, 362–384.

[2] A.-S. Chron. ann. 1137. Pike, Hist. of Crime, i. 427, cites from the Pipe Roll of 34 Hen. II.: 'Petrus filius Ade reddit compotum de xxxv. marcis, quia cepit quandam mulierem et eam tormentavit sine licentia Regis.' This certainly seems to hint that torture could be used if the king pleased. Edward II. tried to throw upon the law of the church all responsibility for the torture of the Templars; Lea, Hist. of the Inquisition, iii. 300. It is of course well known that at a later time torture was used in England as an engine of state; but it never became a part of the ordinary machinery of the law, and its legality could be denied; Lea, Superstition and Force, 567–70; Spedding, Evenings with a Reviewer, ii. 100 ff.; Gardiner, Hist. Engl. 1603–42, ii. p. 275.

[3] See above, vol. ii. p. 557.

logical processes, if logical they were, of which that verdict was the outcome[1].

[p. 658] A few miscellaneous matters we have yet to notice. **Omitted points.**

The king as a litigant.

Of the king as a litigant we must add but little to what has been said above[2]. His exchequer[3] collected his debts for him, attacking his debtors and (if need were) their debtors; but for lands and advowsons he often brought in his own court actions of the ordinary kind[4]. He had, however, an objectionable habit of using a *Quo Waranto* for land[5]—objectionable, we say, because this compelled a defendant to disclose his title as against a plaintiff who had disclosed none[6]. On the other hand, the *Quo Waranto* for franchises was defensible, for there is a sound presumption that all royal powers should be in the king's hands. Under Edward I. this prerogative writ was being taught to know its proper place[7].

[1] Bracton sometimes alludes to the canonical theory of proof, *e.g.* on f. 302, where he speaks of 'praesumptio ex semiplena probatione'; but that theory would not fit into our system, which handed over everything to the verdict of a jury, and was even beginning to treat with contempt the *secta* of eye-witnesses which the plaintiff was supposed to produce. In much later days our law can work out for itself a doctrine of evidence, which is all its own and is fashioned to suit trial by jury; it can do this just because in its days of adolescence it knew little of witnesses and therefore did not take over that theory of legal proof which lay ready to its hand in the works of the canonists. As to this 'théorie des preuves légales,' as French writers call it, see Esmein, *op. cit.* p. 260 fol. It attempted far more than is attempted by our modern English rules which merely 'admit' or 'exclude' evidence; it tried to assign a relative, and almost numerical, value to the various kinds of testimony. See the passage which M. Esmein, p. 369, quotes from Voltaire: 'Le parlement de Toulouse a un usage bien singulier dans les preuves par témoins. On admit ailleurs des demipreuves...mais à Toulouse on admet des quarts et des huitièmes de preuves.'

[2] See above, Book II. ch. 2 § 13.

[3] See above, vol. i. pp. 190, 193.

[4] Note Book, pl. 199 (Right of Advowson), 187 (Darrein Presentment), 785 (Quare Impedit), 628 (Quo Iure), 1124 (Entry), 1220 (Escheat), 908 (Wardship).

[5] There are numerous cases in the Note Book. Sometimes when a subject brings a writ which contains the words *quo waranto*, this is really a writ of intrusion (see Bracton, f. 160 b) and the plaintiff's title is stated.

[6] Bracton, f. 372 b, quoting Cod. 3. 31. 11, would allow a *quo waranto* merely for the purpose of discovering whether the defendant holds *pro herede* or *pro possessore*, so that the plaintiff may know what other action he must bring. We have seen above (vol. i. p. 217, note 5) how the maxim *Cogi possessorem etc.* was current in the court of Edward I.

[7] Placit. Abbrev. p. 199 Norf.; Plac. de Quo War. 681, 686.

Criminal informations.

Could the king put a man on his trial for a crime though no indictment had been found against him? There seems to us to be clear evidence that this was done by Edward I., but not very frequently. Though there has been no indictment and no appeal, a man is called before the court and accused by the king's serjeant of treason or of felony. This evidence, however, comes to us from a somewhat later time than that [p. 659] which we are endeavouring to describe, and as the origin of 'criminal informations' has been the theme of hot debate, we will say no more of it in this place[1].

Voucher to warranty.

One of the commonest episodes in litigation about land is the voucher (*vocatio*) of a warrantor[2]. When the demandant (*D*) has counted against the tenant (*T*), the latter, instead of defending the action, will call in some third person (*V*) to defend it. If *V* admits that he is bound to warrant *T*, or if the court decides that he is thus bound, then *T* retires from the contest and *D* proceeds to count against *V*. If *D* succeeds in his contest with *V*, the judgment will be that *D* is to have the land in dispute and that *T* is to recover from *V* an exchange in value (*excambium ad valentiam*), that is to say, other land of equal value to that which he (*T*) has lost[3].

Counter-pleading.

When *V* first comes before the court, instead of admitting, he will perhaps deny the duty of warranting *T*. In that case he is said to 'counterplead the warranty' and there will then be a debate, trial and decision of this preliminary question before *D* can go on with his action. As a general rule our common law gave *D* no right to protest against the voucher of

[1] Oxford City Documents (Oxf. Hist. Soc.), p. 204; roll of Oxford eyre of 1285: 'Robertus le Eyr serviens dom. Regis pro dom. Rege iusticiariis dom. Regis hic monstravit quod Mag. Nicholaus de Wautham contra fidelitatem suam...[a charge of treason follows]...et petit iustitiam de eo ut de seductore ac proditore dom. Regis.' The famous case of Nicholas Segrave, Rot. Parl. i. 172, Memoranda de Parl. 1305 (ed. Maitland), p. 255, can only be read as an information for treason. An instance of an information for felony which sends a man to the gallows occurs in Mem. de Parl. p. 280. For later history see Stephen, Hist. Crim. Law, i. 295.

[2] Glanvill, iii. 1–5; Bracton, f. 257 b–261 b, 380–399 b. In the Novel Disseisin there can be no voucher of a person not named in the writ; Glanvill, xiii. 38. In Glanvill's day there seems to have been doubt as to whether there could be a voucher in any of the new possessory actions: Ibid. xiii. 30. But a voucher in the Mort d'Ancestor soon became very common.

[3] For instances illustrating the exchange, see Note Book, pl. 196, 284, 600, 633, 945, 1717, 1803.

a warrantor, and as the first warrantor could vouch a second, and the second a third, the hearing of the original claim might be long delayed. A statute of Edward I.[1] gave *D* in numerous [p. 660] cases the right to 'counterplead the voucher,' that is, to insist that *V*'s appearance should not be awaited, and that *T* must himself defend the action.

Explanation of the voucher.

This process of voucher may seem very curious to us; for we may well think that the question whether *D* has greater right than *T* should take precedence of the question whether in that case *T* should receive compensation from a third person. A clue to the original meaning of the voucher we shall perhaps obtain if we observe that even in Bracton's day it was a feature which the actions for land had in common with the antique *actio furti*[2]. When the defendant in such an action alleged that he had purchased the goods which the plaintiff was demanding, he was bound to name the seller in order that the provenience of the goods might be traced backwards to a thief. Now it is said that in remote times the only action for land was, like the old *actio furti*, a punitive action; it aimed at a *wite* as well as at restoration. The plaintiff desired, not merely to recover his land, but to attack the original wrong-doer who took his land away from him. Thus the process of voucher was at first a process which in the interest of plaintiffs strove to bring before the court the real offender in order that he might pay for his offence[3]. Howbeit, very long ago warranty had become one of the most powerful of those forces which had given society its feudal form. The gift of land implied protection, defence, warranty for the donee. If he was impleaded, his battle would be fought for him by a high and mighty lord. To gain the right to vouch such a lord as their warrantor many men would be content to give up their land and take it back again as rent-paying tenants[4]. In Bracton's day a tenant had as a general rule a right to call upon his feoffor, who would also

[1] Stat. West. I. c. 40; Second Instit. 239.

[2] See above, vol. ii. p. 164.

[3] Brunner, D. R. G. ii. 516. This seems to be the origin of the rule (Britton, ii. 108) that if an action is successfully brought by *D* against *T*, in which *T* has vouched *V*, who has vouched *W*, the only person to be amerced is *W*: 'le dreyn garraunt remeigne en nostre merci.' Here 'le dreyn garraunt' is the original wrong-doer, and he owes the *wite*.

[4] See above, vol. i. p. 306.

be his lord, for warranty. He had this right if he had done homage to his feoffor, or if he had a charter of feoffment containing the usual formula *Sciatis me dedisse*; but the recipient of homage would sometimes expressly stipulate that there was to be no warranty[1], and, on the other hand, promises of warranty [p. 661] were often inserted in charters in order either to make assurance doubly sure or to bind the feoffor's 'assigns' and benefit the 'assigns' of the feoffee[2]. The duties of a lord who was bound 'to warrant, acquit and defend' his tenant were brought home to him, sometimes by voucher, sometimes by the action of *Warantia Cartae*[3].

Proceedings of an appellate kind.

Nothing that was, or could properly be, called an appeal from court to court was known to our common law. This was so until the 'fusion' of common law with equity in the year 1875. Long ago both in France and in England the verb *appellare* had been used to describe the action of one who brings a criminal charge against another; such an action is an *appellum*, 'an appeal of felony[4].' In the twelfth century, under the influence of the canon law, Englishmen became familiar with appeals (*appellationes*) of a quite other kind; they appealed from the archdeacon to the bishop, from the bishop to the archbishop, from the archbishop to the pope[5]. The graduated hierarchy of ecclesiastical courts became an attractive model. The king's court profited by this new idea; the king's court ought to stand to the local courts in somewhat the same relation as that in which the Roman curia stands to the courts of the bishops[6]. It is long indeed before this new idea bears all its fruit, long before there is in England any appeal from

[1] Bracton, f. 390 b; Note Book, pl. 196.

[2] Bracton, f. 37; Note Book, pl. 804; Y. B. 20–1 Edw. I. p. 233. The Statute De Bigamis (4 Edw. I.), c. 6, laid down rules about this matter which became the basis of the later law. See Second Instit. 274.

[3] For this action see Bracton, f. 399. It is common in the Note Book. In after days it is often used by one who has been turned out of possession by an Assize of Novel Disseisin. In that Assize he had no chance of vouching his feoffor.

[4] See for France, Esmein, Histoire de la procédure, 24.

[5] Const. Clarend. c. 8: 'De appellationibus si emerserint, ab archidiacono debent procedere ad episcopum...'

[6] Bracton, f. 412: 'Sicut dominus Papa in spiritualibus super omnibus habeat ordinariam iurisdictionem, ita habet Rex in regno suo ordinariam in temporalibus.'

court to court; but we must here notice the various processes which have about them more or less of an appellate character.

Attaint.

First we may once more mention the reversal of a verdict by the process of Attaint (*convictio*). The twelve jurors are accused before twenty-four jurors. If convicted of a false oath, [p. 662] they are severely punished; if their oath was but 'fatuous,' some mercy is shown them; but in either case the verdict of the twenty-four is substituted for the verdict of the twelve. In Bracton's day, however, this procedure was, at least as a general rule, confined to cases in which the recognitors of a Petty Assize had answered the question specified in the original writ, for if both litigants had put themselves upon a verdict, neither could dispute it[1].

Certification.

A process known as a Certification is employed when jurors have given an obscure or an incomplete verdict. They are summoned to Westminster 'to certify the justices' as to the oath that they have made. In this way a verdict given before justices of assize is sometimes brought before the central court. If the jurors admit that they have blundered, they may be punished, but recourse to an Attaint is necessary if they are to be charged with perjury[2].

Prohibition.

The king's court was not superior to the ecclesiastical courts; it could not reverse their judgments. It could, however, and would prohibit them from meddling with a temporal dispute[3], and the ecclesiastical judge who infringed a royal prohibition could be haled before the justices and punished. Archdeacon Bracton speaks of this offence as *laesa maiestas*[4]. We have seen that the king's court would send certain questions to be tried by the bishop. This gave it an interest in the proceedings which took place before him, and it seems to have claimed some power of directing his conduct of the cause[5]; it could at all events maintain the principle that, if the bishop was acting on

[1] See above, vol. ii. pp. 541, 623. We are at one with Brunner (Schwurgericht, 372) and Thayer (Evidence, 143) in thinking that the attaint-procedure is from the first a royal favour which has to be purchased.

[2] For instances, see Note Book, pl. 63, 382, 431, 771, 856, 1209, 1265, 1281, 1928; Somersetshire Pleas, pl. 1491, 1514.

[3] See above, vol. ii. p. 199.

[4] Bracton, f. 410.

[5] See the writs in Bracton, f. 302 b, 307.

the authority of a royal writ, there could be no appeal from his to any higher tribunal[1].

Removal of actions.

From the inferior courts, communal and seignorial, no appeal lay to the king's court. But there were various processes by which actions begun in those courts could be removed before judgment; also, when a decision had been given, a com- [p. 663] plaint of 'false judgment' could be made. The action for freehold, which in theory should be begun in a feudal court, was from Henry II.'s time onwards subordinate to royal control[2]. The 'original' writ threatened the lord with the sheriff's interference. The demandant by a formal oath, which the royal justices were reducing to an absurdity, could prove that his lord had made 'default in justice,' and then the action was removed to the county court; the lord could seldom procure a restoration of the action when once it had been removed[3]. The tenant could stay all proceedings in the inferior courts by putting himself upon the king's grand assize and obtaining a 'writ of peace[4].' From the county court an action could be removed into the royal court by a writ known from its cardinal word as a *Pone*[5]. The plaintiff could obtain such a writ as a matter of course, the defendant only for some good cause such as the sheriff's partiality, the theory being that plaintiffs have nothing, while defendants have much, to gain by mere delay.

False judgment.

If a judgment had been given by an inferior court, the method by which it could be questioned was the complaint of 'false judgment.' This takes us back to very old days when a litigant who is dissatisfied with a proposed doom will at once charge the doomsman who utters it with falsehood[6]. But in course of time the rule had been established that the complaint of false judgment was a royal plea and could only be urged in the king's court[7]. In England this principle was upheld, and

[1] Note Book, vol. i. p. 112; Rot. Parl. i. 16. Sometimes the king's court would order the absolution of an excommunicate. Note Book, pl. 1143.

[2] See above, vol. i. pp. 146, 147.

[3] Glanvill. xii. 7; Bracton, f. 329, 330; Britton, ii. 326-332; and see also the story about Becket and John the Marshal, Materials for the Life of Becket, i. 30; iii. 50.

[4] Glanvill, ii. 7-9; Bracton, f. 331; Britton, ii. 335.

[5] Bracton, f. 330 b; Britton, ii. 336; Hengham Magna, c. 4.

[6] Brunner, D. R. G. ii. 356-365. The A.-S. phrase for this process seems to have been *to forsake the doom*; Edgar, i. 3; Cnut, ii. 15, § 2.

[7] Leg. Henr. 10, § 1.

it delivered us from some of the worst results of feudalism; the great lords had no control over the courts held by their tenants. But in the thirteenth century the complaint of false judgment still retained many an archaic trait. The unsuccessful litigant obtained a writ (*breve de falso iudicio*) which commanded the sheriff or the other president of the incrimi- [p. 664] nated court to cause a 'record' to be made (*recordari facias loquelam*) of the proceedings and to send four suitors of the court to bear this record before the king's justices[1]. Then a debate takes place, not between the two litigants, but between the complainant and the four suitors who represent the court. Very commonly he denies the truth of their record; he offers battle and they offer battle, the champions being, at least in theory, two suitors of the court who were 'within its four benches' when the judgment was given; but we suspect that a county keeps some doughty pugilist in its pay for these emergencies[2]. Generally the justices manage to find some reason for declaring that there shall be no battle. They are beginning to treat the complaint of false judgment as a means of correcting the errors of the lower courts, and they give ear to the successful party as well as to the complainant[3]. But still the procedure is directed against the lower court; the county, the hundred or the manor is amerced if its judgment is annulled, and in appropriate cases it has to pay damages[4]. By a false judgment a lord may lose for ever the right to hold a court[5]. If the truth of the record is admitted, the question as to the falsehood of the judgment appears as a matter of law which the justices decide. In most cases the question turns

[1] Sometimes they will put their record into writing and bring the parchment with them; Note Book, pl. 243.

[2] Glanvill, viii. 9, thinks that the man who pronounced the impugned doom should do the fighting. The procedure is well illustrated by Note Book, pl. 40, 592, 824, 834, 955, 1019, 1412, 1436, 1672. For 'the four benches' see Northumberland Assize Rolls, 196. In 1219 the Surrey champion was Stephen English, who in the next year was waging another battle; Note Book, pl. 40, 1360.

[3] Note Book, pl. 1436, a long and instructive record.

[4] Note Book, pl. 1412: 'Willelmus...dixit quod per recordum illud et per falsum iudicium deterioratus fuit et damnum habuit ad valenciam x. marcarum....Consideratum est...quod W. recuperavit damnum suum x. marcarum versus comitatum [Sussexiae].'

[5] Glanvill, viii. 9; comp. Edgar, iii. 3; Cnut, ii. 15, § 1; Leg. Will. i. 39, § 1.

on a point of procedure; the judgment that is impugned is a 'medial' or 'interlocutory' judgment, and the king's court will sometimes take the case in hand and direct its future course[1].

Error.

The king's court can not be charged with a false judgment; but gradually as it breaks into segments and throws off wandering satellites, something like an appeal from one segment to another or from the satellite to the central nucleus [p. 665] becomes possible[2]. In the early years of the thirteenth century the possessory assizes are often 'taken' by four knights of the shire[3]. These justices of assize, while acting under their commission, are royal justices; but they are not professional lawyers. The central court seems to hesitate in its dealings with them. On the one hand, they can not be accused of false judgment; on the other, they can be directed to bear record of their doings before the central court; they can be amerced for their errors and their errors can be corrected[4]. Even justices in eyre, among whom there will generally be some members of the permanent tribunal[5], can be thus dealt with[6]. But the central court itself is throwing out branches[7]. Above 'the Bench' rises the court held *coram ipso Rege*. In 1235 the Abbot of St Augustine's at Bristol brought 'before the king himself' a case in which the justices of the Bench had in his opinion been guilty of a mistake. They were summoned before the king and pleaded ignorance. Their proceedings were set aside[8]. The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed. But gradually in Edward I.'s day as the king's court assumed a triple form—Common Bench, King's Bench, King in Council[9],—

[1] See *e.g.* Note Book, pl. 824, 1436.

[2] Compare Esmein, Histoire de la procédure, 27.

[3] See above, vol. i. p. 200.

[4] For this procedure, see Note Book, pl. 281, 512, 871, 917, 976, 1285, 530 ('ad iudicium de iustitiariis'), 564 ('et ideo iustitiarii in misericordia').

[5] See above, vol. i. p. 201.

[6] Note Book, pl. 67 (A.D. 1219): the justices in eyre are brought before the Bench and the Council to answer for having unlawfully condemned a man to death; they are amerced and the disherison is annulled. See also pl. 1069.

[7] See above, vol. i. pp. 190—192.

[8] Note Book, pl. 1166: 'Et quia fuit ostensum domino Regi...quod ipsi iustitiarii ita male processerunt, vocati fuerunt coram Rege et ibi cognoverunt quod ita processerunt, sed nesciverunt in dicto negotio melius procedere.'

[9] Maitland, Memoranda de Parliamento (1305), pp. lxxix–lxxxvii. Pike, History of the House of Lords, ch. iv.

and as the work of taking assizes and delivering gaols fell more and more into the hands of the permanent justices, men became familiar with the notion of a 'procedure in error' which does not call for a defence from the judges who are said to have made the mistake[1].

[p. 666] The distinction that we still draw between 'courts of record' and courts that are 'not of record' takes us back to early times when the king asserts that his own word as to all that has taken place in his presence is incontestable[2]. This privilege he communicates to his own special court; its testimony as to all that is done before it is conclusive[3]. If any question arises as to what happened on a previous occasion the justices decide this by recording or bearing record (*recordantur, portant recordum*). Other courts, as we have lately seen, may, and, upon occasion, must bear record; but their records are not irrefragable; the assertions made by the representative doomsmen of the shire-moot may be contested by a witness who is ready to fight[4]. We easily slip into saying that a court whose record is incontrovertible is a court which has record (*habet recordum*) or is a court of record, while a court whose record may be disputed has no record (*non habet recordum*) and is no court of record[5]. In England only the king's court—in course of time it becomes several courts—is a court of record for all purposes, though some of the lower courts 'have record' of some particulars[6], and sheriffs and coroners 'have record' of certain transactions, such as confessions of felony[7]. In the old

Records and courts of record.

[1] Even in Edward I.'s time, however, the justices sometimes come before the king in council almost in the character of defendants; *e.g.* Rot. Parl. i. 41. The old idea that an appeal is a complaint against the judge seems to have endured in northern France until very late days; Viollet, Établissements, i. 279.

[2] Note Book, pl. 239 [A.D. 1224]: 'quia testificatio domini Regis per cartam vel viva voce omnem aliam probationem excedit.' A strong statement of this doctrine that the king's word exceeds every other record was made by Edward I.'s council in 1292; Rot. Parl. i. 74.

[3] Brunner, D. R. G. ii. 523. Leg. Henr. 31, § 4; 49, § 4; Glanvill, viii. 9. In Leg. Will. i. 24 the privilege is confined to the court in which the king sits in person, 'la u le cors le rei seit.'

[4] See above, vol. ii. p. 667.

[5] Glanvill, viii. 9: 'nulla curia recordum habet generaliter praeter curiam domini Regis.' Compare for French law Viollet, Établissements, i. 221.

[6] Glanvill, viii. 11: 'recordum habet comitatus de plegiis, vel plagis datis et receptis in ipso comitatu.'

[7] See *e.g.* Bracton, f. 140 b; Select Pleas of the Crown, pl. 194, 195, 201.

days, when as yet there were no plea rolls, the justices when they bore record relied upon their memories[1]. From Normandy we obtain some elaborate rules as to the manner in which record is to be borne or made; for example, a record of the exchequer is made by seven men, and, if six of them agree, the voice of the seventh may be neglected[2]. In England at [p. 667] an early time the proceedings of the royal court were committed to writing[3]. Thenceforward the appeal to its record tended to become a reference to a roll[4], but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices[5]; and, as duplicate and triplicate rolls were kept, there was always a chance of disagreement among them[6]. A line is drawn between 'matter of record' and 'matter in *pays*' or matter which lies in the cognizance of the country and can therefore be established by a verdict of jurors[7].

Function of the judges.

The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent

[1] Glanvill, viii. 8. If the justices could not remember the levying of a fine, the court would act as though none had been levied. As to the recording of fines, see above, vol. ii. p. 100.

[2] Somma, pp. 310 ff. Ancienne coutume, cc. 103–7 (ed. de Gruchy), pp. 251–6.

[3] See above, vol. i. p. 169.

[4] Note Book, pl. 307: 'et inde ponit se super iustitiarios.' Ibid. pl. 583: 'et inde ponit se super rotulos.' Ibid. pl. 1411: 'et ponit se super recordum curiae et super rotulos.' Ibid. pl. 1285: one out of four justices of assize has no record (*recordum habere non potest*) without his fellows. We are not at all sure that the justices of assize of the first half of cent. xiii. usually kept rolls. See in Y. B. 32–3 Edw. I. pp. 361–7 a curious story about the unwritten record of a court baron.

[5] Bracton, f. 352 b. Y. B. 7 Hen. VI. f. 29 (Pasch. pl. 22). In 1292 the bare word of Beckingham, J. is preferred to the roll of Weyland, J. who has been guilty of forging records; Rot. Parl. i. 84–5.

[6] Note Book, vol. i. p. 65; Select Pleas of the Crown, p. ix.

[7] In some old cases the appeal to the court's memory is spoken of as a voucher to warranty. Note Book, pl. 88: 'vocavit curiam domini Regis ad warantum.' Ibid. pl. 829: 'et inde vocat ad warantum rotulos ipsorum iustitiariorum.'

tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?' This passive habit seems to grow upon them as time goes on and the rules of pleading are developed. In Bracton's day they not unfrequently addressed questions to the parties in the hope of obtaining admissions and abbreviating the [p. 668] suit. The answers given to these questions were enrolled, and judgments were expressly based upon them[1]. In some other respects, unless we are misled, they wielded discretionary powers which were not exercised by their successors. Third parties are allowed to intervene[2], or are summoned in the course of the action[3], in a manner which would have seemed strange to the practitioners of a later age. The judges conceived themselves to be endowed with certain 'equitable' powers[4], and as yet the rules for the intricate game of special pleading had not been formulated. But even in a criminal cause, even when the king is prosecuting, the English judge will, if he can, play the umpire rather than the inquisitor. No rule of law prevented him from questioning the prisoner, and probably he did this from time to time; but in general he was inclined to throw as much responsibility as he could upon the jurors or upon the God of battles.

Considérants.

Often the judgment that is enrolled is *motivé*, or, to use another French term, it is preceded by *considérants*; it has a preamble which states the *ratio decidendi*. Usually this does but sum up the concrete facts on which the court relies. Thus, for example:—'And whereas the plaintiff has not produced sufficient suit, therefore it is considered that he take nothing by his writ.' But occasionally a major premiss, a rule

[1] Note Book, pl. 296, 303, 350, 477, 550, 797, etc.

[2] Note Book, pl. 483, 525, 642, 750, 815, 821, etc.

[3] Note Book, pl. 253, 256, 273, 581, 586, 687, 713, 748, etc.

[4] See above, vol. i. p. 189. In Note Book, pl. 273, third parties are summoned 'per consilium curiae,' a phrase which, as we have noted above, points to judicial discretion. See Bracton, f. 12 b: 'de equitate tamen per officium iustitiariorum.' Ibid. f. 247 b: 'et hoc provenit non per iudicium sed per consilium curiae.'

of law, is stated in abstract terms. We have above set forth the notable judgment in which Edward I.'s court inferred that adultery had been committed and gave its reasons for refusing to send the question to a jury[1]. One other example must suffice: 'And for that Ralph [the would-be lord who is claiming Thomas as his villein] has avowed his writ and his count and has produced as suit but one male and two women, and for that the said women are not to be admitted to proof because of their frailty, and also because a male, who is a worthier person than females, is being claimed, therefore it is considered that the said Thomas and his heirs do go hence quit and free of the said [p. 669] Ralph and his heirs for ever, and that Ralph be in mercy[2].' We may regret that such recitals are not found upon the rolls of a later day; the Year Books hardly supply their place[3].

Caution of the judges.

The justices of Edward I.'s time seem to have been cautious men; they were exceedingly unwilling to decide nice points of law. When in turning over their records we come upon a case which raises a pretty question, our hopes are too often dashed by a *Concordati sunt*, which tells us that the parties after all their pleadings have made a compromise. Bracton advises the justices of assize to induce the litigants to make peace if the jurors can not give a clear and decisive verdict[4]. The king's court knew that to lay down a new rule was no light matter, though it could not know that it was fashioning law for many centuries and for many lands.

Last words.

That we have written at wearisome length of one short period of legal history, this is an accusation that we could not 'defend' with a *thwert-ut-nay*, while an attempt to confess and avoid it might aggravate our guilt. But whatever this book may deserve, the law of the age that lies between 1154 and 1272 deserves patient study. For one thing, it is a luminous age

[1] See above, vol. ii. p. 395.

[2] Northumberland Assize Rolls, p. 275 (A.D. 1279). See also Note Book, pl. 564, 1273.

[3] Coke, Fourth Instit. 4, says that this practice was abandoned under Edward III., when 'the great casuists and reporters of cases (certain grave and sad men) published the cases.' But we now know that cases were being reported under Edward I. at a time when *considérants* were frequent on the rolls.

[4] Bracton, f. 186: 'tutius erit quod partes inducantur ad concordiam.'

throwing light on both past and future. It is an age of good books, the time of Glanvill and Richard FitzNeal, of Bracton and Matthew Paris, an age whose wealth of cartularies, manorial surveys and plea rolls has of recent years been in part, though only in part, laid open before us in print. Its law is more easily studied than the law of a later time when no lawyer wrote a treatise and when the judicial records had grown to so unwieldy a bulk that we can hardly hope that much will ever be known about them. The Year Books—more especially in their present disgraceful plight—must be very dark to us if we can not go behind them and learn something about the growth of those 'forms of action' which the fourteenth century inherited as the framework of its law. And if the age of Glanvill and Bracton throws light forward, it throws light backward also. [p. 670] Our one hope of interpreting the *Leges Henrici*, that almost unique memorial of the really feudal stage of legal history, our one hope of coercing Domesday Book to deliver up its hoarded secrets, our one hope of making an Anglo-Saxon land-book mean something definite, seem to lie in an effort to understand the law of the Angevin time, to understand it thoroughly as though we ourselves lived under it.

But we wrong this age if we speak of it only as of one that throws light on other ages. It deserves study for its own sake. It was the critical moment in English legal history and therefore in the innermost history of our land and our race. It was the moment when old custom was brought into contact with new science. Much in our national life and character depended on the result of that contact. It was a perilous moment. There was the danger of an unintelligent 'reception' of misunderstood and alien institutions. There was the danger of a premature and formless equity. On the other hand, there was the danger of a stubborn *Nolumus*, a refusal to learn from foreigners and from the classical past. If that had not been avoided, the crash would have come in the sixteenth century and Englishmen would have been forced to receive without criticism what they once despised. Again, we have stood at the parting of the ways of the two most vigorous systems of law that the modern world has seen, the French and the English. Not about what may seem the weightier matters of jurisprudence do these sisters quarrel, but about 'mere matters of procedure,' as some would call them, the one adopting the canonical inquest of witnesses,

the other retaining, developing, transmuting the old *enquête du pays*. But the fate of two national laws lies here. Which country made the wiser choice no Frenchman and no Englishman can impartially say: no one should be judge in his own cause. But of this there can be no doubt, that it was for the good of the whole world that one race stood apart from its neighbours, turned away its eyes at an early time from the fascinating pages of the *Corpus Iuris*, and, more Roman than the Romanists, made the grand experiment of a new formulary system. Nor can we part with this age without thinking once more of the permanence of its work. Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children.

INDEX.

HISTORY : LAW CAM 516

THE HISTORY OF ENGLISH LAW

Before the Time of Edward I

Volume 2

POLLOCK & MAITLAND

Although this book was envisaged as a joint venture and bears the name of both Pollock and Maitland, it is substantially the work of Maitland. It was recognised at once as a masterpiece and has since been accepted as one of the great histories in the English language. In Maitland's lifetime Acton pronounced him the ablest historian in England. Plucknett said that 'everything he wrote exercises a deep fascination and a personal attraction'. To Sir Maurice Powicke he was 'one of the immortals'. Lord Annan, in the preface to his *Leslie Stephen*, called him 'perhaps the greatest of all professional historians'. To read *The History of English Law*, even sixty years after Maitland's death, is to feel at once the touch of a master. That touch could only be weakened by editing, so the present issue is a reprint of the second edition but with an introductory essay and a select bibliography by S. F. C. Milsom, Professor of Legal History in the University of London.

Also issued in cloth

CAMBRIDGE UNIVERSITY PRESS
Bentley House, 200 Euston Road, London N.W.1.
American Branch: 32, East 57th Street, New York, N.Y. 10022

Standard Book No. 521 09516 6