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A HISTORY OF ENGLISH LAW

A HISTORY OF ENGLISH LAW

IN NINE VOLUMES

For List of Volumes and Scheme of the History, see p. vii

A HISTORY OF ENGLISH LAW

BY

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VOLUME VIII

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

ROGER NORTH



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BOOK IV (*Continued*)

(1485-1700)

THE COMMON LAW AND ITS RIVALS

A HISTORY OF ENGLISH LAW

PART II

THE RULES OF LAW (*Continued*)

CHAPTER III

CONTRACT AND QUASI-CONTRACT

THAT the essence of contract is agreement, and the essence of agreement is a union of wills, was as clearly recognized by the lawyers of the sixteenth century as it is recognized by us. "The agreement of the minds of the parties," it was said in 1553,[1] "is the only thing the law respects in contracts"; and in 1551 agreement had been defined as the "union, collection, copulation, and conjunction of two or more minds in anything done or to be done."[2] Both the treatment of contract by the court of Chancery, and the development of the action of assumpsit, had helped the lawyers to this conclusion. We have seen that the Chancellor, starting from the broad premise that redress should be given where faith was broken, had helped to familiarize the common lawyers with the idea that an agreement as such ought to be enforced;[3] and that the common lawyers had begun to give technical expression to this idea by the developments which they had made in the actions of debt and assumpsit.[4] We have seen that the developments made in both these actions had brought this idea into the common law; but that it was the development of the latter action which was the most fruitful. Debt was an old action which had originated at a period when the common law had hardly grasped the idea that an agreement as such should give rise to an action. It was essentially proprietary in its nature,[5] and therefore it was not so readily adaptable to the purpose of enforcing agreements as assumpsit, in which the element of agreement had had from the first a prominent place.[6]

[1] Browning v. Beston, Plowden at pp. 140-141.
[2] Reniger v. Fogossa, Plowden at p. 17.
[3] Vol. v 295-297.
[4] Vol. iii 420-423, 429-453.
[5] Vol. ii 368; vol. iii 420.
[6] Ibid 429-430, 442.

This development of the idea of an enforceable agreement, naturally brought to the front the problem of distinguishing the agreements which the law would enforce, from those which it would not—of drawing the line between contracts and mere pacts. It was a problem which confronted both the court of Chancery and the common law courts. Both sets of courts contributed something to its solution; and ideas derived from both can be traced in the history of the doctrine of consideration which solved it. But we shall see that the main essentials and ultimate contents of that doctrine are wholly derived from the rules which regulated the competence of the common law actions of debt and assumpsit, and more especially from the rules developed by the successive expansions of the latter action. In the first place, therefore, I shall trace the history of the doctrine of consideration.

Naturally the recognition and growth of the actionable agreement, and the settlement of the limits within which such agreements were actionable, gave rise to the development of other rules of contract law. Thus, the law began to acquire some rules as to the causes and effects of the invalidity of contracts, as to the manner of their enforcement, and as to their discharge. In the second place, therefore, I shall say something as to the origins of some of the modern rules on these topics, which begin to make their appearance during this period.

Lastly, it will be necessary to say something of the origins of our modern law as to quasi-contract. We have seen that it was at the end of this period that the action of assumpsit was being extended to enforce some of those quasi-contractual relations, which were enforceable by the action of debt.[1] We shall see that it was the adaptation of the action of assumpsit to this new use, and the development of its competence in this new sphere, which have created our modern law of quasi-contract.

My arrangement of this chapter will therefore be as follows:—§ 1 the Doctrine of Consideration; § 2 the Invalidity, Enforcement, and Discharge of Contracts; § 3 Quasi-contract.

§ 1. The Doctrine of Consideration

In the first place, I shall say something of the term consideration. We shall see that the history of the term, and of the manner in which it gradually came to be a word with different technical meanings in the spheres of the equitable and common law jurisdictions, tells us something of the place which it acquired in the law of contract, and of some of the characteristic features which it there developed. In the second place, I shall give some account of the development of the doctrine during the sixteenth and seventeenth

[1] Vol. iii 450-451; vol. vi 630.

centuries. Some of the rules then developed have become the settled rules of the modern common law; but they have not attained this position without difficulty. We shall see that, though the chief and most permanent elements in the modern doctrine of consideration have sprung from the procedural requirements of the action of assumpsit, many difficulties have arisen in the process of translating these procedural rules into the substantive rules of the modern law. These difficulties have arisen partly from the fact that the action of assumpsit was constantly expanding all through this period; but chiefly from the fact that other elements, derived from other sources, have made their influence felt. We shall see that we must reckon with influences derived from the action of debt, with the influence of the idea of consideration which was being developed by the court of Chancery, and, later, with the influence of continental systems of law which came through the law merchant. Some of these influences helped to introduce into the doctrine of consideration an element of moral obligation, which threatened at one time to reduce it to a position of merely evidential value; and, long after this idea had been got rid of, they exercised a disturbing influence on its evolution. It was not till this disturbing influence was removed by the decisions of the last three-quarters of the nineteenth century, that the doctrine has been settled mainly on the basis of those ideas derived from the action of assumpsit from which it started in the sixteenth and seventeenth centuries. With these two topics, therefore, its development in the eighteenth and early nineteenth centuries, and its settlement in the last three-quarters of the nineteenth century, I shall deal next. Lastly, I shall endeavour to estimate briefly the comparative merits of the English doctrine of consideration and the modern continental developments of the Roman *causa*.

The Term Consideration

We have seen that the one idea which the early common law borrowed from the Roman law, was the idea that the nude pact was not enforceable.[1] This idea was adapted to the common law of the thirteenth century, and took shape in the principle that only those agreements were actionable which could be brought within the competence of some one of the older personal actions.[2] But, as soon as the older personal actions began to be employed for the purpose of enforcing certain kinds of agreements, it began to be obvious that some word or expression was needed to differentiate the agreements which could be enforced by them, from the agreements which could not. It was in connection with the action of debt that this need was then chiefly felt, for the requirement of

[1] Vol. iii 413.

[2] For these actions see vol. iii 414-428.

a sealed writing as a condition precedent for bringing the action of covenant supplied a clear test of enforceability. But we have seen that debt did not lie unless the plaintiff had given something for the promise; and the expressions used to signify that the plaintiff had satisfied this requirement were at first general words, such as "cause" or "occasion," since the benefit received was generally the motive or reason for making a grant.[1] We have seen, however, that in the fifteenth century, the more precise expression "quid pro quo" had been appropriated to express the conditions under which the action of debt would lie; and that, in consequence, it had began to acquire almost a technical meaning.[2] But, because the expression "quid pro quo" had thus acquired a technical meaning, some more general word was needed to express the act or other circumstances which had led up to or was the motive or reason for a given transaction. It is clear from the Year Books of the fifteenth and early sixteenth century that the word "consideration" was used for this purpose; and the way in which it was used shows that it had not then acquired a technical meaning.[3] But, as soon as the action of assumpsit began to expand, so as to remedy nonfeasances in breach of agreements, on the faith of which the plaintiff had incurred some charge, the need for some compendious word to express the incurring of this charge, which rendered the agreement actionable, began to be very strongly felt. The expression "quid pro quo" was clumsy and had been appropriated to the action of debt.[4] On the other hand, the expression "consideration" was a more convenient word, both because it had a far more general significance, and because, within the sphere of the common law jurisdiction, it had not yet become a technical term.

While these developments were taking place in the sphere of the jurisdiction of the common law courts, the court of Chancery had been obliged to tackle a somewhat similar problem. We have seen that, for the purpose of its jurisdiction both over contract and over uses, it had become necessary to lay down conditions as to the circumstances under which it would act. It had become necessary to distinguish between the enforceable and the unenforceable agreement,[5] and between cases in which it would and cases in

[1] "Par lescrit qil mest avant il suppose qe il nous faira certein services les queux sont la cause de sa demande," Y.B. 6, 7 Ed. II. (S.S.) 83 *per* Westcot *arg.*; "Dont del hure que ceste annuite fu grante issint pur les services issint les services sont loccasion," Y.B. 5 Ed. II. (S.S.) (1312) 2 *per* Herle *arg.*

[2] Vol. iii 421-423.

[3] An instance of the untechnical use of the word at common law will be found in Y.B. 12 Ed. IV. Mich. pl. 2 *per* Choke, "s'il dit que un estranger baile les biens a luy sans ceo que le pleintiff baille, ce n'est purpose, car icy n'est nul *consideracion*, per que il duist traverser le contrary"; and Y.B. 20 Hy. VII. Mich. pl. 20, "bargaine ou autre *consideracion*."

[4] "The term *quid pro quo* was exceedingly awkward, and besides, usage had associated this term exclusively with debt," Street, Foundations of Legal Liability ii 37.

[5] Vol. v 294-295.

which it would not protect a cestui que use.[1] We have seen that in the case of contract it adopted the canonist theory of causa, and that the English word which it used to express this conception was consideration.[2] This use of the word tended to give the term, if not a more technical, at any rate a more precise meaning. Possibly it might have acquired the same technical meaning as the canonists had given to the word "causa," if the court of Chancery had been able to gain control over the development of the law of contract. But we have seen that the common law rejected so wide a test of the enforceability of contracts; and that the theory of contract, evolved in the sphere of common law jurisdiction, became the theory of English law.[3] Hence a doctrine of consideration in this form failed to get a foothold in English law; and this use of the term "consideration" disappeared with the disappearance of the theory of contract, which had begun to be worked out by the mediæval chancellors. On the other hand, the use of the term in connection with uses did get a permanent foothold in English law. We have seen that in that connection it was used to express the conditions under which equity would imply a use; and that, in the course of the sixteenth century, those conditions had come to be either the creation of a tenure,[4] the payment of money,[5] or love and natural affection.[6] We have seen that the first kind of consideration soon ceased to be important.[7] But the two last, termed respectively "valuable" and "good" consideration, came to be technical terms of permanent importance in the law of conveyancing.[8] We shall see that this use of the term by equity has had an appreciable, though an indirect influence, upon certain phases in the later history of the doctrine of consideration developed by the common law courts.[9]

Thus, in the earlier half of the sixteenth century, the word consideration, when used in connection with the law of contract, had not acquired a technical meaning either at law or in equity. It was no doubt frequently used; but other words and expressions were often used in competition with it to express the same idea. Thus, as Mr. Street points out,[10] St. Germain in the Doctor and Student uses the following expressions: "Recompence (four times), cause (three times), a certain consideration (twice), consideration of worldly profit (once), cause in the sense of a desire to maintain the cause of learning or service of God (once), quid pro quo (once), goods or some other profit (once), thing assigned for a

[1] Vol. iv 424, 425-427. [2] Vol. v 294-295; L.Q.R. xxiv 382.
[3] Vol. v 296. [4] Vol. iv 429. [5] Ibid 424. [6] Ibid 425-426.
[7] For the history and influence of the idea that the creation of a tenure is a consideration, see ibid 429-430, 469-470.
[8] Ibid 427; above vol. vii 359. [9] Below 12-13, 26-29, 31-32, 36-38.
[10] Foundations of Legal Liability ii 39 n. 1.

promise (once), new charge (once), charge by reason of the promise (once)." The *Termes de la Ley*[1] defines it as the material cause or quid pro quo of a contract, without which it will not be effectual or binding—thus explaining the use in the law of contract of the, as yet, less technical word "consideration," by reference to the more technical expression "quid pro quo." Similarly in 1566, in the case of *Sharington v. Strotton*,[2] which, as we have seen, was a case which turned upon the sufficiency of love and natural affection to raise a use,[3] it is clear that, in relation to the law of contract, the term is used in a semi-popular sense to mean the circumstances which will make the contract enforceable, either by the action of debt or by the action of assumpsit;[4] in *Calthorpe's Case* (1574),[5] it is used in quite a general way to mean "a cause or meritorious occasion requiring a mutual recompence in fact or in law";[6] various illustrations are given of the need for a consideration in this wide sense in the law of property; and in contract the need for it is illustrated by a reference to the quid pro quo.[7]

We have seen that it was during the latter half of the sixteenth century that assumpsit became alternative to debt, when debt was brought on a contract, and that it became a remedy on purely executory contracts.[8] By the end of the century, therefore, it had become definitely the chief contractual action of the common law. But, during the latter part of that century, the pleaders were beginning to use the word "consideration" to introduce the facts upon which they relied to make the promise enforceable by assumpsit.[9] Hence it is not surprising to find that the word then

[1] Cited Foundations of Legal Liability ii 39 n. 9.

[2] Plowden 300. [3] Vol. iv 426.

[4] "For if upon consideration that you are my familiar friend or acquaintance, or my brother, I promise to pay you £20, at such a day, you shall not have an action upon the case or an action of debt for it, for it is but a nude and barren contract, *et ex nudo pacto non oritur actio*, and there is no sufficient cause for the payment, nor is anything done or given on the one part, for you were my brother or my acquaintance before, and so will you be afterwards; so that nothing is newly done on the one part, as is requisite in contracts, and also in covenants upon consideration," Plowden at p. 302.

[5] Dyer 334b. [6] At f. 336b.

[7] "Contracts and bargains have a quid pro quo," ibid. [8] Vol. iii 441-446.

[9] Joscelin v. Shelton (1557) 3 Leo. 4, where "the plaintiff declared that the defendant, in *consideration* that the son of the plaintiff would marry the daughter of the defendant, assumed and promised to pay to him etc.," is perhaps the earliest instance of the use of the term in this sense; Ames, Lectures 147 n. 1, cites this case, and says that "it is a noteworthy fact that in the reports of the half dozen cases of the reigns of Henry VIII. and Edward VI. the word 'consideration' does not appear"; the fact that in Whorwood v. Gybbons (1587) Golds. 48 it was said that "it is a common course in actions upon the case against him by whom the debt is due, to declare without any words *in consideratione*," testifies at once to the growing habit of using these words, and to the fact that the usage was not quite settled; it was fairly well settled by 1585, for Periam, J., in Sidenham and Worlington's Case 2 Leo. at p. 225 said, "in an action upon the case upon a promise, the declaration is laid, that the defendant for and in consideration of £20 to him paid, (postea scil.) that is to say, at a day after, super se assumpsit."

acquired the technical meaning of the facts or circumstances which must be proved in order to make a promise enforceable by this action. This fact is clearly illustrated by chief baron Manwood's answer to a writ of error in a case to which he was a party.[1] Not only does he, throughout his answer, use the word consideration in this sense, but he also classifies the various possible considerations as follows: "There are," he says, "three manner of considerations upon which an assumpsit may be grounded: (1) a debt precedent; (2) when he to whom such a promise is made is damnified by doing anything, or spends his labour at the instance of the promiser, although no benefit cometh to the promiser . . . (3) or there is a present consideration."[2] It is clear that the second of these considerations originates in the extension of the action of assumpsit to cover certain kinds of nonfeasance in breach of an undertaking;[3] that the first originates in the extension of the action to enforce a promise to pay an existing debt (indebitatus assumpsit);[4] and that the third originates in the extension of the action to enforce a promise which is given in return for a promise.[5]

Consideration thus acquired its technical meaning in the common law mainly in relation to the action of assumpsit. It became the compendious word used to express the conditions under which that action would lie, and therefore the condition precedent for the validity of all those contracts which could only be enforced by that action. Hence, as we shall see, the leading characteristics of consideration, which emerged in the sixteenth and seventeenth centuries, originate in the rules for the competence of this action. But we have seen that the lawyers, in extending the action of assumpsit to cover the field of simple contracts, used analogies taken from the action of debt;[6] and that they were fully aware of the analogy existing between the quid pro quo which the plaintiff must prove in order to succeed in an action of debt, and the consideration which he must prove in order to succeed in an action of assumpsit.[7] It is not surprising, therefore, that ideas derived from the quid pro quo should have had some permanent influence on the development of the law of contract, and that its influence should still be apparent, not only in the sixteenth century[8] but also in the definition of consideration accepted in our modern law.[9] Similarly, we have seen that the term consideration had developed a different technical meaning in equity.[10] As the relations between the court of Chancery and the

[1] Manwood and Burston's Case (1587) 2 Leo. 203.
[2] Ibid at p. 204.
[3] Vol. iii 434-441.
[4] Ibid 442-444.
[5] Ibid 444-446.
[6] Ibid 436-438, 445-446.
[7] Ibid 440.
[8] Below 10-11, 22, 24.
[9] Below 10-11.
[10] Vol. iv 424, 425-426; above 4-5.

was a valid consideration for a subsequent promise, had a large effect upon the growth of the doctrine, by helping to introduce the notion that the presence of a moral obligation might be sufficient to constitute a consideration.[1] We shall see, too, that this notion tended to obscure the law as to the difference between a past and an executed consideration, and to introduce doubts and difficulties as to the validity of a past consideration.[2]

That consideration could consist merely in a detriment to the promisee was clearly recognized in the Doctor and Student,[3] and in many cases decided at the end of the sixteenth and the beginning of the seventeenth centuries.[4] One instance will suffice. In *William Bane's Case*[5] (1612), where an executrix, in consideration of forbearance, promised to pay the debt of her testator, it was held that the consideration was good; "for it is as much as if a stranger had said to the plaintiff forbear your debt, and do not sue the defendant till Michaelmas, and at the said feast I will pay you your debt, that is a good consideration, although it cannot be any benefit to him who makes the promise; yet because it is a damage to the creditor to forbear his suit or duty, it is a good consideration."[6] This is clearly the direct result of the fact that assumpsit was originally an action in tort; for it followed that the gist of the action was, not the benefit got by the defendant-promisor, but the detriment incurred by the plaintiff-promisee on the faith of the defendant's promise. But in many, perhaps in most cases, the detriment incurred by the promisee is also a benefit to the promisor; for this is always the case when the detriment consists in a payment, conveyance of property, or service rendered to the promisor. In the action of debt the lawyers naturally regarded the matter from the side of benefit, and asked whether the promisor had received a quid pro quo. But we have seen that, when consideration was as yet an untechnical word, it was sometimes used synonymously with quid pro quo.[7] Thus it is not surprising to find that Coke said that "every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge of the plaintiff";[8] and that the accepted definition of consideration is that it consists in "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given suffered or

[1] Below 25-26. [2] Below 15-17. [3] Vol. iii 440-441.

[4] See Richard's and Bartlet's Case (1584) 1 Leo. 19, cited below 21; Greenleaf v. Barker (1591) Cro. Eliza. at p. 194; Knight v. Rushworth (1596) ibid at p. 470; and see the other cases cited by Ames, Lectures 143 n. 3.

[5] 9 Co. Rep. f. 93b. [6] At f. 94a. [7] Above 5-6.

[8] Stone v. Wythipol (1588) Cro. Eliza. at p. 126; so also in Greenleaf v. Barker (1591) ibid at p. 194, Gawdy and Fenner, JJ., said, "every consideration must be for the benefit of the defendant, or some other at his request, or a thing done by the plaintiff, for which he laboureth or hath prejudice."

undertaken by the other."[1] In truth, detriment to the promisee is of the essence of the doctrine, and benefit to the promisor is, when it exists, merely an accident.[2] The idea that benefit to the promisor is as much of its essence as detriment to the promisee, is, as it has been truly said, "a heritage from debt."[3] In fact it comes from a period when analogies taken from the action of debt were used to explain the extensions made in the sphere of the action of assumpsit, and when the doctrine of consideration was in its infancy; but it has lasted long, and has had in consequence some influence on the evolution of the doctrine. That it is erroneous and that it has been influential we shall see more clearly in the following paragraphs.

(2) *Consideration need not move to the promisor, but it must move from the promisee.*

The essence of consideration is thus, not a benefit to the promisor-defendant, but a detriment to the promisee-plaintiff. That detriment may, it is true, have resulted in a benefit to the defendant; but this fact—if fact it be—is, as we have seen, wholly immaterial. But though the detriment to the plaintiff need not have resulted in any benefit to the defendant, the form of the action made it necessary that the detriment, incurred on the faith of the promise, should have been incurred by the plaintiff to whom the promise was made; for it is he alone to whom the promise has been made, on the faith of which he has suffered a detriment by altering his position. This principle was recognized in the seventeenth century. In 1646 it was held that, where J. and B. contracted with each other that each should pay a sum of money to their children who had intermarried, the administrator of B. could sue J. for his contribution, "though he should receive no benefit if he did recover";[4] and in 1668, in the case of *Bourne v. Mason*,[5] a plaintiff was non-suited because "he did nothing of trouble to himself or benefit to the defendant, but is a meer stranger to the consideration."

This principle seems to us to be almost too plain for argument—on historical grounds because it is an obvious deduction from the

[1] Currie v. Missa (1875) L.R. 10 Ex. at p. 162; similarly Martin, B., in Scotson v. Pegg (1861) 6 H. and N. at p. 299 said that "any act done whereby the contracting party receives a benefit is a good consideration for a promise by him," and Wilde, B.'s judgment, ibid at p. 300, is partially based on the same view of consideration; see below 41.

[2] This was for the first time pointed out by Langdell, Contracts § 64.

[3] Street, op. cit. ii 68; as Langdell, op. cit. § 64, says, "one of the most striking differences between debt and assumpsit in respect to consideration is, that in debt the consideration must inure to the benefit of the debtor, while in assumpsit it may inure to the benefit of the promisor, or of some third person, or to the benefit of no one."

[4] Anon. Style 6.

[5] 1 Ventris 6.

conditions under which assumpsit lay, and on logical grounds because it is an elementary principle of contract law that only the parties to the contract can be bound by or take benefits under a contract. But it was by no means firmly grasped at this period. This was due mainly to three causes.

(i) The disturbing influence of the equitable conception of consideration.

We shall see that in the sixteenth century it was distinctly asserted that, though love and natural affection were sufficient considerations to raise a use, they would not support an assumpsit.[1] But in *Bourne v. Mason* earlier cases, which were influenced by this conception, were approved. In the first of these cases it was held that a son could sue on a promise made to his father to settle land on his marriage; and in the second it was held that the daughter of a physician could sue on a promise, made to her father, to give her a sum of money if he performed a cure. In the first case, said the court, "the parties that brought the assumpsit did the meritorious act, though the promise was made to another"; and, in the second case, it was said that "the nearness of the relation gives the daughter the benefit of the consideration performed by her father." The latter reason, which is plainly inspired by the equitable conception, was the ground of the decision in *Dutton v. Poole*[2] (1677). In that case it was held that a promise, made by a son to his father, to pay £1000 to his sister, could be enforced by the sister. Scroggs, C.J., said that "there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children." It is true that in 1724, in the case of *Crow v. Rogers*[3] —a case which did not involve a family settlement—*Bourne v. Mason* was followed, and a stranger to the consideration was not allowed to sue. But it is clear that, as the law stood at the end of the seventeenth century, ideas derived from the equitable conception of consideration had introduced a considerable exception to the rule that consideration must move from the promisee, which tended to obscure the common law doctrine.[4] It was not till

[1] Below 18 and n. 3.

[2] 2 Lev. 211; we see the same confusion in Parker, C.J.'s, judgment in Mitchel v. Reynolds (1711) 1 P. Wms. at p. 193.

[3] 1 Stra. 592; cp. Butcher v. Andrews (1699) Carth. 446 where a plaintiff, who brought assumpsit against a father for money lent to the son at the father's request, was not allowed to recover; Holt, C.J., said "if it had been an indebitatus for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt, and not his son's; but when the money is lent to the son, 'tis his proper debt, and not the father's."

[4] For another curious confusion between the equitable and common law use of the term see the judgment of Parker, C.J., in Mitchel v. Reynolds (1711) 1 P. Wms. at p. 193, cited below 62 and n. 1.

the decisions of the nineteenth century[1] that this obscurity was removed; and, as we shall now see, its effect was increased by the second of the two causes which hindered the clear perception of this principle.

(ii) The disturbing influence of the idea, derived from the competence of the actions of debt and account, that a person not a party to an agreement may take a benefit thereunder.

We have seen that if money were paid by A to B for the use of C, C could sue by action of debt or account;[2] and that, in the seventeenth century, he could make use of the action of indebitatus assumpsit.[3] Thus in 1651, in the case of *Starkey v. Mill*,[4] a father gave goods to his son in consideration that the son should pay the plaintiff £20. The objection that there was no consideration moving from the promisee was overruled; and Rolle, C.J., said, "that there was a plain contract, because the goods were given for the benefit of the plaintiff though the contract be not between him and the defendant, and he may well have an action upon the case,[5] for here is a promise in law made to the plaintiff, though there be not a promise in fact etc., and there is a debt here; and the assumpsit is good." It would seem, too, from a dictum of Holt's, that he agreed with this reasoning.[6]

(iii) The fact that the lawyers considered that benefit to the promisor-defendant was, equally with detriment to the promisee-plaintiff, a valid consideration, tended to obscure the fact that such benefit ought only to have been considered a consideration, if it moved from, and so was a detriment to, the promisee-plaintiff. Rolle, C.J.s', judgment in *Starkey v. Mill*[7] exhibits clear traces of this confusion. We shall now see that the confusion so caused has tended to obscure the application of the rule that consideration may be executed or executory, but cannot be past.

(3) *Consideration may be executory or executed, but it cannot be past.*

The terms executed and executory are obviously apt terms to describe the cases where the consideration for a promise has been fulfilled, and where it has not. They were applied to express this difference between considerations in 1597, though not in connection with the law of contract;[8] and, as soon as the scope of assumpsit was extended, so that by it wholly executory contracts could be enforced, they begin to be used to express this difference

[1] Below 40.
[2] Vol. iii 425-428.
[3] Ibid 447-450; below 88 seqq.
[4] Style 296.
[5] The action on the case here brought was assumpsit.
[6] "If A assumes to B to pay money to C upon good consideration, C may have an action against A for this money," Yard v. Eland (1699) 1 Ld. Raym. at pp. 368-369.
[7] (1651) Style 296.
[8] Barwick's Case 5 Co. Rep. at f. 94a.

between the kinds of consideration which will validate a simple contract.[1]

Before this date, however, the lawyers had begun to have some perception of the difference between an executed and a past consideration. We have seen that assumpsit lay upon a contract where a detriment had been actually incurred by the promisee, before it was extended to enforce a wholly executory contract;[2] and that, except in the case of the contract of sale,[3] debt would not lie unless a quid pro quo had been actually received by the defendant.[4] The lawyers, therefore, were obliged to discriminate between the performance of an act which would support a promise, and the performance of an act which would not. Thus they were obliged to recognize the rule that the gift of the quid pro quo, or the incurring of the detriment, must be so connected with the promise that they formed substantially one transaction. In other words, the distinction between an executed consideration which would, and a past consideration which would not support a promise, had been forced upon their attention in connection, both with the action of debt, and the action of assumpsit. It is clear that St. Germain considered that a promise given in return for a wholly past act not done in contemplation of the promise, though it might create a moral obligation, could not be united with the promise so as to make the promise actionable.[5]

This principle was laid down in the case of *Andrew v. Boughey*[6] in 1553, and it was made the basis of the decision in the case of *Hunt v. Bate* in 1568.[7] In that case the servant of A had been arrested, and B had bailed him. A, in consideration of this action by B, had promised to indemnify him. It was held that no action lay upon this promise because the consideration for it was wholly past; but that it would have been otherwise if the act done

[1] In Sidenham and Worlington's Case (1585) 2 Leo. at p. 225 Periam, J., uses the term executed in the sense of past; and in Docket v. Voyel (1602) Cro. Eliza. 885 the terms past and executed are used as synonymous; but in Lampleigh v. Brathwait (1616) Hob. at p. 106 an executed consideration, which is incorporated with the promise, is distinguished from a past consideration, which, not being so incorporated, does not validate a contract; the fact that the term "executed" then and later was used as a synonym for "past" has tended to confuse this topic; cp. Street, op. cit. ii 83.

[2] Vol. iii 441-442. [3] Ibid 355-356, 423, 445-446. [4] Ibid 423.

[5] "*Doctor.* But what hold they if the promise be made for a thing past, as I promise thee xl *li*, for that thou hast builded me such a house, lyeth an action then? *Student.* They suppose nay, but he shall be bound in conscience to perform it after his intent," Bk. II. c. 24.

[6] "Here the warranty and promise of the goodness of the wax was void and of no force in law, because it was not made immediately upon the contract but a month after," Dyer at f. 76a.

[7] Dyer f. 272a; the note to that case contains a valuable collection of sixteenth and early seventeenth century cases which show that the distinction between a past and an executed consideration was well understood

by the plaintiff had been done at the request of the defendant.[1] In 1585 in *Sidenham and Worlington's Case*[2] the distinction was laid down in almost modern fashion by Rhodes, J.[3] "If one serve me for a year and hath nothing for his service, and afterwards at the end of a year I promise him 20 pounds for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master *ex abundanti*, doth promise him 10 pounds more after his service ended, he shall not maintain an action for that 10 pounds upon the said promise; for there is not any new cause or consideration preceding the promise." In 1636 Jones and Croke, JJ., in the case of *Townsend v. Hunt*, made a very similar statement.[4] Clearly this view of the law facilitated the adaptation of assumpsit to the sphere of implied contracts.[5] If A does work or performs a service for B at B's request, the work or the service can be regarded as an executed consideration, which will support a promise to pay.

It is clear from these and other cases that the lawyers were fixing upon the fact that the service was done by the plaintiff at the request of the defendant, as the feature which differentiated an executed from a past consideration. Thus we have seen that in *Hunt v. Bate* it was said that if the master had first requested the plaintiff to bail his servant it would have made all the difference.[6] This distinction was approved by Periam[7] and Rhodes, JJ.,[8] in *Sidenham and Worlington's Case;* and was clearly stated in its accepted form in 1616 in the well-known case of *Lampleigh v. Brathwait*[9]—"a meer voluntary curtesie will not have a consideration to uphold an assumpsit. But if that curtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise though it follows, yet is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference."

But this manner of stating the law led to some confusion as to

[1] "By the opinion of the Court it (the action) does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head. But in another like action on the case brought upon a promise of twenty pounds made to the plaintiff by the defendant in consideration that the plaintiff, at the special instance of the said defendant, had taken to wife the cousin of the defendant, that was good cause, although the marriage was executed and past before the undertaking and promise, because the marriage ensued (upon) the request of the defendant," ibid at ff. 272a, 272b.

[2] 2 Leo. 224. [3] Ibid at p. 225.

[4] Cro. Car. 408-409, cited below 16 n. 4; cp. also Marsh and Rainford's Case (1588) 2 Leo. 111.

[5] Vol. iii 446-447. [6] Above n. 1. [7] 2 Leo. at p. 225.

[8] Ibid. [9] Hobart 105, at p. 106.

the basis on which it really rested, which, as we shall see,[1] was not cleared up till the nineteenth century. To explain how this confusion arose, we must glance at the manner in which the form of assumpsit known as indebitatus assumpsit had been allowed to encroach on the sphere of debt. We have seen that *Slade's Case*[2] sanctioned the principle that the existence of a precedent debt raised an implied promise to pay it. The consideration for the promise was the precedent debt. But this was clearly a past consideration. This point was, as we have seen, taken in the case of *Hodge v. Vavisour* in 1617, but it was overruled.[3] The debt it was said "always continues," and "the law will imply a tacit consideration"; and it was compared to a case where the service was executed on the request of the defendant. Clearly these reasons were specious rather than sound. They were verbal quibbles put forward to explain the undoubted fact that indebitatus assumpsit lay upon a precedent debt, and to square this fact with the undoubted rule that a past consideration was no consideration. The result seems to have been that not only the case where a promise was made to pay a precedent debt, but also the case where an act was done on request, were regarded as being in substance exceptions to the rule that a past consideration was invalid. For this reason the latter class of cases were not treated, as the earlier decisions treated them, as cases of executed consideration, but as showing that a past consideration, if given at the request of the plaintiff, was valid.[4] It was for this reason that it was held, in the case of *Hayes v. Warren*,[5] in 1724, that if work was done by the plaintiff he could not sue on a subsequent promise to pay, unless it was alleged that the work was done at the request of the defendant, or unless such request could be implied by proof that the defendant had had the benefit of the work.

It is obvious, therefore, that the course which the decisions had

[1] Below 38-39. [2] (1603) 4 Co. Rep. 92b; vol. iii 443-444.

[3] 3 Bulstr. 222; above 9.

[4] This is illustrated by the case of Townsend v. Hunt (1636) Cro. Car. 408; in that case the defendant's wife was an executrix and as such liable to pay a legacy of £60 to the plaintiff when he came of age; the defendant and his wife paid £53 in April, and the plaintiff gave a general release; in September the defendant, in consideration that the plaintiff had at his request given this release, promised to pay the remaining £7; Jones and Croke, JJ., held that the contract was valid, "for if this promise had been made at the time of the release made, it had been clearly a good promise and a good consideration; then, being made after the release, forasmuch as the release is made at the defendant's request, and the defendant hath the continuance of the benefit thereof, the promise upon this consideration is good enough"; after the verdict the exception that the consideration was past was again moved, "*sed non allocatur*; because it was made at the defendant's request"; note the recurrence of the idea that consideration may consist in a benefit to the promisor-defendant.

[5] Stra. 933—"it was objected that this was a past consideration; and not being laid to be done at the request of the defendant, it could be no consideration to raise an assumpsit."

taken in the seventeenth century had tended, firstly, to obscure the relations between executed and past consideration; and, secondly, to indicate that the rule that a past consideration was invalid was a rule which admitted of exceptions. The rule that a precedent debt would support an action of indebitatus assumpsit was a clear exception; and, if it is argued that the consideration is sufficient because the man who owed the debt ought to pay it, it is clear that the acceptance of this argument will mean the admission of something very like moral obligation as a valid consideration.[1] It is clear, too, that the decisions which made for exceptions to the rule that consideration must move from the promisee, and especially the decisions which allowed a person, not a party to a contract, to sue on a contract made for his benefit,[2] tend in the same direction. All this, as we shall see later, tended to obscure the logical development of the doctrine from its procedural basis in assumpsit. But at this point we must consider, in the two following sections, the development of certain other rules which emerged in the seventeenth century. Here again we shall see conflicting tendencies at work which prevented any final settlement of the law during this period.

(4) *Consideration need not be adequate but it must be certain.*

The law has never attempted to adjudicate upon the adequacy of a consideration. That is a matter for the parties to the contract. If a person chooses to make an extravagant promise for an inadequate consideration it is his own affair.[3] Thus in 1587, in the case of *Sturlyn v. Albany*,[4] it was said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action"; and this principle is an accepted doctrine of our modern law. But, though the consideration need not be adequate, it must be sufficiently definite for the court to see that it really exists. Thus it was said in 1553 that, "if I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it,

[1] Thus in Bosden v. Thinn (1603) Cro. Jac. at p. 19 the court decided in favour of the plaintiff, "because Roberts, upon the plaintiff's undertaking at the defendant's request, had credit given him by Fludd; and that the plaintiff was damnified by reason thereof, which in *conscience the defendant ought to satisfy*; that the consideration is sufficient and not past"; cp. the Doctor and Student cited above 14 n. 5.

[2] Above 12.

[3] "The idea," says Sir F. Pollock, "is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: 'the value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give,'" Contracts (9th ed.) 186-187.

[4] Cro. Eliza. 67; cp. Bunniworth v. Gibbs (1654) Style 419 *per* Rolle, C.J.

then it is good."[1] In 1588[2] and 1600[3] it was held that love and natural affection were not considerations upon which an assumpsit could be grounded. In 1636 it was held that a promise to forbear "aliquo tempore" was void for uncertainty.[4]

It is easy to state this principle, but difficult to apply it to concrete cases which come near the line; and it is clear that this difficulty will be enormously increased, if once the law begins to develop those lines of cases which tended to mix up moral obligation and consideration. No doubt it is easy to say that one test of certainty is to be obtained by asking whether the act or forbearance had a definite value. But this solution merely shifts the difficulty, for, as we shall now see, the law had no very clear ideas as to what acts or things it accounted of sufficiently definite value.

(5) *Consideration must be an act or forbearance of some value in the eye of the law.*

The question whether or not an act or forbearance is of sufficient value in the eye of the law, was discussed during this period chiefly in three classes of cases: (i) when the promise was made in consideration of a forbearance to prosecute a groundless claim; (ii) when a promise was made by a creditor to his debtor that, in consideration that the debtor would pay or promise to pay his debt wholly or in part, the creditor would release him; and (iii) when a promise was made by a third person that he would do something for one of the parties to a subsisting valid contract, if that party would perform or promise to perform his duty under the contract.[5]

(i) Promises made in consideration of a forbearance to prosecute a groundless claim.[6]

It was settled in 1568, in the case of *Stone v. Wythipol*,[7] that forbearance to prosecute an invalid claim was no consideration. In that case the executor of an infant testator promised to pay his testator's debt, if the creditor would forbear to sue. It was held that, as he could not have sued for this debt because the testator was an infant, the promise of the executor to pay was based on no consideration. Coke's argument, to which the court assented, was as follows: "Every consideration that doth charge the defendant in an assumpsit must be to the benefit of the defendant or charge

[1] Mervyn v. Lyds, Dyer at f. 91a.

[2] Harford and Gardiner's Case 2 Leo. 30.

[3] Brett v. J.S. and his Wife, Cro. Eliza. 756—"Natu[illegible] sufficient consideration to ground an *assumpsit;* for alth[illegible] a use, yet it is not sufficient to ground an action without [illegible]

[4] Tolson v. Clark, Cro. Car. 438.

[5] On these topics generally see Ames, Two Theories of Consideration, Lectures 323-353.

[6] See Ames, op. cit. 325-327.

[7] Cro. Eliz. 126.

of the plaintiff, and no case can be put out of this rule. And this contract by the infant was void; and staying of suit is no benefit to the defendant, nor any charge to the plaintiff, more than was before." This decision was followed in a long line of cases;[1] and substantially the same reasoning as that used by Coke was used by Tindal, C.J., in 1846.[2] But, before this date, it had ceased to be possible to state the principle quite so absolutely. It had been decided in 1821 that forbearance to prosecute a suit already instituted, when the law was doubtful, was a valid consideration for a promise.[3] This view was approved in 1861, and extended to a forbearance to institute proceedings to establish a claim which there was a bona fide intention to make the subject of litigation.[4] Finally, in 1870, in the case of *Callisher v. Bischoffsheim*,[5] it was held that forbearance to prosecute a bona fide claim was a good consideration, though the claim was in fact baseless. It would seem, therefore, that the old principle only applies to a forbearance to prosecute a claim which the claimant knows to be baseless.[6]

(ii) During this period a much discussed question was the validity of a promise made by a creditor to his debtor that, in consideration of the debtor paying or promising to pay the whole or part of his debt, the creditor would release him. During this period opinion was fairly evenly divided upon this question. Let us look at the cases, firstly upon the question whether the actual payment of the whole or part of an existing debt, and secondly upon the question whether a promise to pay the whole or a part of an existing debt, could be a good consideration for a release.

(*a*) There were two lines of reasoning which led the courts to deny that a part payment by a debtor was a consideration for a promise by his creditor to release him.

[1] See the list collected by Ames, op. cit. 325 n. 2.

[2] "In order to constitute a binding promise, the plaintiff must show a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action; and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain," Wade v. Simeon 2 C.B. at p. 564.

[3] Longridge v. Dorville 5 B. and Ald. 117.

[4] Cook v. Wright 1 B. and S. 559.

[5] L.R. 4 Q.B. 449.

[6] "Every day a compromise is affected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. . . . It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise derived an advantage under it; in that case his conduct would be fraudulent," *per* Cockburn, C.J., L.R. 4 Q.B. at p. 452; "It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact, which it is not vexatious or frivolous to litigate, he does give up something of value," Miles v. New Zealand Alford Estate Co. (1886) 32 C.D. at p. 291, *per* Bowen, L.J.

Firstly, after some hesitation in the fifteenth century,[1] the opinion of Brian, C.J., to the effect that a smaller sum cannot be a satisfaction for a larger,[2] had come to be generally approved in the sixteenth century.[3] The rule on this point was stated in its final form in *Pinnel's Case* in 1602:[4] "Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse hawk or robe etc., in satisfaction is good." This really amounts to the arithmetic proposition that a lesser sum cannot be satisfaction for a greater.[5] It is a rule relating to the discharge of contract, which was evolved in the sphere of the action of debt, and naturally followed from the limitations of that action. It is not, and it could not be, based upon the view that such an agreement was not enforceable by action of assumpsit, because there was no consideration for it, for the simple reason that the action of assumpsit was only just beginning to develop, and the doctrine of consideration was as yet wholly undeveloped.[6] In fact, till the expansion of assumpsit to remedy purely executory contracts, it was inevitable that this question should be regarded solely from the point of view of the action of debt. A mere agreement to discharge was not actionable. It only became actionable when the thing for which the discharge was promised was done; for, till then, the promisor had no quid pro quo. But if that thing was less than the party doing it was liable to do, where was the quid pro quo? As Brian, C.J., said, "It is agreed that the agreement merely is nothing to the purpose, but the agreement coupled with the satisfaction; so that the performance of the agreement is the substance of the plea."[7]

Secondly, we have seen that the Roman rule, that a contractual obligation ought to be discharged by the same formalities as those by which it had been made, had been received by the common law.[8] It followed that a contract, which purported to discharge

[1] Y.B. 33 Hy. VI. Mich. pl. 32 (p. 48) *per* Danvers, J., cited Ames, op. cit. 329; and in Y.B. 10 Hy. VII. Mich. pl. 4, Fineux, J., expressed the same opinion—"Semble que il n'y ad diversite perenter le cas de satisfaction de concord in argent ou d'un cheval. Car nien obstant que le sum in concord soit moins que le sum in demande; uncore quand le debtee (i.e. creditor) ce ad receu per son agreement demesne, c'est ausey bon satisfaction a luy en Ley come receit d'un chose d'autre nature"; to the same effect Perkins, Profitable Book § 749 (ed. 1642), who notices the divergence of opinion on the point.

[2] "L'accion est port sur xxl., et le concord que il paiera forsque xl., lequel appert estre nul satisfaction de xxl., car paiement de xl., ne poit estre paiement de xxl. . . . Mes si fuit du cheval, quel cheval est paye accordant al concord, c'est bon satisfaction; car non appert le quel le cheval vault plus ou moins que le som en demande," Y.B. 10 Hy. VII. Mich. pl. 4.

[3] (1563) Dalison 49; (1587) 4 Leo. 81.

[4] 5 Co. Rep. 117a.

[5] Ames, op. cit. 330-331.

[6] Ibid 330.

[7] Y.B. 10 Hy. VII. Mich. pl. 4.

[8] Vol. ii 277 n. 10.

an existing contractual obligation, must be based on consideration. But if A, being under a contractual obligation to pay £10 to B, agrees with B that, if B will discharge him, he will pay £5, what consideration is there for B's promise? Clearly A has incurred no detriment by the making of such a promise. It follows that such a consideration is not valid. This reasoning was followed in *Richard's and Bartlet's Case* in 1584.[1] In that case R, the executrix of A, sued B for the price of corn delivered by her testator. B pleaded that, after the contract had been made, R agreed that, because the corn had been lost by a tempest, he would charge only part of the price; and that he had always been ready to pay this part of the price. The whole court decided in favour of the plaintiff, "because there is here not any consideration set forth in the bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff." This decision was followed by cases decided in 1591,[2] and 1597.[3] In the latter of these cases it was held that the payment of the same sum as that which the plaintiff was liable to pay, was no consideration for a further promise by the defendant.

It follows, therefore, that whether we regard the rule as a rule relating to the acts which will operate as a discharge, or whether we regard it as a rule regulating the validity of a contract to discharge the party liable, the same result is produced. The payment of the whole or a part will operate neither as a discharge, nor will it be a consideration for an agreement to discharge.

So far the law is clear. The payment of the whole or part of the sum due cannot be consideration for a further promise, because such payment is no detriment to the promisee. But in the sixteenth and seventeenth centuries the law was not finally settled on these lines. There is another line of cases in which the judges, looking rather at the benefit derived by the promisor in getting speedy payment or payment without action, held such payment to be a valid consideration for a promise to release the debt. They held therefore that, though as decided in *Pinnel's Case*,[6] payment of a lesser sum was no satisfaction of a greater, yet the payment of such lesser sum might be a valid consideration for a promise to give a release, or to do some other act. Thus in 1595, in the case of *Reynolds v. Pinhowe*,[5] the defendant had recovered £5 from the

[1] 1 Leo. 19; cp. Street, op. cit. ii 98-99.
[2] Greenleaf v. Barker, Cro. Eliza. 193.
[3] Dixon v. Adams, Cro. Eliza. 538.
[5] 5 Co. Rep. 117a. [6] Cro. Eliza. 429.

plaintiff. In consideration of £4 paid to him by the plaintiff, the defendant promised to acknowledge satisfaction of the judgment. The court held the contract valid, "for it is a benefit unto him to have it without suit or charge." The same view was put forward by Coke, C.J., in 1617, in the case of *Bagge v. Slade*.[1] "If," he said, "a man be bound to another by a bill in £1,000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1,000, this £500 is no satisfaction of the £1,000, but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid money—£500—and he hath no remedy for this again." Possibly Coke may have considered that the payment was a consideration because, if such payment could have been resisted, it was a detriment to the promisee; but I think that his dominant idea was that the payee has got the money, and that this benefit to him should be a consideration—as he said elsewhere in the same case, "I have never seen it otherwise, but when one draws money from another, that this should be good consideration to raise a promise." There are other cases decided in the seventeenth century in which the same reasoning was used;[2] and we shall see that it was not till the beginning of the nineteenth century, that it was finally settled that the payment by a debtor to his creditor of a part of a sum due, cannot be a consideration for a promise by the creditor.[3]

(*b*) As soon as it was recognized that a promise given for a promise was a valid consideration,[4] it is difficult to resist the conclusion that a promise by a debtor to pay part of a debt to his creditor, ought to be a consideration for a promise by the creditor to release him. This view seems to have been taken in the earlier half of the seventeenth century. In 1602, in the case of *Goring v. Goring*,[5] an agreement by an executor to discharge a debtor of his testator who owed £205, in consideration of a promise by the debtor to pay £150 in instalments, though admitted to be no valid satisfaction, was held to be a valid agreement, as it was promise against promise.[6] Similarly Comyns states that "an accord with mutual promises to perform is good, though the thing

[1] 3 Bulstr. 162.

[2] Flight v. Crasden (1625) Cro. Car. 8 (payment of the whole); Johnson v. Astell (1667) 1 Lev. 198 (payment of less); Anon. (1675) 1 Ventris 258 (payment of the whole); and see other cases cited by Ames, op. cit. 331-332.

[3] Below 40. [4] Vol. iii 445. [5] Yelv. 11.

[6] "And (*per Curiam*) the consideration alleged is sufficient for another reason; for although the plaintiff has not shown that he has discharged the defendant of the £205, yet if the defendant should afterwards be charged with it, he might have *assumpsit* against the plaintiff; for the plaintiff agreeing to take £150 for £205 is a promise on his part, and so one promise against another," ibid; cp. Ames, op. cit. 348.

be not performed at the time of action; for the party has a remedy to compel the performance."[1] We shall see that it was not till the following century, that, not without some conflict of opinion, it came to be thought that promises of this kind, though mutual, were inoperative to operate as a satisfaction of the original debt;[2] and that the view that in this case the mutual promises are not considerations for each other, derives its strength from cases in which the judges had failed to adapt the old rules as to accord and satisfaction, to the new situation created by the rise of the wholly executory contract.[3] But we shall see that there is authority to the contrary, and that the law on this point is not yet wholly settled.[4]

(iii) A somewhat analogous problem to that last discussed arises, when a promise is made by a third person that he will do something for one of the parties to a subsisting valid contract, if that party will perform or promise to perform his duty under the contract.[5] Such contracts are of course of comparatively rare occurrence; but, during this period, at least two cases arose in which the problem was discussed. Both were cases in which the consideration for the promise by the third person was, not the actual performance by the party to the contract of his duty under that contract, but a counter promise by that party to perform his duty.[6] In 1600, in the case of *Sherwood v. Woodward*,[7] the plaintiff sold cheeses to the defendant's son. The defendant, "in consideration the plaintiff would deliver the said cheeses to his said son, assumed, that if the son did not pay for them then he would." The son did not pay, and the plaintiff sued on this promise. In arrest of judgment it was moved "that this was not any consideration; for it is no more than what the law appoints to deliver that which he sold." The court over-ruled this objection and held the consideration valid. In the case of *Bagge v. Slade*,[8] "two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this; the plaintiff here in this writ of error said to the other, pay you all the debt, and I will pay you the moyety of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moyety according to his promise, which to do he refused." Thereupon the plaintiff sued for the moiety, and judgment was given for him.

[1] Digest *Accord* B 4.
[2] Below 40-41, 83-85.
[3] Below 83-85.
[4] Below 85.
[5] On this topic there has been much discussion; see Ames, op. cit. 327-329, 340-348; Williston H.L.R. viii 27-38; Langdell, H.L.R. xiv 496-508; Pollock, Contracts (9th ed.) 197-202, and L.Q.R. xvii 419-422; Street, op. cit. ii 116-120.
[6] But Ames, op. cit. 327, takes the view that in Bagge v. Slade 3 Bulstr. 162, the consideration was the performance; for the reasons given below 24, I do not agree.
[7] Cro Eliza. 700.
[8] (1616) 3 Bulstr. 162,

Now it is reasonably clear that both these cases were cases of promise for promise. It is clear, in the first case, that, when promise was made, the cheese was not yet delivered; and, in the second case, that, when the promise was made, the money had not yet been paid. For this reason no valid objection can be taken to the actual decisions in these cases. A promise for a promise was clearly a valid consideration—why should not a promise to perform a legally enforceable duty already owed to a third person be a good consideration for a counter promise? We shall see that, unlike the case of a promise by a debtor to pay a sum less than the debt owed, in consideration of a counter promise to give a release, no body of opinion excluding this particular sort of promise has grown up.[1]

But in both these cases the court went a good deal further than this. In both they were inclined to take the same view as was taken in that line of cases in which it was held that a payment of part of a debt might be good consideration for a promise to release the whole;[2] for in both they assigned, as the reason for their view that such payment was a valid consideration, the fact that it was a benefit to the creditor to get the money. We have seen that this view is indicated in Coke's remarks in the case of *Bagge v. Slade*;[3] and it is even more clearly apparent in the remarks of Gawdy and Fenner, JJ., in the case of *Sherwood v. Woodward*. "It is an ease," they said,[4] "to the bargainee to have them without suit, which peradventure otherwise he could not have had. And although the bargainee may take them in this case, the bargainor is not bound to deliver them; and there is a new act done by him upon this agreement, and it is an ease to the vendee."

The development of these rules, during the sixteenth and seventeenth centuries, shows that consideration was acquiring a technical meaning in connection with the law of contract, and that a doctrine of consideration was growing up. As assumpsit was fast ousting all other remedies for the enforcement of contracts it was only natural that the contents of that doctrine should be shaped largely, and perhaps principally, by the exigencies of that remedy. It tended to be a reflection of the conditions which a plaintiff must satisfy before he could succeed in this action. But, as the developments just described show, this was not the only influence which has gone to the making of the doctrine. Ideas derived from the quid pro quo, which must be proved in order to succeed in an action of debt; ideas derived from the very different

[1] Below 41.
[2] Above 21-22.
[3] Above 22.
[4] Cro. Eliza. 700.

conception of consideration which was being developed by the court of Chancery; and doubts as to the invalidity of a past consideration, caused largely by the fact that the past consideration of a precedent debt was the foundation of the action in indebitatus assumpsit,—all tended to import into the doctrine of consideration elements, which led in practice to results very different from those which flowed from the view that it was simply the sum and substance of the conditions which a plaintiff must satisfy, in order to succeed in an action of assumpsit. We must not underrate the importance of these elements. We shall now see that, during the eighteenth and early nineteenth centuries, they came very near to ousting the ideas derived from the conditions under which assumpsit lay; and that it was not till the second half of the nineteenth century that the latter set of ideas prevailed, and that the doctrine was settled on its modern basis.

Consideration in the Eighteenth and Early Nineteenth Centuries

During this period the doctrine of consideration was developed mainly on lines which ignored its historical connection with the action of assumpsit. More and more emphasis was laid upon those elements in the doctrine, and those ideas, which were derived from other sources; and thus it became possible for Lord Mansfield and his fellow judges to put forward theories which almost, if not quite, identified consideration with moral obligation. Thus the doctrine of consideration was given a wholly new shape which would, if it had become established as a part of the common law, have fundamentally altered the whole theory of our law of contract. At one time there was some likelihood that consideration would become of merely evidentiary value; and even when this possibility had disappeared, it still remained extremely probable that its identification with moral obligation would leave it as vague and illusory a test of the validity of a contract as the continental "cause."[1]

In this section I shall describe the technical lines upon which this development proceeded and indicate its effects upon the doctrine of consideration.

The earliest line of development started from the rule that, if a debt was due, a promise to pay that debt would give rise to an action in indebitatus assumpsit.[2] This principle was applied to cases where the debt was really due, but, for one reason or another, it was not enforceable by action. As the debt was due, it was no very violent departure from principle to rule that an express

[1] Below 44.

[2] Vol. iii 443-444.

promise by the debtor to pay it would remove the bar to the enforcement of the debt. Thus it was held in 1697 that "when the defendant under age borrowed money of the plaintiff, and afterwards at full age promised to pay it, this is a good consideration for the promise, and the defendant shall be charged."[1] On similar principles, it was held in 1699 that a promise to pay a debt barred by the statute of limitation made the debt enforceable by action, and could be set up in answer to a plea of the statute;[2] and the former ruling, that an infant could be sued on an express promise made after he had come of age to pay a debt contracted during infancy, was affirmed.[3] A further development of the same principle was made in 1777, in the case of *Trueman v. Fenton*,[4] when it was held that a promise by a bankrupt to pay a creditor, who had accepted no dividend, was enforceable. The transaction was regarded as the revival of the old debt, and, in this as in the other cases, the old debt was considered to be a sufficient consideration for the subsequent promise.[5]

So far there is an extension of, but no very violent departure from, the older precedents which allowed that an existing debt was a good consideration for a subsequent promise. But, when *Trueman v. Fenton* was decided, these cases were being made by Lord Mansfield the foundation of a large generalization, which put their ratio decidendi on the very different ground of moral obligation. At the same time, influenced by the new principles of mercantile law which he was introducing into the common law, he was prepared to assign to the doctrine of consideration a new and subordinate position in the law of contract. Let us examine these two lines of approach to the establishment of a wholly new theory of consideration in English law.

(i) *The idea of moral obligation.*

It is clear from the judgment in *Trueman v. Fenton*, that Lord Mansfield relied far more on broad equitable principles, than upon the comparatively narrow common law doctrine that the existence of a precedent debt is a good consideration for a promise to pay. "The debts of a bankrupt," he said, "are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone the debts are clearly not extinguished in conscience."[6] He used both the old

[1] Ball v. Hesketh Comb. 381.
[2] Hyleing v. Hastings 1 Ld. Raym. 389.
[3] Ibid.
[4] 2 Cowper 544.
[5] "Then the case of Barnardiston v. Coupland in C.B. is in point. Lord Chief Justice Willes there says 'that the revival of an old debt is a sufficient consideration.' That determines the whole case," *per* Lord Mansfield, C.J., ibid at p. 549.
[6] Ibid p. 548.

cases, which showed that a debt barred by the statute of limitation and a debt irrecoverable by reason of infancy, were considerations for a promise to pay, and the analogy of equitable doctrines, to show that the courts had recognized such a conscientious obligation.[1] And, though he based his judgment to some extent upon the common law decisions, he relied far more on a case decided by lord chancellor Parker,[2] in which the right of a creditor to recover on a bond given by a bankrupt had been put wholly on the ground of conscience.[3] This reliance on equitable decisions was the more attractive in that equity had, as we have seen, a doctrine of consideration very different from that of the common law.[4] But the rules as to what amounted in equity to consideration necessarily shared the vagueness of many of the principles of equity, and, like those principles, still retained many traces of notions derived from abstract morality or natural reason;[5] and thus it happened that Lord Mansfield's bias in favour of introducing equitable principles into the common law was eminently calculated to introduce confusion into the common law doctrine of consideration, and, ultimately, fundamental changes which would have altered the whole of the common law theory of contract.

Lord Mansfield's appeals to moral and natural law were attractive to the minds of the lawyers of his day; and so the idea that a conscientious obligation could be a consideration for a promise was speedily taken up. It would seem that it was argued unsuccessfully in *Rann v. Hughes*,[6] that the fact that an administratrix had assets was sufficient consideration for a promise by her to pay in her personal capacity, because she was liable in conscience. And, though it was held on the facts of that case that there was no consideration, Lord Mansfield distinguished *Rann v. Hughes* in

[1] "How far have the Courts of Equity gone upon these principles? Where a man devises his estate for payment of his debts, a Court of Equity says (and a Court of Law in a case properly before them would say the same), all debts barred by the Statute of Limitations shall come in and share the benefit of the devise; because they are due in conscience: therefore though barred by law, they shall be held to be revived and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the Statute of Limitations, is very true. The slightest acknowledgment has been held sufficient. . . . So in the case of the man who after he comes of age promises to pay for goods or other things, which, during his minority, one cannot say he has contracted for, because the law disables him from making any such contract; but which he has been fairly and honestly supplied with," 2 Cowper at p. 548.

[2] Lewis v. Chase (1720) 1 P. Wms. 620.

[3] The judgment begins as follows: "Here is an honest creditor, and the bankrupt if he pay him all, still pays but what in conscience he ought"; the decision in this case was contrary to the spirit of many other cases, 1 P. Wms. 622 n. 1, and it was over-ruled by Sumner v. Brady (1791) 1 H. Bl. 647.

[4] Above 4-5; I shall deal with the later history of consideration in equity in the following Book of this History; see Roscoe Pound, Consideration in Equity, Wigmore Celebration Essays 435 seqq.

[5] Roscoe Pound, op. cit. 457-458.

[6] (1778) 7 T.R. 350 n. *a*.

Hawkes v. Saunders[1] (1782), on the ground that in the former case the administratrix had no assets.[2] In *Hawkes v. Saunders* he followed his own earlier decision in *Atkins v. Hill*[3] (1775), and held that, if an executor had assets and promised to pay a legacy, assumpsit would lie. In so deciding he based his judgment on the broad ground that any moral obligation was a sufficient consideration. "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."[4]

It is true that in this judgment, in which the doctrine that moral obligation amounts to consideration attained its most unqualified and complete recognition, we can see an echo of the reasoning by which the decision in *Slade's Case*[5] was justified. The existence of a debt imports a promise, and so assumpsit will lie, even though there has been no express promise to pay. But the reasoning appears here in a very different setting. It is based wholly on equitable considerations; and the only dictum which really supported the actual decision was a dictum of Lord Hardwicke's, cited by Buller, J.,[6] to the effect that the fact that assets had come to an executor's hands was sufficient consideration for a promise by him to pay a legacy. It is true that other cases were cited; but they bore out neither the broad propositions on which the judgment was based, nor the decision itself. Thus it is clear that a decision that the indebtedness of a testator was a consideration for a promise by the executor to pay the creditor,[7] is no authority for the proposition that the possession of assets is a consideration for a promise to pay a legacy, for the element of precedent debt is wholly wanting. Nor was it much to the point to cite a case in which it was held that the abandonment of a right, enforceable in equity, was a good consideration.[8] The fact that such cases could be cited and such arguments used, taken in connection with the fact that other older cases, which pointed in a very different direction, were not cited,[9] show that on the slender basis

[1] 1 Cowper 289.

[2] "It is not like the case of Rann v. Hughes; for there there were no assets, nor any averment of assets stated in the declaration. But in this case there was a full fund; and therefore she was bound in law justice and conscience to pay the plaintiff his legacy," ibid at p. 291.

[3] Ibid 284.

[4] Ibid at p. 290.

[5] (1603) 4 Co. Rep. 92a; vol. iii 445-446.

[6] Reech v. Kennegal (1748) 1 Ves. Sen. at p. 126.

[7] Trewinian v. Howell (1588) Cro. Eliza. 91, cited by Buller, J., 1 Cowper at p. 293.

[8] Wells v. Wells (1669) 1 Ventris 40, cited by Buller, J., 1 Cowper at p. 293.

[9] Above 11, 14-15, 18; below 27-28.

of earlier cases which allowed that a precedent debt, though unenforceable, was consideration for a promise, a wholly new theory of consideration was being created. It is not surprising, therefore, to find that any past decisions, which could give any sort of support to this new theory, should have gained the approval of Lord Mansfield and his colleagues. Thus in the case of *Martyn v. Hind*[1] he expressed surprise that anyone could have doubted the correctness of the decision in *Dutton v. Poole*;[2] and in another case he was said by Buller, J., to have expressed the opinion that an agreement by a creditor to discharge his debtor, in consideration of receiving a smaller sum, was valid.[3]

(ii) *The influence of mercantile law.*

Lord Mansfield's achievements in the field of commercial law were remarkable; and they were due largely to the fact that he was widely read in other systems of law than the common law. But he had the defects of his qualities. He was not so widely or accurately read in the technical doctrines and technical history of the common law, as other lawyers far inferior to him in breadth of intellect; and, for this reason, in his desire to import reasonable principles into the common law, he was sometimes led to lay down rules which were demonstrably not rules of English law. I have already had occasion to notice this failing in some of his decisions on points connected with the land law.[4] We shall now see that, in his desire to construct a body of mercantile law on principles which would be satisfactory to the world of commerce, he was led to propound a wholly heterodox view as to the position of the doctrine of consideration in the law of contract.

In 1765, in the case of *Pillans v. Van Mierop*,[5] he laid down the undoubted principle that "the law of merchants and the law of the land is the same."[6] He then proceeded to lay down the much more doubtful principle that "a nudum pactum does not exist in the usage and law of merchants."[7] But, if both propositions were true, a nudum pactum could not exist in the law of the land. This however was obviously untrue, for an agreement made without consideration was nudum pactum, unless it was made in writing and under seal. In order to reconcile the existence of this rule of law with his own theory, he propounded the view that consideration was only of evidentiary value; and

[1] (1776) 2 Cowper at p. 443. [2] For this case see above 12.

[3] "Whether an agreement by parol to accept a smaller sum in satisfaction of a larger can be pleaded or not, I do not know; it was formerly considered that it could not, and was so decided in Coke. I think however that there are some late cases to the contrary, and one in particular in Lord Mansfield's time, who said, that if a party chose to take a smaller sum, why should he not do it?" Stock v. Mawson (1798) 1 B. and P. at p. 290.

[4] Vol. vii 19-20, 43-46. [5] 3 Burr. 1663. [6] Ibid at p. 1669. [7] Ibid.

that, therefore, if an agreement were in writing, whether under seal or not, consideration was not needed. "I take it that the ancient notion about want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants specialties bonds etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle."[1] But as mercantile contracts are almost invariably in writing, it followed that "in commercial cases amongst merchants the want of consideration is not an objection."[2]

This heretical doctrine was very shortly afterwards over-ruled in the case of *Rann v. Hughes* (1778).[3] The judges, on being consulted by the House of Lords, laid it down that "the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration; such agreement is nudum pactum ex quo non oritur actio; and whatsoever may be the sense of this maxim in the civil law, it is in the last mentioned sense only that it is to be understood in our law." Hence it followed that, "all contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class . . . as contracts in writing."

But, though Lord Mansfield's attempt to make consideration merely one of several kinds of evidence, by which the existence of a contract could be proved, failed, his view that a merely moral obligation was a sufficient consideration grew and flourished. It is true that in 1794, in the case of *Deeks v. Strutt*,[4] Lord Kenyon, C.J., in effect overruled the actual decisions in *Hawkes v. Saunders* and *Atkins v. Hill*, and held that no action at law could be maintained for a legacy.[5] But this decision was treated as proceeding on the ground that the matter was not subject to the cognisance of a common law court, and not as in any way infringing the principles laid down as to the sufficiency of a moral obligation to support a promise.[6] We shall now see that, though a reaction against this view had begun to set in in the second quarter of the

[1] 3 Burr. at p. 1669. [2] Ibid.
[3] 7 T.R. 350 n. *a*. [4] 5 T.R. 690.
[5] It was pointed out that the only precedent for allowing such an action was one in the time of the Commonwealth; and that to allow individual legatees to sue would in effect overthrow the equitable rules for the administration of assets, and work grave injustice; thus, "if an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover, and therefore when the legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or family: whereas a court of Equity will take care to make some provision for the wife in such a case," ibid at p. 692 *per* Lord Kenyon, C.J.
[6] "The overturning of these decisions . . . went on the ground that the ecclesiastical court was the only legal place where to sue for a legacy . . . but the decision in *Deeks v. Strutt* had nothing to do with the general ground of conscience," Barnes v. Hedley (1809) 2 Taunt. at p. 191 *per* Mansfield, C.J.

nineteenth century, it was, until then, almost an accepted doctrine. In fact, so deeply did it leave its marks on English law, that traces of it can be found even as late as the second half of that century.[1]

It is possible to trace two lines of decisions in which this doctrine made its influence felt.

(i) We have seen that it was well established that a precedent debt, though unenforceable by reason of the expiration of the period fixed by the statute of limitation, or infancy, or a discharge in bankruptcy, was a valid consideration for a subsequent promise.[2] We have seen, too, that these decisions were no very violent departure from the principle that a precedent debt was a good consideration for a promise to pay, which could be enforced by indebitatus assumpsit; for in all these cases there was a debt existing, though it was not enforceable by action.[3] But these decisions were extended to cover the case where, by reason of a statutory enactment or of common law rules, the contract was wholly void, so that there was no debt in existence. Thus in 1809, in the case of *Barnes v. Hedley*,[4] it was held that a promise to pay the principal and legal interest could be founded on a precedent loan, which was void by reason of the infringement of the usury laws; and as late as 1863 this decision was followed, in spite of the vigorous dissent of Martin, B., in the case of *Flight v. Reed*.[5] So too in 1813, in the case of *Lee v. Muggeridge*,[6] a debt created by a bond, which was void because it was given by a married woman, was allowed to be a sufficient consideration for a promise by her to pay the debt after her husband's death. In that case precedents were cited, which proved the somewhat obvious proposition that a void debt could not possibly be a consideration for a promise.[7] But they were distinguished on the ground that, in those cases a void consideration had been pleaded, and that they might have been decided differently if the real consideration—the moral obligation—had been stated.[8] The court then laid it down that, "it has long been established that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will

[1] See Flight v. Reed (1863) 1 H. and C. 703; below 33.
[2] Above 26. [3] Vol. iii 442-444; above 26. [4] 2 Taunt. 184.
[5] 1 H. and C. 703; Martin, B., said at p. 711, "I cannot understand how an utterly void and illegal contract or transaction can be a legal consideration for a new contract."
[6] 5 Taunt. 36.
[7] Barber v. Fox (1670) 2 Wms. Saunders 136; Lloyd v. Lee (1718) 1 Stra. 94.
[8] "As to the cases of *Lloyd v. Lee* and *Barber v. Fox* they have been sufficiently answered by my Lord and my brother Chambre, that if a man will state on his declaration a consideration which is no consideration, and shews no other consideration on his declaration, although another good consideration may exist, when that which he does shew fails he cannot succeed upon the proof of the other which he has not alleged," 5 Taunt. at p. 48 *per* Gibbs, J.

give a right of action."[1] It is clear that no proposition less wide would have sufficed to decide the case in favour of the plaintiff.

(ii) We have seen that it was well established that, if an act had been done at the request of the defendant, this act was a valid consideration for a promise by him to pay for it.[2] But we have also seen that this rule was coming to be regarded as resting, not on the ground put forward in some of the earlier cases, that the act is in these circumstances an executed consideration for the promise, but on the ground that in such a case the law admitted of an exception to the rule that consideration cannot be past.[3] In the case of *Pillans v. Van Mierop* Wilmot, J., was prepared to give a very wide extension to this exception.[4] It is therefore not surprising to find that, during this period, the rule, established in this form, was extended in a manner somewhat analogous to the manner in which the rule that a precedent debt was a valid consideration had been extended. Just as the rule that a precedent debt was a valid consideration for a subsequent promise to pay, was extended to a precedent debt, which for one reason or another was unenforceable by action;[5] so the rule that a past act done at the request of the promisor was a valid consideration for a promise to pay, was extended to the case where a person, without a previous request, voluntarily did what another was legally liable to do, and that other in consideration thereof made a promise. No doubt this extension could be justified on the ground that, under these circumstances, the act so done could be taken as executed consideration for the subsequent promise. This was in substance the explanation given by Selwyn;[6] and, as thus explained, it is in accord with the principles of the modern law.[7] But both the original rule and its extension, if regarded as exceptions to the rule that a past consideration is not valid, can easily be justified by the theory that a moral obligation is a valid consideration; for, if a past act is

[1] 5 Taunt. at p. 46 *per* Mansfield, C.J.

[2] Above 14-15.

[3] Above 16.

[4] "It is now settled, 'that when the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon.' In another instance the strictness has been relaxed; as for instance, burying a son, or curing a son; the considerations were both past; and yet holden good. It has been melting down into common sense of late times," 3 Burr. at pp. 1671-1672.

[5] Above 26.

[6] "The defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff who afforded that assistance to the pauper which it was the duty of the defendants to have provided: this was the consideration, and the subsequent promise by the defendants to pay for such assistance was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants, and consequently sufficient to support a general indebitatus assumpsit for work and labour performed by the plaintiff for the defendants, at their request," Selwyn, Nisi Prius i 51 n. 11, cited Anson, Contracts (9th ed.) 107.

[7] Below 38-39.

accepted as a valid consideration for a subsequent promise, it is almost tantamount to asserting that a mere motive or feeling of moral obligation is a sufficient consideration. And so we find that, in the cases in which this extension was made, moral obligation occupies a prominent place.

The facts of all these cases were very similar, as they all turned on the liability of a parish, in which a pauper was settled, to maintain him. In the case of *Atkins v. Banwell*[1] the guardians of the parish where a pauper was resident, having expended money on his relief, sued the guardians of the parish where he was settled, to recover the amount so expended. It was held that the action failed, because the defendants had made no express promise to pay. But Lord Ellenborough, C.J., held that, if there had been an express promise, the plaintiffs would have succeeded because "a moral obligation is a good consideration for an express promise";[2] and he gave effect to this view in the subsequent case of *Wing v. Mill.*[3] In the later case of *Paynter v. Williams*[4] the plaintiffs, who had given relief, recovered against the parish where the pauper was settled, but on the ground that the officers of the parish of settlement had requested the relief to be furnished, so that it was a case of an act done at the request of the defendant.[5] Necessarily moral obligation played some part in the argument;[6] but not much reliance was placed on it by either side; and we shall see that in 1833—the date when that case was decided—the view that moral obligation was always a good consideration was beginning to decline.[7] But, even after the theory had ceased to be held in the large sense given to it by Lord Mansfield and by Mansfield, C.J., traces of it lingered on in the language used by distinguished judges. We have seen that as late as 1863 it inspired the decision of the court in *Flight v. Reed*;[8] and traces of its influence can be seen in the language of judgments delivered by Parke, B., in 1843[9] and 1848.[10]

[1] (1802) 2 East 505. [2] 2 East at p. 506.

[3] (1817) 1 B. and Ald. 104—Lord Ellenborough, C.J., said, "in this case both the legal and moral obligation obtain. The parish of Willoughby have by their weekly allowance admitted that they were bound to provide for the pauper; and the defendant, one of the overseers, after the pauper's death, expressly desires the plaintiff to send his bill made out to the overseers, and promises that he shall be paid."

[4] (1833) 1 C. and M. 810. [5] Ibid at pp. 818-819 *per* Lord Lyndhurst, C.B.

[6] Ibid at pp. 811-818. [7] Below 37.

[8] 1 H. and C. 703; above 31.

[9] "The principle on which the law allows a party, who has attained his age of twenty-one years, to give validity to contracts entered into during his infancy, is that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound," Williams v. Moor (1843) 11 M. and W. at pp. 264-265, and see the passage cited below 40 n. 1.

[10] "The principle of the rule laid down by Lord Mansfield is, that when the consideration was originally beneficial to the party promising, yet if he be protected from

It is quite clear that if these eighteenth-century developments of legal doctrine had been received into the common law, the doctrine of consideration would not hold the place which it holds to-day in the English law of contract. If Lord Mansfield's view that consideration had a merely evidentiary value had prevailed, it would have become simply one of several ways of proving the existence of a contract, it would have lost all connection with its historical origin in the procedural necessities of assumpsit, and it would probably have disappeared before now as a substantive body of doctrine. The acceptance of this view would, as Sir F. Pollock has said, have changed the whole modern development of the English law of contract, "and its principles might have been (with only minute theoretical differences) assimilated to those of the law of Scotland."[1] Nor would the result have been very different if the theory of the identification of moral obligation and consideration in its extreme form had been accepted. In that case the English theory would have become something very similar to the continental theory, which regards mere moral obligation, or the intention to confer a benefit, as a sufficient "*cause*." We shall see that this "*cause*" has consequently become so uncertain a test for distinguishing between a pact and a contract, that in the opinion of many it is wholly useless.[2] And this is only natural; for, as Lord Denman, C.J., pointed out in the case of *Eastwood v. Kenyon*, the doctrine that moral obligation was a sufficient consideration, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."[3]

But, as we shall now see, these ideas were decisively rejected in the nineteenth century, the procedural origin of the doctrine of consideration was recalled, and the modern law was settled on this basis.

The Settlement of the Modern Doctrine

The causes which brought about the rejection of theories, which seemed to have acquired so much authority in the eighteenth century, must be sought ultimately in weight of

liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it," Earle v. Oliver (1848) 2 Ex. at p. 90.

[1] "If it had occurred a century or two earlier to a judge of anything like Lord Mansfield's authority, the whole modern development of the English law of contract might have been changed, and its principles might have been (with only minute theoretical differences) assimilated to those of the law of Scotland," Contracts (9th ed.) 191; the only criticism that can be made of this dictum is that it probably could not have occurred to any judge "a century or two earlier," as the procedural origin of consideration was then too well recognized.

[2] Below 44.

[3] (1840) 11 Ad. and E. at p. 450.

earlier precedents, which came from a period when the origin of consideration, in the procedural necessities of assumpsit and to some extent of debt, was almost too obvious to require statement. We must therefore examine the manner in which these precedents were used to prove that consideration was something very much more than mere evidence, and more than motive or moral obligation.

It was the view expressed by Lord Mansfield in *Pillans v. Van Mierop*,[1] that consideration was merely evidence of the existence of the contract, that was the first to be rejected. It was, as we have seen, rejected in the case of *Rann v. Hughes*[2] only thirteen years later, so that it had no time to gather weight by the approval express or tacit of later judges. That it was so speedily rejected is, in my opinion, an indirect and undesigned consequence of § 4 of the statute of Frauds. The case of *Rann v. Hughes* was an action on a promise by an administratrix to pay out of her own estate.[3] It was urged that, as the statute had required such promises to be in writing, they did not require consideration to support them. But it was clear enough, both from the words of the statute and from the manner in which it had been interpreted, that non-observance of the provisions of the statute rendered the contract, not void, but unenforceable by action.[4] If this had not been so, it would have been impossible for equity to have originated the equitable doctrine of part performance, the beginnings of which we can see in the time of Lord North,[5] who had helped to draft the statute;[6] nor would it have been possible for a contract to be proved by means of a written memorandum drawn up after the agreement had been made.[7] It was the better opinion, therefore, that writing affected, not the validity, but the enforceability of the contract.[8] It followed

[1] (1765) 3 Burr. at p. 1669; above 29-30. [2] (1778) 7 T.R. 350 n. *a*.

[3] It is not even certain that the promise was in that case in writing—"It is said that if this promise is in writing that takes away the necessity of a consideration, and obviates the objection of nudum pactum, for that cannot be where the promise is put in writing: and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing; and this last is certainly true," 7 T.R. 350 n. *a*.

[4] "It was said by the Attorney-General, that since the statute of Frauds, if an agreement be made and reduced into writing, and signed but not sealed, that this is still but a parol agreement, and the writing is only evidence of it," Marquis of Normanby v. Duke of Devonshire (1697) Free. Ch. at p. 217.

[5] Hollis v. Edwards (1683) 1 Vern. 159; Butcher v. Stapely (1685) 1 Vern. 363; vol. vi 658-659.

[6] Vol. vi 380-384.

[7] Smith v. Watson (1719) Bunbury 55; cp. Welford v. Beazely (1747) 3 Atk. 504.

[8] Pollock, Contracts (9th ed.) 699-701; the discussion in Leroux v. Brown (1852) 12 C.B. 801, in which the rule was finally decided, was confused by references to the question of the effect of § 17 of the statute; that section was differently worded, and no final decision was reached as to its effect, vol. vi 386 n. 4.

that, if consideration was needed for the validity of all contracts not under seal, it must be necessary for contracts required to be in writing by the statute of Frauds. But for the fact that the contract then before the court was one which fell within the fourth section of the statute, and but for the fact that the statute affected only the enforceability of such contracts, it may well be doubted whether Lord Mansfield's opinion, which is not in itself unreasonable, would have been so speedily and decisively overruled. If it had not been speedily overruled, and if it had been combined with the doctrine that moral obligation was equivalent to consideration, very little would, as we have seen, have been left of the doctrine of consideration.

Though the case of *Rann v. Hughes* did not allude to the doctrine of moral obligation, though, as we have seen, that doctrine continued to flourish for many years after that decision,[1] the opening words of the judgment impliedly condemn the wide meaning afterwards given to it by Mansfield, C.J. "It is undoubtedly true," said Skynner, C.B., in the name of the judges,[2] "that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration." There were many lawyers who saw clearly enough that the large efficacy attributed to moral obligation could not be supported. Coke's doctrine that consideration "must be either an immediate benefit to the party promising or a loss to the person to whom the promise was made,"[3] was still put forward in argument. And, though this doctrine was then denounced as too narrow,[4] it still had life in it. In 1802 the reporters Bosanquet and Puller appended to their report of the case of *Wennall v. Adney* a learned note, which showed that the doctrine that moral obligation was a sufficient consideration to support a promise, was inconsistent with the earlier authorities, and was unnecessary for the decision of most of the cases usually cited for it.[5] They maintained that "if a contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract"; though they admitted that, "according to the com-

[1] Above 30-31.

[2] 7 T.R. 350 n. *a*.

[3] Stone v. Wythipol (1588) Cro. Eliza. at p. 126, cited above 10 and n. 8.

[4] "The rule laid down at the Bar, as to what is or is not a good consideration in law, goes upon a very narrow ground indeed; namely, that to make a consideration to support an assumpsit, there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. I cannot agree to that being the only ground of consideration sufficient to raise an assumpsit," Hawkes v. Saunders (1782) 1 Cowper at p. 290 *per* Lord Mansfield, C.J.

[5] 3 B. and P. 249.

monly received notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay." They maintained that "an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by a positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law." In other words, a precedent debt, as decided in *Slade's Case*,[1] is a valid consideration on which indebitatus assumpsit will lie, either by reason of a subsequent express promise, or, if no subsequent promise has been made, by reason of the promise implied from the debt; and a precedent debt, though voidable or unenforceable by action, is a good consideration for a subsequent express promise to pay. But a precedent void obligation, because it is void, cannot be a consideration, whatever be the moral obligation which arises from its creation.

That this note had much to do with the change of opinion on this subject, which took place in the latter part of the nineteenth century, is clear from the use made of it in later cases. It was used in argument in the case of *Paynter v. Williams*,[2] it was approved by Parke, B., in *Earle v. Oliver*,[3] and it was cited, though it was misapplied by Pollock, C.B., and Wilde, B., in *Flight v. Reed*.[4] More important than all, it was approved by Denman, C.J., in the case of *Eastwood v. Kenyon*[5]—the case which gave the death blow to the theory that moral obligation could be regarded as a valid consideration. Lord Denman's opinions upon this question had progressed. In 1838[6] he had contented himself with following in substance a decision of Lord Tenterden's in 1831,[7] and holding that the plaintiff failed, because, if there was a moral obligation, it had not been sufficiently set forth in the declaration. But in *Eastwood v. Kenyon* he stated clearly that moral obligation could never be a consideration; and it is clear that the decision was mainly grounded, as the note to *Wennall v. Adney* was grounded, upon the "old common law of England," contained in such cases as *Hunt v. Bate*, *Townsend v. Hunt*, "and indeed in

[1] (1603) 4 Co. Rep, 92a.
[2] (1833) 1 C. and M. at p. 816.
[3] (1848) 2 Ex. at p. 90.
[4] (1863) 1 H. and C. at p. 716.
[5] (1840) 11 Ad. and E. at p. 447.
[6] Meyer v. Haworth 8 Ad. and E. 467; at p. 469 Lord Denman, C.J., said, "the record states that the goods were supplied to a married woman, who, after her husband's death, promised to pay. That is not sufficient. The debt was never owing from her. If there was a moral obligation that should have been shown."
[7] Littlefield v. Shee 2 B. and Ad. 811; Lord Tenterden, C.J., observed at p. 812 that, in Lee v. Muggeridge, all the circumstances showing that the money "was in conscience due" were set forth in the declaration; but it should be noted that he felt misgivings as to the extent of the doctrine—"the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation."

numerous old books."[1] "The principle," he said, "of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained." From that time onwards the doctrine of consideration has been developed for the most part on strictly historical lines, and entirely in accordance with those older sixteenth and seventeenth century precedents, which regarded the term consideration as the compendious word which summed up the conditions which a plaintiff must satisfy before he could succeed in indebitatus or in special assumpsit.

Though this note to *Wennall v. Adney* had much to do with producing this change of opinion, it is possible that it was partly due to the new rules of pleading which were made in 1834. We shall see that those rules prevented defendants from pleading the general issue in assumpsit, and required them to plead specially.[2] This change obviously tended to concentrate attention upon the kind of pleas appropriate to the action, and to call increased attention to the procedural basis of the doctrine of consideration. However that may be, the fact of this change in the attitude of the courts is undoubted. It is a change in attitude which is analogous to that already noted in the view taken by them as to the extent of the modification of the maxim *actio personalis moritur cum persona* recognized in the case of *Phillips v. Homfray*;[3] and as to the relations of the actions of trover and trespass de bonis asportatis.[4] As we shall now see, it has made our modern law.

Three consequences followed from the decision in *Eastwood v. Kenyon* that a past consideration was no valid consideration, and that moral obligation was not the same thing as consideration. In the first place, it became possible to distinguish clearly between motive and consideration. This distinction was stated in its final form two years later in the case of *Thomas v. Thomas*.[5] In the second place, it became possible to get rid of the confusion caused by the habit of regarding a consideration executed on request, as an exception to the rule that a past consideration is invalid. In truth, as had long ago been pointed out by Selwyn, in connection with the cases turning on the liability of the poor law authorities,[6] those cases could be treated more properly as cases of executed consideration. It is clear, as we have seen from *Lampleigh v.*

[1] 11 Ad. and E. at p. 452; for the cases cited see above 14-15.

[2] Vol. ix c. 7 § 2; Common Law Procedure Commission, First Report, Parl. Papers (1831) xxii at pp. 590, 599; Cambridge Law Journal i 273-275.

[3] Vol. iii 582. [4] Vol. vii 420-421.

[5] (1842) 2 Q.B. 851; "motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law moving from the plaintiff," ibid at p. 859 *per* Patteson, J.

[6] Above 32 n. 6.

Brathwait[1] and numerous other cases before and after that decision,[2] that the validity of a consideration executed on request is not an exception to the rule that a past consideration is invalid, but simply a case of an executed consideration. This new point of view can be seen gradually emerging in the decisions of the latter half of the nineteenth century;[3] and it received its clearest statement from Bowen, L.J., in *Stewart v. Casey*[4]—"The fact of a past service raises an implication that at the time it was rendered it was to be paid for; and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered." Thus most of the so-called exceptions to the rule that consideration cannot be past disappear.[5] It is true that the rule is still recognized that a precedent debt, though barred by the statute of limitation, is consideration for a promise to pay, or for an acknowledgment from which a promise to pay can be inferred. But it is not a consideration for a promise to do any other collateral thing;[6] for, as Lord Sumner has pointed out in his learned judgment in the case of *Spencer v. Hemmerde*, the rule only applied to actions of assumpsit for debts, and not to actions for other kinds of damage.[8] Thus, though the consideration is in this case past, it is a legitimate extension of the rule that a precedent debt would support an action of indebitatus assumpsit.[7] And this is the true historical ground. But at the present day, when the procedural origin of this anomalous rule has been forgotten, it is perhaps better to base it, as Holt, C.J.,[9] and Sir F. Pollock have based it,[10]

[1] (1614) Hobart 105; above 15.

[2] Above 14-16.

[3] Anson, Contracts (12th ed.) 114-116.

[4] [1892] 1 Ch. at pp. 115-116. It is unfortunate that Scrutton, L.J., in Evans v. Heathcote [1918] 1 K.B. at pp. 435-436, persisted in the old error of regarding the consideration in Lampleigh v. Brathwait as past, and even referred to the decision in Flight v. Reed without positive disapproval.

[5] Changes in statute law have changed the rules that the infant's promise, after he has attained his majority, to pay a debt contracted during infancy, and the bankrupt's promise after getting his discharge to pay a debt formerly owing by him, are valid, Anson, Contracts (7th ed.) 102.

[6] "But it does not follow that, though a promise revives a debt in such cases, any of those debts will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so indeed it was held in this court in the case of Reeves v. Hearne (1 M. and W. 323). In such a case it is but an accord unexecuted, and no action will lie for not executing it," Earle v. Oliver (1848) 2 Ex. at p. 90.

[7] Vol. iii 442-444; above 9.

[8] [1922] 2 A.C. at p. 524; see L.Q.R. xxxix 146-148.

[9] Heyling v. Hastings (1699) 1 Ld. Raym. at p. 421; in Tanner v. Smart (1827) 6 B. and C. at pp. 607-608 it was said that the pleadings were not calculated to raise the question of waiver, and the point was passed over.

[10] "It seems better at this day to say that the law of limitation does not belong to substantive law at all, but is a special rule of procedure made in favour of the debtor, who may waive its protection if he deliberately chooses to do so," Contracts (9th ed.) 192.

on the ground that the defendant has waived the benefit of the statute.[1] In the third place, this decision emphasized the rule that consideration must move from the promisee, and so got rid of cases like *Dutton v. Poole*,[2] where the judges had evidently been influenced by the equitable doctrine of consideration.[3] That rule had been strongly asserted in 1833, in the case of *Price v. Easton*;[4] and in 1861, in the case of *Tweddle v. Atkinson*, it was finally held that "the modern cases had in effect overruled the old decisions"; and that they "shewed that the consideration must move from the party entitled to sue upon the contract."[5]

It is by the application of the same principles that other doubtful points in the law of consideration have been practically settled. Thus the case of *Foakes v. Beer*[6] settled that the payment of a smaller sum by a debtor to a creditor, to whom a larger sum is due, is not a valid consideration for a promise by the creditor to release his debtor. In such a case, said Lord Selborne,[7] "I cannot say that I think that consideration is given in the sense in which I have always understood that word as used in our law." On somewhat similar grounds it may be doubted whether A's performance of his contractual duty to B can be consideration for a promise by C to A.[8] Here A has only done what he was legally bound to do, just as when he pays part of his debt to B. In neither case is there any detriment to A, the promisee, which can afford a consideration for a further promise.[8]

Whether or not a promise by a debtor A to pay less than his debt to his creditor B, can be a consideration for a promise by B to release him is more doubtful. There is much authority to show that an accord to be operative must always be executed; and, as we have seen, actual performance of less than is due is not a con-

[1] The rationale of the analogous case of a promise given by an infant, after attaining his majority, was never clearly settled; in Williams v. Moor (1843) 11 M. and W. at p. 263, Parke, B., said that it might be treated, either "as an act giving validity to an otherwise invalid contract, or as a new contract, voluntarily entered into after the party has obtained the capacity of contracting, the consideration being the moral duty arising from the previous transactions."

[2] (1677) 2 Lev. 211. [3] Above 12. [4] 4 B. and Ad. 433.

[5] 1 B. and S. 393. [6] (1884) 9 A.C. 605. [7] At p. 613.

[8] "Andrew's performance of his binding promise to Peter does not appear capable of being a consideration for a new promise by John to Andrew; not because it cannot be beneficial to John, for this it may very well be, but because in contemplation of law the performance is no new detriment to Andrew, but on the contrary is beneficial to him, inasmuch as it discharges him of an existing obligation. Therefore the necessary element of detriment to the promisee is wanting. It seems therefore that if a promise is given in exchange merely for the performance of the promisee's duty under an

way so far as it goes," citing Bagge v. Slade, Scotson v. Pegg, and Shadwell v. Shadwell; but the first two cases may be perhaps regarded as cases where a promise was given for a promise, above 23-24 below 41; and in the last case it may perhaps be contended that the point did not arise, as the promisee did more than he was bound to do under his contract, below 41.

sideration. On the other hand, the better opinion would seem to be that a promise by A to C to perform his contractual duty to B may be consideration for a promise by C to A. It is a case of promise for promise; and no exceptional rule, excluding this particular kind of promise from the general rule that mutual promises are a valid consideration for each other, can, as Sir F. Pollock has pointed out, be produced.[1] In this respect it differs from a promise by a debtor to his creditor to pay a less sum than his debt in consideration for a promise of discharge; for there is, as we shall see,[2] some authority for saying that an exceptional rule exists which prevents these promises from being consideration for one another. In fact two cases—*Shadwell v. Shadwell*[3] and *Scotson v. Pegg*[4]—are in favour of the validity of the former class of contracts. But both of these cases call for some comment.

The case of *Shadwell v. Shadwell* did not necessarily involve the decision of this point. In that case an uncle promised his nephew, who was engaged to be married, that he would on his nephew's marriage pay him £150 a year. Obviously the nephew, though bound to marry the lady at some time, was not bound to marry her immediately. Relying on his uncle's promise he did what he was not bound to do—he married her immediately. This, as Erle, C.J., pointed out, was an ample consideration.[5] The case of *Scotson v. Pegg* did involve the determination of this point; and though Martin, B., and to some extend Wilde, B., based their judgments on the erroneous view that "any act done whereby the contracting party receives a benefit is a good consideration for a promise by him,"[6] the principle which we are discussing was correctly stated by Wilde, B. "I accede," he said, "to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that, where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing."[7]

[1] Contracts (9th ed.) 200-201.
[2] Below 83-85.
[3] (1860) 9 C.B.N.S. 159.
[4] (1860) 6 H. and N. 295.
[5] "The plaintiff may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss, if the income which had been promised should be withheld; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry," 9 C.B.N.S. at p. 174.
[6] 6 H. and N. at p. 299; Wilde, B., said at p. 300, "but why is there no consideration? It is said because the plaintiffs in delivering the coals, are only performing that which they were already bound to do. But to say that there is no consideration is to say that it is not possible for one man to have an interest in the performance of a contract made by another."
[7] Ibid at pp. 300-301.

Thus the modern doctrine of consideration was settled on lines, which are remarkable for the historical and logical correctness with which they have been deduced from that procedural basis in the action of assumpsit, from which the conception of consideration originated. Whether the resulting law is wholly fit for the needs of this twentieth century is another question, which I shall discuss in the following section.

"Cause" and Consideration[1]

We have seen that the canon law, starting from the basis that faith should be kept, had evolved a theory of contract based upon a generalized conception of the Roman causa; and that this canonist conception of causa has been accepted and applied by the chancellors in the exercise of the jurisdiction which, during the Middle Ages, they were assuming over contract.[2] This fact comes out clearly enough in the Latin version of the Doctor and Student;[3] and that the Doctor and Student correctly represented the facts may be said to have been proved by Barbour's essay on the history of contract in early English equity.[4] I have already described the main characteristics of this conception of causa; and at this point it is only necessary to recall briefly its main characteristics. They may be summed up, says Sir Paul Vinogradoff, under the following heads:[5] "(1) The promise must be intentional; (2) it is subject to be taken back in consequence of a material change of circumstances; (3) it must have a reasonable cause, which may consist either in a material equivalent or in moral considerations; (4) a liberal disposition is to be deemed a sufficient cause in the case of gifts; (5) promises to moral persons, to political learned or religious bodies, are legally valid if they are made for the sake of their moral aims, e.g. for the honour of God, the advancement of learning, assistance of the poor, and the like."

It is obvious that this canonist theory of causa made for an extension of the sphere of the enforceable agreement, and a corresponding restriction of the sphere of the nude pact; for if, as seems probable, causa in the civil law means actionability,[6] the extended meaning given to the term by the canonists necessarily had this effect. In the sixteenth and seventeenth centuries the tendency towards this extension was assisted by two other causes.

[1] On this subject see E. G. Lorenzen, Causa and Consideration in the Law of Contracts, Yale Law Journal xxviii 621; and a paper by F. P. Walton, L.Q.R. xli 306.

[2] Vol. v 294-296. [3] L.Q.R. xxiv 381-384; vol. v. 267.

[4] Ibid 263, 294. [5] L.Q.R. xxiv 382; cp. vol. iii 412; vol. v. 294-295.

[6] "With the Romans an agreement was not actionable unless there was some reason why it should be so. The result is that, in these texts, *causa* means actionability, and does not denote anything else, independent of actionability, which creates that important characteristic," Buckland, Roman Private Law 232.

It was assisted, firstly, by the notion that "the enforceable quality of all agreements was demanded by natural law, and that the non-enforceability of pacts was a specific Roman doctrine which was opposed to natural law";[1] and, secondly, by the mistaken idea that the old Germanic law specially emphasized the duty of keeping faith.[2] These two causes, and especially the second, led in Germany to the total elimination of causa as a necessary condition precedent for the enforceability of contracts.[3] In other countries, however, a causa still continued to be necessary; but it was a causa of the canonist type. It would seem, in fact, that this canonist theory of causa inspired the theory of contract accepted in many continental states in the seventeenth and eighteenth centuries.[4] Thus the necessity for a causa is stated to be necessary by many writers on Roman-Dutch law.[5] It was introduced into the French law by Domat, accepted by Pothier, and, through Pothier, found a place in the code Napoleon.[6] Brissaud points out that the theory was accepted the more easily, because it could be regarded as a development of the older ideas which required something which corresponded to the English quid pro quo.[7]

But the "cause," which was thus adopted into French law and Roman-Dutch law, was, as might be expected from the conditions under which it originated, both elastic and vague. Thus, "the existence of a natural, i.e. moral obligation, or even of a real or supposed duty in point of honour only, may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise."[8] It is not surprising, therefore, that consider-

[1] Yale Law Journal xxviii 631. [2] Ibid.

[3] "In Germany the notion erroneously attributed to the older Germanic law that 'every lawful agreement entered into with the serious intention of being legally binding would directly produce of its own force obligatory effect, without regard to the form in which it was expressed,' ultimately prevailed; which left no room for the requirement of a *causa* as a necessary element for the enforceability of contracts," ibid 632.

[4] Ibid 630-631. [5] Ibid 631. [6] Ibid 632.

[7] "La *cause* pour les anciens jurisconsultes correspond au *quid pro quo* ou a la consideration du droit anglais; ils ont pris pour point de départ les idées romaines sur la *condictio sine causa*, sur les contrats innomés, sur les nullités des stipulations, et de la ont tiré la règle; pas d'obligation sans cause. *Cil n'a mie bele reson de demander*, dit P. de Fontaines, *qui demande por ce que on li convenança, sanz autre reson metre avant*. On accepta plus facilement ce principe qu'il cadrait dans beaucoup de cas avec la théorie plus ancienne de la nécessité de l'execution au moins partielle du contract pour qu'il en resultat une obligation," Brissaud, Droit Français ii 1419-1420.

[8] Pollock, Contracts (5th ed.) App. 692; cp. Jazawickreme v. Amarasuriya [1918] A.C. at p. 875, where the Judicial Committee say, "It may well be that according to English law, as a general rule, an existing moral obligation not enforceable at law does not furnish good consideration for a subsequent express promise: but the Roman Dutch law, by which, in their Lordships view, this case must be governed, is wholly different. According to the latter law it would appear that a promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence, can be enforced at law, the justa causa debendi, sufficient according to the latter system of law, to sustain a promise, being something far wider than that which the English law treats as good consideration for a promise."

able difficulty should have been experienced in making a satisfactory definition of the term.[1] Nor is much light got from the interpretation placed upon the clause of the Code Civil which enacts that, "L'obligation sans cause, ou sur un fausse cause, ou sur une cause illicite, ne peut avoir aucun effet."[2] A contract is said to be without a "cause" if the parties did not intend by their agreement to affect their legal relations, or if the subject matter of the contract had perished before the contract was made. It is said to have a false "cause" if the parties contracted under a mistake as to the existence of certain facts, belief in which induced the making of the contract—e.g. a promise by A to B to pay B a sum of money under the false belief that he owed him the money. It is said to have an illegal cause if the object of the contract is illegal.[3] All this really amounts to is that the parties must have intended by their contract to affect their legal relations, that they must have really consented, and that the object of their contract must be legal.[4] Hence it is not surprising to find that many French writers reject the idea that causa is needed for the validity of a contract. "They regard the requirement of causa . . . as an abstract and metaphysical notion calling for subtle distinctions, and creating confusion instead of serving a useful purpose."[5] The same view seems to be taken by distinguished Roman-Dutch lawyers. Thus Professor Lee calls the requirement of causa "a juristic figment,"[6] and says that it means little more than that "an agreement to be legally enforceable must be entered upon with a serious and deliberate mind." Exactly the same reasoning applies to causa as defined by the Spanish civil code, the Chilean code, and the countries in America which have adopted the provisions of those codes.[7]

Thus the process of the alteration of the Roman causa has proceeded continuously and logically to its inevitable result—the elimination of the necessity for a causa as a condition of the validity of a contract. And, as in Germany the same result had been produced by the belief that the old Germanic law enforced as a contract every lawful agreement intended to be legally binding,[8] it follows that, in most countries outside the sphere of the common law, the maxim *ex nudo pacto non oritur actio* has ceased to be true. "Any pact whatever," says Professor Lee, speaking

[1] "Many attempts have been made to find a general definition of *causa*, but none of them has met with approval. . . . Great difficulty seems to be experienced by the French writers in distinguishing the *causa* of a contract, on the one hand from its object, and on the other hand from motive in general," Yale Law Journal xxviii 632.

[2] Art. 1133. [3] Yale Law Journal xxviii 633.

[4] See Lee, Introduction to Roman Dutch Law 198.

[5] Yale Law Journal xxviii 634, and note 75.

[6] Introduction to Roman Dutch Law 198 n. 2.

[7] Yale Law Journal xxviii 635. [8] Above 43.

of Roman-Dutch law, "is enforceable, provided only that it is freely entered upon by competent persons for an object which is physically possible and legally permissible";[1] and the same description, it would seem, might be given of either the actual state of the law, or the state to which it is approximating, in all civilized countries which are not governed by the common law. The result is a striking illustration of the truth of Lord Denman's dictum that, the doctrine that moral obligation is a sufficient consideration "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."[2]

The adoption by the law of this liberal attitude ensures the carrying out of the lawful intentions of contracting parties; and, if it is right that the law should enforce contracts, there seems no good reason why it should not at the present day adopt this attitude. There seems to be no reason why it should allow itself to be fettered, either by obsolete procedural difficulties, or by obsolete technicalities which have been inherited from other legal systems. But undoubtedly such a system of contract law has its weak points. In the first place, there is the difficulty of proving the contract; and, in the second place, there is the difficulty of proving whether or not the parties really intended by their agreement to affect their legal relations. Both these questions may raise very difficult questions of fact. But these difficulties may be obviated by requiring, as French law requires, all contracts which involve more than a certain sum of money to be in writing;[3] and by requiring, as is done in many countries, that promises to give shall be authenticated by a judge or notary.[4]

Continental systems of law, therefore, by gradually altering, and then in effect dropping, the doctrine of causa, have worked out a theory of contract very different from the English system based on the doctrine of consideration. But it will be clear that, if the eighteenth-century theories of moral obligation, and still more if the theory put forward by Lord Mansfield in *Pillans v. Van Mierop*, had prevailed, the English theory of contract would now be approaching very closely to the continental system. It is worthy of note that, in the case of *Pillans v. Van Mierop*, Wilmot, J., to a large extent, based his judgment on an identification of the civilian causa with the English consideration.[5] As the civilians held that there could be no nudum pactum when the agreement

[1] Op. cit. 197. [2] Eastwood v. Kenyon (1840) 11 Ad. and E. at p. 450.
[3] Yale Law Journal xxviii 642, citing Art. 1341 of the Civil Code; for a similar rule in Scotland see Bell, Principles §§ 63, 67, cited [1918] A.C. at p. 875 n. 2.
[4] Yale Law Journal xxviii 643, citing the codes of France, Germany, and Italy.
[5] (1765) 3 Burr. at pp. 1670, 1671.

was put into writing, because the writing made a causa, so in England writing should supply the place of consideration. But we have seen that this theory was never accepted; and that, in the second quarter of the nineteenth century, the theory that moral obligation was a valid consideration was rejected. Both these lines of development, therefore, were closed.

Instead, a return was made to those sixteenth and seventeenth century cases, in which the doctrine of consideration was being developed from the procedural necessities of the action of assumpsit. Thus the English theory of contract is still bound up with the conditions imposed upon it by the form of action through which contracts, other than specialty contracts, became enforceable.

No doubt the resulting theory of contract has its strong points. "Roughly stated it seems plain and sensible, the court will hold people to their bargains, but will not enforce gratuitous promises unless they are made in solemn form."[1] It is in fact strong where the rival theory is weak. But it may be questioned whether, in its present form, its weaknesses do not outweigh its advantages. Some of its weaknesses have been very clearly pointed out by Markby.[2] A gratuitous promise is not actionable unless it is made in writing under seal; but the court will not enquire into the adequacy of the consideration, and a mere nominal consideration will suffice. Why should not the performance by A of his duty under his contract with B, be a consideration for a promise by C to A? Why should not a promise to keep an offer open for a week, or a promise to release a debt in consideration of part payment, be valid? Why, in fact, should not any promise be binding if the party promising intended to put himself under a legal liability? The requirement of consideration in its present shape prevents the enforcement of many contracts, which ought to be enforced, if the law really wishes to give effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others, if the judges had not used their ingenuity to invent considerations. But the invention of considerations, by reasoning which is both devious and technical, adds to the difficulties of the doctrine.[3] Markby's strictures have recently gained an increasing measure of support. Sir F. Pollock has said that the application of the doctrine "to various unusual but not unknown cases has been made subtle and obscure by excessive dialectic refinement."[4]

[1] Pollock, Genius of the Common Law, 91.

[2] Elements of Law (3rd ed.) 310-317.

[3] "In some cases where it was clear that contractual liability ought to be recognised, they have found great difficulty in recognising it, because they could not find any 'consideration,' although there was ample other indication of intention. They have in most cases managed to get over the difficulty, but by reasoning which is the reverse of satisfactory," Markby, op. cit. 311.

[4] Genius of the Common Law 91.

In a recent case Lord Dunedin said,[1] "I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce." Professor Lorenzen, in an able article in the Yale Law Journal, to which I am much indebted, takes substantially the same view.[2]

In fact, the doctrine of consideration in its present form is something of an anachronism. The substantive law has long ago broken away from the leading strings of the forms of action, and the law of actions has become merely adjective law. But our theory of contract is still governed by a doctrine which is historically developed, with great logical precision, from the procedural requirements of the form of action by which simple contracts were enforced. These procedural requirements were not mere matters of form. They were the conditions precedent for applying the remedy which was the best, and in many cases the only remedy, which the common law possessed for the enforcement of contracts. Thus it happens that it has not been possible to treat the doctrine of consideration as mere form. It has been necessary to treat it as the essential condition for the validity of all simple contracts.

There is, it seems to me, good sense in Lord Mansfield's view that consideration should be treated, not as the sole test of the validity of a simple contract, but simply as a piece of evidence which proves its conclusion. This is in effect the view which he tried to enforce in *Pillans v. Van Mierop*;[3] and though, like some of his other rulings,[4] it was demonstrably not English law, it embodied a true idea of the tendency of legal development. The consequence of adopting this view would be that any lawful agreement into which the parties to it entered with the intention of affecting their legal relations,[5] would, if it could be proved by

[1] Dunlop Pneumatic Tyre Co. v. Selfridge and Co. [1915] A.C. at p. 855; it might however be contended that the refusal to uphold the validity of the contract in this case was on the whole in accordance with public policy, as a contrary decision would have facilitated the operations of a design to keep up prices as against the public; but this does not affect the main argument.

[2] "Subject to certain qualifications relating to form, it should suffice for the formation of contracts that there exist (1) capacity; (2) an intention to contract; and (3) a possible and lawful object," Yale Law Journal xxviii 646.

[3] Above 29-30. [4] Vol. vii 45.

[5] This must of course be a condition precedent in any body of contract law; for a good and recent instance where an agreement was held to be unenforceable on the ground that no such intention existed, see Balfour v. Balfour [1919] 2 K.B. 571; and cp. Rose and Frank Co. v. Crompton and Bros. [1923] 2 K.B. 261, [1925] A.C. at p. 454, where it was held that the agreement of the parties was not enforceable because they had expressly negatived an intention to create any legal obligations; note also that exactly the same principle has been applied by Tomlin, J., to the creation of a trust, In re

adequate evidence, be enforceable. The intention of the parties to enter into a lawful agreement affecting their legal relations would be the main thing. If that was proved the agreement would be enforceable.

We have seen that in Continental states difficulties of proof have made it impossible to adopt an attitude quite so liberal as this;[1] and to introduce any such rule into the law of this country would make a total break with all existing rules of English law. But it is at least arguable that the time has come to make some sort of a change. A legal history is not perhaps the place to make suggestions as to the law of the future. It is concerned with the past. But, if history is to be something more than mere antiquarianism, it should be able to originate suggestions as to the best way in which reforms in the law might be carried out, so as to make it conform with present needs. The doctrine of consideration has, as we have seen, its strong points. Its weakness is that it is inadequate as the sole test of the validity of simple contracts. The true remedy, therefore, is not to scrap it, but to reduce it to a subordinate place in the English theory of contract. This, it seems to me, could be done, and at the same time a great simplification could be made in the English law of contract, if a short Act were passed which, (1) abolished the differences between simple and specialty contracts;[2] (2) repealed § 4 of the statute of Frauds and § 4 of the Sale of Goods Act;[3] and (3) provided that all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into writing and signed by all the parties thereto. By making these changes we should get a body of law which would be easy to apply, and would allow a greatly increased freedom of contract. The need for proof that the parties to the contract intended to affect their legal relations would be satisfied; proof of the existence of the contract would be facilitated; and, at the same time, full effect could be given to the intention of persons who wish to enter into contractual relations.

But it is time to return from these anticipations of the future to the law of the sixteenth and seventeenth centuries.

Falkiner [1924] 1 Ch. 88; in fact in equity this principle has long been recognized, see Lord Walpole v. Lord Oxford [1797] 3 Ves. at p. 419; Maunsell v. Hedges (1854) 4 H.L.C. 1039; Jorden v. Money (1854) 5 H.L.C. 185.

[1] Above 45.

[2] Something like this has already been affected in the law as to the administration of assets by 32, 33 Victoria c 46; Re Samson [1906] 2 Ch. 584.

[3] It might be necessary to reconsider other statutes which impose restrictions of form; the rule that the contracts of corporations must be under seal would not necessarily be affected, but they would cease to be specialty contracts.

§ 2. THE INVALIDITY, ENFORCEMENT, AND DISCHARGE OF CONTRACTS

The growth of rules upon the first of these topics was due, partly to the working out of the consequences of the fact that the essence of contract is agreement, and partly to the necessity of bringing the rules of contract law into line with the law of status and the law of crime and tort. Thus we get the growth of rules as to the effect of mistake, as to the contractual capacity of married women and infants, and as to the effect of illegality of object; and the growth of these and other rules gradually enables the law to draw distinctions between different grades of invalidity—between contracts which are void, contracts which are voidable, and contracts which are unenforceable. But, just as the different rules which make up the doctrine of consideration were gradually developed from the procedural rules which regulated the competence of the action of assumpsit, so some of the rules as to the invalidity of contracts, the greater part of the rules which regulated the conditions under which the parties could enforce their contracts, and the forms and modes of discharge, were gradually built up from the same procedural basis. It is true that some of these rules owed something to the mediæval rules as to covenants and conditions contained in deeds, which, for the most part, related to the land law; and that other doctrines, e.g. the rules as to payment and tender, which first made their appearance in connection with the land law,[1] were adapted to the law of contract. But most of the substantive rules of our modern law were built up from decisions as to the rights of the parties in personal actions, and more especially in actions of assumpsit, brought to enforce contracts; and it is only when these decisions have begun to accumulate, that the substantive rules begin to take their modern shape.

During this period these rules are for the most part only beginning to be developed. In many cases their later development is the work of the eighteenth and nineteenth centuries, and will be related in the succeeding Book of this History. In these cases, therefore, it will only be possible at this point to indicate briefly the origins of some of these rules, under the three heads which I have indicated.

Invalidity

That the absence of consideration made a contract invalid followed, as we have seen, from the procedural requirements of assumpsit. Further causes of invalidity flowed from the nature

[1] Vol. ii 590 and n. 4.

of an agreement, the incapacity of the parties, illegality of object, impossibility, the alteration of a contract under seal, and the effect of statutory provisions. With these causes of invalidity I shall deal in the first place. Secondly, I shall deal with one of the results of these causes of invalidity—the elucidation of the distinction between void, voidable, and unenforceable contracts. Thirdly, I shall say something of the effects of fraud and misrepresentation, and explain why at this period these topics have not assumed the place which they will occupy in our modern law of contract.

(1) Causes of invalidity.

Causes arising from the nature of an agreement.

We have seen that the contract under seal was the only purely consensual contract known to the mediæval common law.[1] It is not surprising, therefore, to find that the early authorities on contracts invalid by reason of circumstances vitiating consent are all concerned with these contracts under seal. As early as Edward I.'s reign Fleta stated that a deed executed under a mistake as to its contents and without negligence was not binding.[2] But we have seen that the mediæval common law had not acquired a doctrine of negligence;[3] and so, in the Year Books, Fleta's rule was stated in the following form: if an unlearned man, to whom the provisions of a deed had been wrongly read, executed it under a mistake as to its contents, he could say that it was not his deed.[4] The principle of these cases was summed up by Coke in *Thoroughgood's Case*[5] (1584), where it was held that if an illiterate man was induced, either by a party to the deed or by a stranger, to deliver as his deed a document which contained provisions quite different from those which he intended, the deed was void. Clearly this decision depends at bottom on the principle that the party so deceived has never consented. The fact that the person deceived was illiterate is really immaterial, as was seen by some of the judges[6] before *Thoroughgood's Case* was decided, provided, as Fleta in the thirteenth century,[7] and as the later cases point out,[8]

[1] Vol. iii 420.

[2] "Si autem vocatus dicat quod carta sibi nocere non debeat . . . quia per dolum advenit ut si cartam de feoffamento sigillatam (*qu.* sigillavit or sigillaverit) cum scriptum de termino annorum sigillare crediderit, vel ut si carta fieri debuit ad vitam, illam fecit fieri in feodo et hujusmodi, dum tamen nihil sit quod imperitiæ vel negligentiæ suæ possit imputari," Fleta, 6. 33. 2, cited Pollock, Contracts (9th ed.) 502 n. (*f*).

[3] Vol. iii 375. [4] Y.BB. 30 Ed. III. 31b; 9 Hy. VI. Hil. pl. 8 *per* Paston, J.

[5] 2 Co. Rep. 9a; cp. Pigot's Case (1615) 11 Co. Rep. at ff. 27b, 28a.

[6] "Nota que fuit dit per Frowike et Kingsmill que lou jeo desire un home que il voit moy enfeffer dun acre del terre en Dale, et il moy command de faire un fait dun acre del terre ove letter d'attorney, et jeo face le fait de deux acres, et lie et declare le fait a luy forsque dun acre, et il enseale le fait, cest fait est merement voide lequel le feoffor soit letter au nient letter," Anon. (1506) Keil. 70 pl. 6.

[7] Above n. 2.

[8] Foster v. Mackinnon (1869) L.R. 4 C.P. at p. 712.

there has been no negligence. It was inevitable that, as the idea that the essence of contract is consent became more distinctly realized, the principle should be applied to all kinds of contracts. In 1869 it was applied to a case where a man was induced to indorse a bill of exchange by the fraudulent representation of the acceptor that he was signing a guarantee;[1] and other modern cases afford illustrations of different varieties of this fundamental error or common mistake, which, because it excludes consent, prevents the conclusion of any contract.[2]

Similarly, there was authority in the Year Books that an agreement induced by threats or violence could be avoided,[3] because in such a case consent was not freely given.[4] "If a stranger menace A to make a deed to B, A shall avoid the deed which he made by such threats as well as if B himself had threatened him."[5] This was a slight advance on some of the earlier authorities, which had refused to pay any attention to duress by a stranger;[6] but the common law still continued to take so narrow a view of what constituted duress[7] that there was abundant need for the creation and elaboration by equity of a doctrine of undue influence as a supplementary cause of invalidity. It was, however, very early recognized that the effect of duress was different from the effect of a common mistake. Inasmuch as consent had been given, though not freely given, the effect was to render the deed not void but voidable.[8]

Causes arising from the incapacity of the parties.

That a married woman's contract was, with very few exceptions, absolutely void, was a principle which had been clearly ascertained in the Middle Ages.[9] On the other hand, it was reasonably clear that an infant's contract, other than a contract for necessaries, was voidable at his option;[10] and it was settled early in the seventeenth

[1] Foster v. Mackinnon L.R. 4 C.P. 704.

[2] See Anson, Contracts (12th ed.) 149-159.

[3] Y.BB. 1 Hy. VII. Pasch. pl. 2 (p. 15) *per* Keble *arg.*; 14 Hy. VIII. Pasch. pl. 7 (p. 28) *per* Pollard, J.

[4] Y.B. 21 Ed. IV. Mich. pl. 4 (p. 13), and Pasch. pl. 22 *per* Collow *arg.*

[5] Thoroughgood's Case (1584) 2 Co. Rep. at f. 9b.

[6] "Le defendant en dette plede que il fist l'obligacion al plaintif per duresse denprisonment dun estrange, et demanda judgement si accion. Et Iopinion de Rede et auters que ceo nest plea sans faire obligee partie a cest duresse," Anon. (1509) Keil. 154 pl. 3; though it was admitted that, "dures per estranger per procurement del partie que avera benefit est bon cause d'avoider," Rolle, Ab. *Dures* C. 1, citing Y.B. 43 Ed. III. Hil. pl. 15.

[7] See Huscombe v. Standing (1608) Cro. Jac. 187 where it was held that if a bond be obtained from A and B, B being A's surety, by duress against A, B could not plead the duress in discharge of the bond.

[8] Y.BB. cited n. 3; Whelpdale's Case (1605) 5 Co. Rep. at f. 119a; Dive v. Manningham (1551) Plowden at p. 66 cited below 65-66.

[9] Vol. iii 528.

[10] Y.B. 1 Hy. VII. Pasch. pl. 2 (p. 15) where the infant's and the married woman's contracts are contrasted from this point of view; Whelpdale's Case (1605) 5 Co. Rep. at f. 119a; Pollock, Contracts (9th ed.) 59-60, 74; vol. iii 518-519.

century that, if an infant took a lease of property, he was liable for the rent, if he did not repudiate it during his infancy.[1] Moreover, the court was careful to safeguard the infant's liability for necessaries. A bond for the payment of money lent, though it was for the purchase of necessaries;[2] and a contract to buy goods "to maintain his trade though he gain thereby his living" did not bind him.[3] Whether or not the infant's liability was truly contractual, so that he was liable to pay the contract price, or whether it was rather quasi-contractual, so that he was only liable to pay a reasonable price, was not as yet clearly ascertained. We have seen that in the Middle Ages there is some authority for the proposition that, the action of debt lay against him, and if this action lay it could be brought only for the contract price.[4] It is clear, too, that for the rent reserved on a lease made during infancy he could be sued by action of debt,[5] for otherwise he could not have been sued at all.[6] But in many cases where he was sued for necessaries the form of the action was assumpsit on a quantum meruit;[7] and in this action the plaintiff could obviously recover only a reasonable price. Thus the form of the action usually employed gave rise to the modern idea, to which effect is given by the Sale of Goods Act,[8] that his liability for necessaries is rather quasi-contractual than contractual.[9]

The treatment by the law of the contracts of drunken persons or lunatics was for some time uncertain.[10] Coke, speaking of dispositions of their property made by them, laid it down that the lunatic and idiot, and a fortiori the drunkard whose disability was his own fault, could not be allowed to avoid them;[11] and presumably he would have applied the same principles to their contracts.[12]

[1] Ketsey's Case (1614) Cro. Jac. 320.

[2] "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physick, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing, with a penalty for the payment of any of these, that obligation shall not bind him," Co. Litt. 172a.

[3] Whittingham v. Hill (1619) Cro. Jac. 494.

[4] Vol. iii 519 n. 5; this was assumed to be good law in Makarell v. Bachelor (1598) Cro. Eliza. 583.

[5] Ketsey's Case (1614) Cro. Jac. 320. [6] Vol. vii 263, 272.

[7] See e.g. Ive v. Chester (1620) Cro. Jac. 560; Rainsford v. Fenwick (1670) Carter 215.

[8] 56, 57 Victoria c. 71 § 2.

[9] Nash v. Inman [1908] 2 K.B. at pp. 8-9 *per* Fletcher-Moulton, L.J.

[10] On this topic see generally Pollock, Contracts (9th ed.) 96-101.

[11] "As for a drunkard, who is voluntarius dæmon, he hath (as hath been said) no privilege thereby. . . . And if an idiot make a feoffment in fee, he shall in pleading never avoid it by saying that he was an idiot at the time of his feoffment," Co. Litt. 247a.

[12] "Every deed feoffment or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall be in any plea to be pleaded by him, received by the law to stultify himself, and disable his own person," Beverley's Case (1603) 4 Co. Rep. at f. 124a.

But it is doubtful if this was ever really accepted as law. It was certainly not the law of Bracton's day, who on this point followed Roman law;[1] and Fitzherbert expressly dissents from it, and maintains that the dealings by a lunatic with his property were, like the dealings of an infant, voidable.[2] In the eighteenth century it was thought that, if the lunacy or drunkenness was so complete that the lunatic or drunkard was incapable of consent, the contract was void.[3] But there are many cases in which a man is a lunatic or drunk, but not completely incapacitated; and it may well be that his state is not immediately obvious to the other contracting party. It would be hard to rule that in such cases the contract was wholly void; and so in 1848 the principle which had been for some time acted on by the court of Chancery[4] was adopted; and it was laid down that a contract entered into by a lunatic or drunken person makes the contract voidable at his option, provided that his state was known to the other contracting party.[5]

Illegality of object.

That an agreement to do something contrary to law is void has necessarily been recognized from the earliest times. "If," it was said in *Dive v. Manningham*,[6] "the obligation was to save one harmless if he killed such an one or did such a trespass, the obligation should be void. So shall it be here, for the obligation is to save the sheriff harmless for doing a *tort* and a thing contrary to law, in which case the obligation is void by the course of the common law". There are many cases of this period which lay down the principle that, if the whole consideration for a contract is illegal, the contract is void;[7] and this is still the law, for the illegality of the consideration vitiates the whole.[8] In certain of these cases, however, we can see the origin of distinctions which, to some extent, limit the generality of this principle. Two of these distinctions are well established in our modern law, and the third is obsolete.

(i) If some of the stipulations in a contract are legal and some are illegal, and it is possible to sever the legal from the illegal, the court will make this severance, and enforce those which are legal.

[1] "Furiosus autem stipulari non potest, nec aliquod negotium agere, quia non intelligit quid agit," f. 100a.

[2] F.N.B. 202 D.

[3] Yates v. Boen (1739) 2 Str. 1104; Pitt v. Smith (1811) 3 Camp. 33; Pollock, Contracts 98-100.

[4] Ibid 98 n. (g).

[5] Molton v. Camroux (1848) 2 Ex. 487, 4 Ex. 17.

[6] (1551) Plowden at p. 64.

[7] Bridge v. Cage (1606) Cro. Jac. 103; Mackeller v. Todderick (1634) Cro. Car. 337; Rosindale's Case cited in Hussey v. Jacob (1697) 1 Ld. Raym. at p. 89.

[8] Pollock, Contracts (9th ed.) 443-444.

"It is unanimously agreed in 14 H. 8 25, 26 that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void ab initio, and the others stand good."[1] (ii) It was settled in 1623 that if one man makes a promise to another, in consideration of the performance of a service by that other, which is not manifestly unlawful, and is not known to the person who performs it to be unlawful, the fact that it is unlawful will be no answer to an action on the promise to pay for it.[2] "If I request one man to enter into another man's ground, and in my name drive out the beasts and impound them, and promise to save him harmless, this is a good assumpsit, and yet the act is tortious; but . . . where the act appears in itself to be unlawful, then it is otherwise, as if I request you to beat another, and promise to save you harmless, this assumpsit is not good."[3] (iii) It was at one time thought that the operation of a statute in making a contract void was wider than the operation of the common law. In 1669 Twisden, J., said[4] that he had heard Hobart say that "the statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is and preserves the rest"; and there was some authority in favour of this view.[5] But it was repudiated by Wilmot, C.J., in *Collins v. Blantern*;[6] and it is long ago settled that no such principle is law. The extent of the operation of a statute depends entirely upon its wording.[7]

Historically, by far the most interesting branch of this cause of the invalidity of contracts is that which is compendiously grouped under the head of "public policy." At the present day a number of contracts are held to be void for illegality of object, because they aim at effecting certain results which it is the policy of the law to prevent.[8]

It has very often been said, and rightly said, that "public policy" "is a vague and unsatisfactory term and calculated to lead to uncertainty and error when applied to the decision of legal rights";[9] for in its ordinary sense it means little more than

[1] Pigot's Case (1615) 11 Co. Rep. at f. 27b; cp. Pickering v. Ilfracombe Railway Co. (1868) L.R. 3 C.P. at p. 250.
[2] Battersey's Case (1623) Winch. 48.
[3] At p. 49.
[4] Maleverer v. Redshaw 1 Mod. 35.
[5] "A statute is a strict law; but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand," Norton v. Simmes (1615) Hob. at p. 14.
[6] "I think there is no difference between things made void by Act of Parliament, and things void by the common law," (1767) 2 Wils. at p. 351.
[7] Pickering v. Ilfracombe Railway Co. (1868) L.R. 3 C.P. at p. 250.
[8] See Anson, Contracts (12th ed.) 221-230.
[9] Egerton v. Brownlow (1853) 4 H.L.C. at p. 123 *per* Parke, B.; cp. the similar but less cautious statement of Lord Halsbury in Janson v. Driefontein Mines Ltd. [1902] A.C. at p. 401.

political expediency, which is a matter for the consideration of the statesman and not of the judge. But Parke, B., who used these words, admitted that some decisions have been founded "upon the prevailing and just opinions of the public good; for instance the illegality of covenants in restraint of marriage or trade";[1] and he pointed out that "public policy," if the term was used to signify the policy of the law, might be "a just ground for judicial decision," for, "it amounts to no more than that a contract or condition is illegal which is against the principles of the established law."[2] In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles; and, if it is to maintain these principles, it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.[3] Only thus can it maintain the essential continuity of its principles. At the same time, because this principle of public policy gives to a legal system the power of preserving in this way the continuity of its principles, it also gives it the power of developing its principles so as to keep them in touch with the needs and ideas of the age. It thus helps to secure, not only continuity, but also a certain elasticity in the growth of the law. The decision, for instance, in the case of *Bowman v. The Secular Society*[4] would have been as unintelligible to lawyers of an earlier age, as their tolerance of traffic in offices of trust[5] is to us.

In fact, some such principle is an almost necessary accompaniment of our system of case law, and gives it much of its effectiveness; for it makes it possible for the judges to preserve the continuity of legal principles and at the same time to keep the

[1] Egerton v. Brownlow at p. 123.

[2] "The term 'public policy' may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well decided cases, or the principle of decided cases, and void by analogy to them, and within the same principles, the objection ought to prevail," ibid at pp. 123-124.

[3] "The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion," Evanturel v. Evanturel (1874) L.R. 6 P.C. at p. 29; "rules which rest upon the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification. Circumstances may change and make a commercial practice expedient which formerly was mischievous to commerce," Maxim Nordenfelt Co. v. Nordenfelt [1893] 1 Ch. at p. 661 *per* Bowen, L.J.; these dicta were approved by Vaughan Williams, L.J., in Wilson v. Carnley [1908] 1 K.B. at pp. 737-738—"I cannot," he said, "in the least acquiesce in the suggestion that as habits change and time goes on, we may not find new instances of contracts which cannot be enforced on the ground that they are contrary to public morality."

[4] [1917] A.C. 406; below 416.

[5] Vol. i 250-251.

law in touch with the facts and needs of daily life.[1] No doubt, in its application to the law of contract, we must remember the epigram of Jessel, M.R., to the effect that not lightly to interfere with freedom of contract is paramount public policy.[2] But that was said in the days when freedom of contract was supposed to be the panacea for all the ills of the body politic. It represented a passing phase of political thought; and it would now command as much and as little assent as it would have commanded in the sixteenth and seventeenth centuries. Historically, complete freedom of contract was never regarded as "paramount public policy." If the common law had ever taken this view it would, in effect, have abandoned its valuable concept of public policy, and have thereby lost much of its power of shaping the legal and political ideas of the many races which acknowledge its sway; for, as Bowen, L.J., truly said,[3] "the interests of contracting parties are not necessarily the same as the interests of the commonwealth."

Because the common law has, largely through its system of case law, kept in touch with the needs of the day, it is a little difficult to say exactly to what kinds of transaction this concept of public policy was first applied. In the sphere of contract law it has been said that it was first applied to discourage wagering contracts.[4] In truth, it is much older than this. Long before these contracts became enforceable through the development of assumpsit, it had been applied to invalidate transactions which ran counter to the morality of the day. In fact, one of the oldest and one of the most continuous of its applications in the sphere of contract law is its application to contracts in restraint of trade.[5] We can see from the bulk of the commercial legislation enacted at all periods in the history of English law,[6] that all matters connected with trade have always possessed great legal and political importance; and that the law relating to them has reflected very accurately prevailing political and economic ideas.[7] It is not, therefore, surprising to find that the law as to contracts in restraint of trade has, more than any other class of contracts, been moulded by changing ideas of public policy.

In the Middle Ages, when the object of the Legislature was

[1] See Rodriguez v. Speyer Bros. [1919] A.C. at pp. 79-81 *per* Lord Haldane.

[2] "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider in that you are not lightly to interfere with this freedom of contract," Printing Co. v. Sampson (1875) 19 Eq. at p. 465.

[3] Maxim Nordenfelt Co. v. Nordenfelt [1893] 1 Ch. at p. 661.

[4] Pollock, Contracts (9th ed.) 380.

[5] See Anson, Contracts (12th ed.) 221 (*u*).

[6] Vol. ii 466-473; vol. iv 314-407; vol. vi 313-360.

[7] The history of the usury laws, below 100-112, is a good illustration.

the attainment of ideally fair conditions of commerce and industry, when, with this object in view, their conditions were minutely regulated by statutes and local by-laws,[1] any attempt to disturb the working of these regulations of contract was regarded almost as a crime.[2] Such an attempt was akin to the operations of the iniquitous forestaller and regrator; and there is little doubt that all contracts in restraint of trade were, on these principles, regarded as wholly illegal. But we have seen that, during the sixteenth century, political and moral ideas were changing as rapidly as the conditions of trade; and that these changes necessarily produced many changes in men's economic ideas.[3] The object aimed at was not so much the attainment of ideally fair conditions as the increase in national power. Traders must be encouraged to found new industries, and, with that object in view, new associations and companies must be founded, in order that the requisite capital might be provided. Freer play must be left to the initiative of the individual trader or body of traders, and therefore to their power to make what contracts they pleased. Trade was not, as we have seen, left free in the modern sense.[4] As in the Middle Ages, it was still only free within the limits not covered by regulation; and, though those regulations now left a wider scope to the activities of the trader, anything which infringed those regulations was still regarded as the infringement of the freedom of trade as defined by law. So that, just as a monopoly which infringed the freedom of trade as thus understood was illegal,[5] so a contract restraining a man from trading must be for the same reason held to be void.

Throughout the sixteenth century this was the view taken by the courts. They therefore held to be void all contracts in restraint of trade. Thus, in 1578, a covenant by an apprentice with his master not to exercise his trade in Nottingham for four years,[6] and in 1587 a covenant not to exercise the trade of blacksmith in Southmins in Surrey,[7] were held to be void. In 1602, in the case of *Colgate v. Bacheler*,[8] it was resolved that it was illegal "to prohibit or restrain any to use a lawful trade at any time or at any place; for as well as he may restrain him for one time or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth"; and Anderson, C.J., remarked that a man "might as well bind

[1] Vol. ii 468-469.
[2] Y.B. 2 Hy. V. Pasch. pl. 26 *per* Hull, J., cited vol. ii 468 n. 3.
[3] Vol. iv 316-319, 324-326.
[4] Ibid 350.
[5] Ibid 350-353.
[6] Anon. Moore 115
[7] Anon. ibid 242; S.C. 2 Leo. 210.
[8] Cro. Eliza. 872; S.C. Owen 143.

himself that he would not go to church."[1] This remark shows that, as in the Middle Ages, these contracts were still considered to be illegal, because they attempted to vary the conditions of trade as settled by law; and in all of them the dictum of Hull in Henry V.'s Year Book[2] was cited. The mediæval point of view was still predominant.

But, as more scope was given to the individual, as he therefore became more free to make what contracts he pleased, it began to be seen that this rigid rule worked injustice. The sale of a business would be impossible, if the vendor could at once set up a shop next door, and begin to compete with a purchaser; and it was felt to be hard that an apprentice could, as soon as he had served his time, use all his former master's trade secrets to compete with him. Therefore contracts imposing a limited restraint of trade were in fact made. Consequently, the courts found it necessary to revise their attitude to them. The case of *Rogers v. Parry* in 1614[3] marks the beginning of this change. In that case the defendant had, in consideration of a sum of money paid by the plaintiff, promised the plaintiff that he would not carry on the trade of a joiner in a certain shop, during the term of twenty-one years for which he held the shop. Coke, C.J., pointed out that this was not a contract in general restraint of trade; and the whole court agreed that, "as this case here is for a time certain and in a place certain a man may well be bound and restrained from using of his trade"; and this view of the law was upheld in the court of Exchequer Chamber in 1621 in the case of *Broad v. Jollyfe*,[4] and given effect to in several contemporary and subsequent cases.[5]

But it is clear that these cases gave only a very carefully guarded liberty to make these contracts. They only established an exception to the general rule that these contracts were prima facie illegal. It was thus necessary to define the conditions under which they would be held to be valid. In the first place, it was held that they must be limited as to space; and they were at first very narrowly limited. Thus, in 1668, the courts were inclined to hold that a covenant not to set up a trade in Cirencester was void.[6] In the second place, it was held that a restraint un-

[1] Owen 143; cp. the Case of the Tailors of Ipswich (1615) 11 Co. Rep. at f. 54a, where an ordinance restricting apprentices in their trade was held void as contrary to the Act of 5 Elizabeth c. 4 (see vol. iv 380 seqq.), and as contrary to the policy of the common law.

[2] Cited vol. ii 468 n. 3. [3] 2 Bulstr. 136. [4] Cro. Jac. 596.

[5] Jelliet v. Broad (1621) Noy 98; Bragge v. Stanner (1622) Palmer 172; Prugnell v. Gosse (1649) Aleyn 67; Hunlocke v. Blacklowe (1670) 2 Wms. Saunders 156.

[6] Ferby v. Arrosmyth 2 Keble 377.

limited as to space, though limited as to time, was bad.[1] In the third place, no restraint could be justified which was not reasonable as between the parties. A limited restraint imposed on the purchase and sale of a business,[2] or by a master on his apprentice,[3] might be justified. But there must not only be a sufficient consideration, as in the case of all other contracts, but a consideration which was of such a sort that it proved the reasonableness of the transaction.[4] Thus, in 1685, a bond taken by the Company of Tailors at Exeter from a tailor not to use his trade in Exeter;[5] and in 1689 a bond not to buy certain goods of any but the plaintiff, and not to buy more than a certain quantity,[6] were held to be void. In so far as these two cases decided that the court could not enforce such a contract unless it was reasonable as between the parties, they were no doubt rightly decided. But some of the dicta went further. Thus, in the first of them the analogy of the infant's bond for necessaries was used, and it was held that a bond not to exercise a trade was in no circumstances good, though a simple contract to the same effect might be good.[7]

We have seen that after the Revolution there was a tendency to remove many of the old restrictions to which trade had formerly been subject. The Whigs were backed by the merchants; and the mercantile opinion which favoured freedom of trade got more weight in the Legislature.[8] It was inevitable that this changed point of view should react upon the courts, and that, in the light of it, they should revise their views as to the validity af contracts in restraint of trade. In fact, at the beginning of the eighteenth century, a revision of the law on this topic was as necessary as it

[1] See Barrow v. Wood (1643) March 191, where serjeant Evers admitted that, "if a man binds himself not to use his trade for two years, or if a husbandman be bound he shall not plough his land, these are conditions against law, because where the restraint is total . . . the condition is not good"; cp. the Case of the Tailors of Ipswich (1615) 11 Co. Rep. 53a.

[2] "And this was agreed by Rolle for law, who took these differences, that where a bond or promise restrains the exercise of a trade, although it be as to a particular place only, yet if it be upon no consideration, the bond etc., is void: but if there were a consideration for the restraint, as if A assign a shop to B . . . there in respect of the apparent prejudice which may accrue to B if A should continue the

Ferby v. Arrosmyth (1668) 2 Keble 377.

[4] Above n. 2; cp. Jelliet v. Broad (1621) Noy 98 where emphasis was laid on the adequacy of the consideration; and Clerk v. Taylors of Exeter (1685) 3 Lev. at p. 242.

[5] Clerk v. Taylors of Exeter 3 Lev. 241.

[6] Thompson v. Harvey 1 Shower 2.

[7] Clerk v. Taylors of Exeter (1685) 3 Lev. at pp. 242-243; and the same rule was laid down by Reeve, J., in Barrow v. Wood (1643) March at p. 193; but opinions were somewhat conflicting, see Rolle's opinion cited above n. 2, and Dolben's dissenting opinion in Thompson v. Harvey (1689) 1 Shower at p. 3.

[8] Vol. vi 333-334.

had become at the end of the nineteenth century. The scattered cases, which had begun to modify the older rigid principle, contained the germs of the newer law; but they were not wholly consistent, and some laid down law which was not wholly reasonable. It was obvious that they all required to be reviewed in the light of the new economic ideas which were beginning to prevail. This review of the cases and restatement of the law was made in 1711 by Parker, C.J. (the future Lord Macclesfield), whose judgment in the case of *Mitchel v. Reynolds*[1] is the true beginning of the modern law on this subject.

The facts in the case of *Mitchel v. Reynolds* were as follows: The defendant had assigned to the plaintiff the lease of a bakehouse in the parish of St. Andrews, Holborn, for the term of five years, and had given a bond promising to pay a penalty if, during that term, he exercised the trade of a baker in that parish. The question was whether this bond was valid. Parker, C.J., pointed out that restraints on trade might be either involuntary, that is imposed by law or custom, or voluntary, that is imposed by the agreement of the parties.[2] The first sort were restraints imposed by grants, charters, customs, or bye-laws; and of these some, e.g. a grant which created a monopoly, were bad, while others, e.g. a bye-law for the better regulation of trade, were good.[3] All general restraints imposed by the agreement of the parties, and all restraints whether general or particular made without consideration, were void.[4] But particular restraints, if imposed upon a good and adequate consideration, "so as to make it a proper and useful contract"[5] were good. In order to prove this thesis, Parker, C.J., made a novel and somewhat unhistorical use of the analogy of those older restraints on trade imposed by the law, which were then beginning to be regarded as obsolete.[6] He used it to show that the law had never indiscriminately condemned all restraints on trade, pointing out that, as involuntary restraints had, from time immemorial, been imposed by custom, they must have had a lawful beginning.[7] But these involuntary restraints must always have been reasonable, so that even a crown grant which attempted to impose an unreasonable restraint, would be void.[8] No doubt the reasons which induced the courts to hold unreasonable involuntary

[1] 1 P. Wms. 181. [2] Ibid at p. 183. [3] Ibid at pp. 183-185.
[4] Ibid at p. 185. [5] Ibid at p. 186. [6] Vol. vi 337.
[7] "Thirdly, that since these restraints may be by custom, and custom must have a lawful foundation, therefore the thing is not absolutely and in itself unlawful. Fourthly, that it is lawful upon good consideration for a man to part with his trade. Fifthly, that since actions on the case are actions injuriarum, it has been always held that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously," ibid at p. 187.
[8] Ibid at p. 183.

restraints did not apply to voluntary restraints;[1] but, as both alike were restraints on trade, this difference did not prevent the law from treating reasonable voluntary restraints in the same way as reasonable involuntary restraints. That the restraints should be reasonable was the important matter. What then should be the test of reasonableness? The law should look to see whether the restraint imposed, either a restriction on the party which would prevent him from earning his livelihood, or a hardship on the public by depriving it of the abilities of one of its members.[2] More especially should it look to see that these contracts do not facilitate the operations of those corporations, "who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible";[3] or the operations of "masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves."[4] If none of these evils appeared to be likely to result from a contract stipulating for a particular restraint, it was reasonable and valid,[5] even though the contract took the form of a bond.[6] But the onus of proving that it has satisfied these tests of reasonableness is always on the party seeking to enforce it, and, if he cannot satisfy that onus, it is void; for the law always presumes these contracts to be void.[7]

This case stands at the parting of the ways. In the play which it makes with the older regulations, depending on crown grants customs and bye-laws, we can see traces of methods of controlling trade which had fast been weakening ever since the Revolution; and, in the manner which it uses the analogy afforded by the control, which the common law exercised over the reasonableness of these regulations, we can see a skilful adaptation of the principles underlying this control, to those new voluntary restraints which the greater freedom accorded to trade was making increasingly common. The control, which formerly was applied to the older involuntary restraints, must be adapted to the more modern voluntary restraints. And some adaptation was necessary, both because the control of these voluntary restraints could not be justified on quite the same grounds, and because new tests of reasonableness must be supplied. It is in the definition of these new tests that this case lays down substantially modern law. No

[1] "The true reason of the disallowance of these (voluntary restraints) in any case is never drawn from *Magna Charta*; for a man may voluntarily and by his own act put himself out of his possession of his freehold. . . . Neither is it a reason against them that they are contrary to the liberty of the subject; for a man may, by his own consent, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands," 1 P. Wms. at pp. 188-189.

[2] Ibid at p. 190. [3] Ibid. [4] Ibid.

[5] Ibid at pp. 191, 197. [6] Ibid at pp. 194-196. [7] Ibid at pp. 101-102.

doubt changes in economic conditions have rendered some of the dicta contained therein obsolete. No doubt certain expressions are misleading and have misled—the use throughout the case of the term consideration, both in its technical sense, and in a non-technical sense to mean a reasonable ground for making a contract,[1] was the foundation of erroneous ideas as to the part which consideration played in relation to these contracts.[2] No doubt the leading principles there laid down were somewhat obscured by the detailed rules, and fine distinctions, which were elaborated by the long line of cases which followed it.[3] But, when all deductions have been made, there is no doubt that we see in this case the same principles which were restated, and applied to a new economic environment, in *Nordenfelt v. the Maxim Nordenfelt Co.*,[4] in *Mason v. the Provident Clothing Co.*,[5] and in *Morris v. Saxelby*.[6] All these decisions follow this case in recognizing that contracts in restraint of trade are prima facie void. The first recognizes pre-eminently the principle that they must not be injurious to the public. The other two that they must not be oppressive to the party restrained. In fact, the two main evils pointed out by Parker, C.J., as likely to result if these contracts were not carefully controlled—the danger of allowing a great corporation to get too exclusive a control of trade, and the danger that masters would oppress their apprentices—precisely correspond to the two sets of circumstances in which these contracts are usually made. They are usually made, either on the purchase and sale of a business, or on the engagement of an employee; and, as the modern cases show, it is the first of these dangers which must be specially guarded against in the former, and the second in the latter type of case.

Impossibility.

The parties to a contract may either (i) promise something absolutely impossible in itself or made impossible by law; or (ii) something not inherently impossible, but impossible in fact; or

[1] See especially 1 P. Wms. at pp. 192-193 where consideration is used (1) in the sense of evidence of reasonableness, and (2) is compared with the consideration in a covenant to stand seised.

[2] "It was laid down in *Mitchel v. Reynolds* that the court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of the consideration may enter into the question of the reasonableness of the contract," Nordenfelt v. Maxim Nordenfelt Co. [1894] A.C. at p. 565 *per* Lord Macnaghten; see 1 S.L.C. (10th ed.) 404-405, and Hitchcock v. Coker (1837) 6 A. and E. at pp. 456-457 *per* Tindal, C.J.

[3] A good account will be found in the note to this case in 1 S.L.C. (10th ed.) 402 seqq.; and in the judgments in Nordenfelt v. Maxim Nordenfelt Co. [1894] A.C. 535, especially Lord Macnaghten's criticism of the views of Bowen, L.J. at pp. 562 seqq.

[4] [1894] A.C. 535. [5] [1913] A.C. 724. [6] [1916] 1 A.C. 688.

(iii) the object of the contract may be made impossible by the act of one of the parties to the contract. The last named case is really one of the ways in which a contract may be discharged by breach, and I shall speak of it under that head.[1]

(i) As to promises which are absolutely impossible in themselves there is not much authority.[2] Probably a contract, in which such a stipulation was the consideration for a promise, would be held to be void because there was in fact no real consideration.[3] But such promises have sometimes come before the courts in the shape of conditions in bonds. A promises B to pay a sum certain, with a condition that, if a certain event happens, the promise to pay is to be void. What is intended is to secure the happening of the event; and "when the condition is illegal our courts have found no difficulty in considering the bond as what in truth it is, an agreement to do the illegal act. But in the case of impossibility the law has stuck at the merely formal view of a bond as a contract to pay the penal sum, subject to be avoided by the performance of the condition; accordingly, if the condition is impossible either in itself or in law, the obligation remains absolute."[4] On the other hand, if the condition is subsequently made impossible of performance by the act of God, or if one of several conditions is thus made impossible, the bond becomes void.[5]

If a stipulation in a contract is legally impossible of performance it is tantamount to saying that its performance is illegal, and therefore void. Thus, where the bailiff of J.S. promised the defendant that he would release a debt due from the defendant to J.S., if the defendant would repair his barge, the contract was held to be void because the consideration was legally impossible, "for the plaintiff cannot discharge a debt due to his master."[6]

(ii) The mere fact that a promise is impossible in fact is no ground of invalidity, if an unconditional promise has been made.[7]

[1] Below 78. [2] See Pollock, Contracts (9th ed.) 309.

[3] Anson, Contracts (12th ed.) 357.

[4] Pollock, Contracts (9th ed.) 335; Co. Litt. 206b (there cited) says, "If a man be bound in an obligation etc. with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good."

[5] "Where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part: for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and he hath election to perform the one or the other for the saving of the penalty of his bond: and when one part is become impossible by the act of God, it is as beneficial for him as if that part of the disjunctive, which is become impossible, had been only the condition of the bond," Laughter's Case (1595) 5 Co. Rep. at f. 22a; Pollock, Contracts 335.

[6] Harvey v. Gibbons (1676) 2 Lev. 161.

[7] "En tiels cases ou nul defaut est en le obligee en le performance del condicion, en ceux cases si la condicion ne soit performe, l'obligor forfeitera, come en case si

This principle is well illustrated by the case of *Paradine v. Jane.*[1] In that case the plaintiff sued the defendant for three years arrears of rent. The defendant pleaded that Prince Rupert had kept him out of possession from July, 1643, till March, 1646, so that he could not take the profits. It was held that this plea was no answer to the action. "And this difference was taken, that when the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, then the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused. . . . But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This is still the law if the contract is in terms unconditional. And at this period the courts were the more ready to apply it to all contracts, because, as we shall see, they were inclined to hold that where the two parties to a contract made mutual promises, those promises were independent of each other, so that each could sue the other for the breach of the other's promises, whether or not the party suing had performed his part.[2] We shall see that later the tendency was the other way, and the courts were more inclined to hold that such promises were dependent the one upon the other, so that non-performance by one party was an excuse for non-performance by the other.[3] But this enabled more attention to be paid to the underlying intention of the parties when they entered into the contract, and so made it possible to hold that they were excused by the happening of events which neither had contemplated at that date.[4] This has led to numerous exceptions which have, to a large extent, eaten up the original rule. The original rule is now only applicable in cases where the parties have used words which show that they intended their promises to be absolute.

The alteration of a contract under seal.

It was laid down in *Pigot's Case*[5] that, if a deed is altered in a material point, either by a party to it or by a stranger, the deed becomes void. If it is altered in an immaterial point by a party to it, it likewise becomes void; but if it is altered in an

home soit oblige a un auter en xxli, sur condicion *quod pluvia debet pluere cras*, et sinon donques l'obligation sera bon, en cel cas *si pluvia non pluit cras*, le obligor forfeitera son obligation et uncore nul defaut fuit en luy, car il ne scavoit que *pluvia non debet pluere*, mez pur ce que l'obligor fuit oblige, et nul defaut fuit en le obligee en le performance, pur cel cause il avera son accion; en meme le maner si home soit oblige a moy sur condicion que le Pape sera icy a *Westmonesteris in crastino*, en cel cas si le Pape ne vient, uncore n'est nul defaut en le defendant, et uncore il ad forfeit le obligacion," Y.B. 22 Ed. IV. Mich. pl. 6 (p. 26) *per* Brian, C.J.

[1] (1648) Aleyn 26. [2] Below 72-73. [3] Below 73.
[4] Pollock, Contracts 270. [5] (1615) 11 Co. Rep. at f. 27a.

immaterial point by a stranger without the privity of the party, the deed is not avoided. These rules laid down by Coke are the foundation of the present law applicable to all written contracts.[1]

Statutory Provisions.

The two statutes affecting the validity of contracts of which I intend to speak at this point are the statute of Frauds[2] and the statute of Limitation.[3] Of the first I need say little as I have already discussed the effect of the two sections—the fourth and the seventeenth—which affect the validity of contracts.[4] We have seen that the question whether the fourth section rendered the contract void, or left it valid but unenforceable by action, was for some time doubtful; but that, before the point was actually decided, the better opinion was that it only rendered the contract unenforceable.[5] We have seen too that the question as to the effect of the seventeenth section was never finally decided.[6] On the other hand, it was reasonably clear from the words of James I.'s statute of Limitation that that statute affected, not the right under a contract, but the right to enforce it. As the court said in the case of *Wainford v. Barker*,[7] "it is a debt tho' barrable by pleading of the Statute."

(2) The different effects of these various causes of invalidity.

It will be clear that these various causes of invalidity produced very different effects upon contracts. They might render them either void, voidable, or unenforceable by action. It is clear that, as early as 1551, the courts were well aware of the difference between void and voidable transactions—indeed it was clearly brought out by the rules as to the different manner in which it was necessary to plead these two facts. "The statute saith 'if an obligation be taken in other form than is contained in the statute it shall be void,' and from what time shall it be void? I say, from the beginning, and if it be void from the beginning, then it never was his deed, and if it never was his deed, then he ought to have concluded *non est factum*. As if a man will plead in avoidance of a deed that he was a man not lettered, and that the deed was read to him in other form . . . then he ought to conclude, *non est factum*, because the matter proves that it never was his deed. But, if it was once his deed, and afterwards the duty thereof became extinct, then he ought to demand judgment *si actio*. . . . As if an infant or a man by duress make an obligation, they shall demand judgment

[1] See Master v. Miller (1791) 4 T.R. at p. 330 *per* Lord Kenyon, C.J.
[2] 29 Charles II. c. 3.
[3] 21 James I. c. 16 § 3; vol. iv 533.
[4] Vol. vi 390-393.
[5] Above 35.
[6] Vol. vi 386 n. 4.
[7] (1698) 1 Ld. Raym. 232.

si actio, because the delivery of the deed was not void. And so is the diversity when a man shall say *non est factum*, and when he shall demand judgment *si actio*." [1] Or, to translate these differences from the phraseology of adjective to the phraseology of substantive law, so is the diversity between void and voidable. Similarly, it is clear from the manner in which the courts interpreted the statute of Limitation, and the fourth section of the statute of Frauds, that they had a clear enough appreciation of the practical consequences of the differences between void and unenforceable.

But, though the courts have shown a clear enough appreciation of these essential differences, both they and the Legislature have often used the terms void, voidable, and unenforceable very loosely. The word void is often used where either voidable or unenforceable is meant. Thus, the incorrect term "void" was applied to infants' contracts instead of the correct term "voidable," before certain of these contracts had really been made void by the Infants' Relief Act;[2] and the same term was sometimes applied to contracts which were not evidenced by writing as required by section four of the statute of Frauds.[3] So that, as Sir F. Pollock has truly said, "the language of text writers, of judges, and even of the Legislature, is no safe guide apart from the actual decisions." [4] We shall, I think, find the explanation of this curious phenomenon in the fact that these differences were worked out mainly from the point of view of the procedure and pleading in an action. The fact that they were so worked out is illustrated clearly enough by the extract from the case of *Dive v. Manningham* just cited.[5] We have seen, too, that the best evidence of the fact that the effect of non-compliance with section four of the statute of Frauds was to render the contract unenforceable, is, firstly, the manner in which the courts allowed a memorandum, drawn up after the contract had been made, to be given in evidence; and, secondly, the growth of the equitable doctrine of part performance.[6] Both these rules really originate in rulings as to the evidence admissible to prove the contract. Similarly the long controversies as to whether it was necessary to plead specially the statute of Limitation,[7] would hardly have been possible, if the courts had not been conscious that the statute affected, not the validity, but the enforceability, of the contract.

[1] Dive v. Manningham, Plowden at p. 66 *per* Mountague, C.J.; as we have seen there was Year Book authority for these propositions, above 51 n. 3.
[2] Pollock, Contracts (9th ed.) 59-60.
[3] See e.g. Birkmyr v. Darnell (1705) 1 Salk. at p. 28.
[4] Contracts (5th ed.) 54.
[5] Above 65-66.
[6] Above 35; vol. vi 393, 658-659.
[7] See note 6 to Hodsden v. Harridge 2 Wms. Saunders 62.

Now, if a judge is trying an action, and a defendant pleads a plea which is an answer to the plaintiff's claim, the result upon the issue of that action is the same whether the effect of the plea is to make the contract void, voidable, or unenforceable. Whether the plea is non est factum, or infancy, or the statute of Limitation, the result upon the action of the proof of the plea is the same—the plaintiff loses. Hence, if the matter is looked at solely from the point of view of the result of the particular case before the court, it is very easy to slide into a loose way of characterising the contract, which a plaintiff is seeking in vain to enforce. It is easy to call it void, when voidable or unenforceable is meant, because, whichever word is used, the result to the plaintiff is the same; and when once this loose manner of talking has become habitual to judges and lawyers, it is bound to affect the phraseology of text-books and statutes, which are written or drafted by those same lawyers.[1]

That this explanation of this confusion in phraseology is true, is the more probable if we consider that the greater part of our law of contract has grown up in the atmosphere of procedure. The origin and growth of the doctrine of consideration is, as we have seen, one striking illustration of this fact. We shall see other illustrations of this fact in the manner in which the law originally dealt with the effects upon a contract of fraud and misrepresentation, and in many of the rules relating to the enforcement of contracts, and to their discharge by breach.

(3) The effects of fraud and misrepresentation.

In modern law fraud and misrepresentation are usually classed among the facts which may affect the validity of a contract. But it was long before they came to be regarded from this point of view.[2] Fraud, as we have seen, was a tort; and in the Middle Ages it had been developed by an action of deceit on the case.[3] It was only by bringing such an action that a fraud (whether inducing a contract or not) could be remedied; and there was no remedy for misrepresentation not amounting to fraud. For the growth of such a remedy, and for the growth of the idea that fraud, and in certain cases misrepresentation, may operate to invalidate a contract, and may give rise to remedies on the contract, we must look to a development in the remedies provided for frauds inducing a contract.

Both the action of deceit and the action of trespass on the case played their part in the development of the action of assumpsit.[4]

[1] For an instance where the Legislature used the term "void" when it meant "voidable" see *Re* Carter and Kenderdine's Contract [1897] 1 Ch. 776.

[2] For the early interference of the chancellor owing to this defect in the common law, see vol. v 292, 326, 328.

[3] Vol. iii 407-408.

[4] Ibid 407-408, 420 n. 3.

We have seen that in *Somerton's Case* it was held that a lawyer who had, in breach of his undertaking, betrayed his employer and acted for his rival, could be made liable in an action of deceit on the case.[1] It was no long step to take to hold that, if a person definitely and expressly warranted the truth of certain facts, and the facts turned out to be otherwise, he could also be made liable to an action of deceit on the case.[2] In other words, he could be made liable in tort for a false warranty; and, if he had thus warranted the truth of certain facts, he could be made liable for the damage resulting from their untruth, whether or not he knew them to be untrue.[3] It followed, therefore, that if a contract was induced by fraud or misrepresentation the party aggrieved had no remedy by action on the contract; for the contract was not thereby rendered invalid. But he had an action in tort for deceit if he could prove that the other contracting party knew that his representation was false,[4] or if at the time of the contract he had expressly warranted its truth.[5]

It was with reference to contracts for the sale of goods that these principles were almost exclusively developed;[6] and it is one of these cases—the case of *Chandelor v. Lopus* [7]—which shows most clearly the attitude of the law at the beginning of the seventeenth century. In that case the plaintiff brought an action on the case against the defendant a jeweller, for that he, "being a jeweller, and having skill in jewels and precious stones, had a stone which he affirmed to be a Bezoar stone, and sold to the plaintiff for one hundred pounds; *ubi re vera* it was not a Bezoar stone." The plaintiff got a verdict in the King's Bench; "but error was thereof brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, viz.: that he *warranted it to be* a Bezoar stone, or that he *knew that it was not* a Bezoar stone; for it may be that he himself was ignorant whether it were a Bezoar stone or not"; and on this ground the judgment was reversed. As it was clear that there had been no warranty, the plaintiff then brought a fresh action, alleging that the defendant knew the stone not to be a Bezoar stone.[8] Whether this declaration disclosed a good cause of action

[1] Vol. iii 431-432.

[2] Bellewe 139-140, citing a Y.B. of 7 Rich. II. concerning a warranty of a horse, cited vol. iii 408 n. 1.

[3] Ibid 408 and n. 2.

[4] Dale's Case (1586) Cro. Eliza. 44; Sprigwell v. Allen (1649) Aleyn. 91.

[5] Roswell v. Vaughan (1608) Cro. Jac. at p. 197; Rolle, Ab. *Action sur Case* P. pl. 4 (i p. 90), and see ibid i 97 pl. 1, citing a case of 39 Eliza.

[6] As Mr. Street had said, Foundations of Legal Liability i 377, "the proper approach to the subject of fraud in its modern aspects is found in the law of chattel sales."

[7] (1603) Cro. Jac. 4.

[8] From a MS. volume of reports in the Harvard Law School Library printed H.L.R. viii 282-284.

divided the court, and the ultimate issue of the action is not known.[1] But it is clear from this case that a defendant, induced to contract by fraud, had no remedy except in tort; and that he could only succeed in an action of tort if he could prove that the defendant either knew that his statements were untrue, or he had expressly warranted[2] their truth at the time of the making of the contract.[3] The only exceptions to this rule were the cases of sales of food and drink, which the law required to be pure, and to which there was therefore annexed an implied warranty of quality.[4]

It would seem that the judges, dreading to encourage litigation by disappointed purchasers, were inclined to insist very strictly on the maxim "caveat emptor."[5] If a man sells an unsound horse or unsound wine, "it behoveth," says Fitzherbert,[6] "that he warrant the wine to be good and the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in that case." This, in effect, left the law without any adequate means of repressing fraud. Its definition of fraud was too narrow, in that it did not include statements made recklessly; and it took no account of statements made at the time of a sale, which in fact amounted to a warranty, unless they were put into the form of an express warranty.[7] But it is obvious that, in one respect, the idea that a man might be liable in tort for the breach of an express warranty, tended to develop the law. This liability for breach of warranty, though asserted by an action in tort, existed whether or not the person warranting knew of its falsity. In fact, the ground of the liability was as much contractual as delictual; for it was based on the breach of the warranty as to the truth of the statement warranted.

[1] It may perhaps be inferred from the statement of counsel in Southern v. How (1618) Cro. Jac. at p. 469 that the second action succeeded; he says distinctly that "because that it was *sciens* the plaintiff had judgment"; this statement was not contradicted, and Tanfield, J., had said, H.L.R. viii 284, "it is agreed by all that if in this case *sciens le defendant* were omitted, the plaintiff could not recover."

[2] "Note that by the civil law every man is bound to warrant the thing that he selleth and conveyeth, albeit there be no express warranty: but the common law bindeth him not unless there be a warranty either in deed or in law, for *Caveat Emptor*," Co. Litt. 102a.

[3] Andrew v. Boughey (1553) Dyer at ff. 75b, 76a; in the case of Pope v. Lewyns (1622) Cro. Jac. 630 it was held that the proper form of declaration was warrantizando vendidit *not* warrantizavit et vendidit; cp. Mew v. Russell (1683) 2 Shower 284.

[4] Vol. iii 386; Street, op. cit. i 379-380.

[5] "This case is a dangerous case and may be the cause of a multitude of actions, if it be thought that the bare affirmation of the vendor causes the action," Chandelor v. Lopus H.L.R. viii 284 *per* Popham, C.J.

[6] F.N.B. 94c; cp. Tanfield, J.'s views, H.L.R. viii 284.

[7] Street, op. cit. i 379-380; and see Popham, C.J.'s views H.L.R. viii 284; as Mr. Street says, "Between the two propositions that there can be no warranty without an express agreement, and no fraud without an actual knowledge of the falsity of the representation, the ingenious rascal went free."

This clearly tended to introduce into the law the idea that non-fraudulent misrepresentation might be a ground of liability.

It was not till the eighteenth century that the liability of vendors for mis-statements, fraudulent or otherwise, was extended by the growth of the idea that a warranty could be implied. This development took place, first in relation to warranty of title,[1] and later and less completely in respect of warranties of quality. When, towards the close of the eighteenth century, it became possible to sue for damages for breach of a warranty by an action on the contract,[2] it became clear that fraud, and certain kinds of non-fraudulent misrepresentation, had a direct effect upon the validity of a contract. In fact, as Mr. Street has truly said,[3] since then "the law of warranty has been transferred almost bodily to the domain of contract." When that happened, the ideas which originated in the law of warranty as applied to sales of goods, during the period when the action on a warranty was an action in tort, were applied to other classes of contract.[4] As the result of this development, it will become possible to regard fraud, and certain kinds of non-fraudulent misrepresentation, as having definite effects upon the validity of a contract. But the law had not reached this point at the close of the seventeenth century. The only remedy for a false representation was an independent action in tort; and, as we shall see in the following sections, the rules as to the enforcement of contracts, and as to their discharge by failure of performance, were such that it would hardly have been possible for a person who had been defrauded to get adequate relief by an action on the contract.

Enforcement

Both the rules as to quid pro quo, and the doctrine of consideration, presuppose the fact that both the parties to a contract have duties thereunder. If, therefore, one of the parties to a contract wishes to compel the other to perform his duties under it,

[1] The first advance in this direction was made by Holt, C.J.'s decisions in Crosse v. Gardner (1689) Carth. 90, and Medina v. Stoughton (1700) 1 Ld. Raym. 593, to the effect that an affirmation by a seller in possession of goods that they were his own amounts to a warranty; as Mr. Street says, op. cit. i 383, this decision tended to "break down the rule that express words of warranty are necessary."

[2] The first reported case in which this was allowed was Stuart v. Wilkins (1778) 1 Dougl. 18; but according to Buller and Ashhurst, JJ., ibid at p. 21, the practice of so declaring was considerably older, though it evidently struck Lord Mansfield as a novelty.

[3] Op. cit. i 390.

[4] At this period there are very few examples of the application of this remedy except in the case of contracts of sale; one of the few cases is Anon. (1683) Skin. 119, where the plaintiff sued the defendant for deceit in pretending to be a single person, and inducing her to go through the form of marriage with him; cp. Street, op. cit. i 392.

the question arises whether he can do so if he has not himself performed his own duties. It is clear that on this question three possible views may be taken. Firstly, A's right to enforce B's duty under a contract, made between A and B, may be conditional upon A's performance of his own duty; or A's and B's duties may be regarded as being entirely independent of each other, so that each can sue the other, though the party suing has not performed his part; or A's and B's duties may be regarded as being due simultaneously, so that neither can sue the other, unless the party suing is ready and willing, at the time of the action brought, to perform his duty.[1]

The rules applicable to this question are, at the present day, regarded as depending on the interpretation of the intention of the parties to the contract. "The court looks to the purpose and effect of the contract as a whole as a guide to the probable intentions of the parties, and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole."[2] But this was not so clearly the attitude of the court in the sixteenth and seventeenth centuries. The rules on this subject were still implicated with, and influenced by, the forms of action by which contracts were enforced; and though, no doubt, the courts attempted to ascertain the intention of the parties, both the procedural rules, and the tendency, which has already been noted in dealing with the interpretation of conveyances,[3] to lay down rigid rules of construction, combined to make the law on this topic one of the most technical and least satisfactory parts of the law of contract.

As the growth of the law on this topic during this period was largely influenced by the development of the forms of action, I shall consider, firstly, the rules which grew up in the spheres of debt and covenant, and their modification when they came to be applied in the sphere of assumpsit; and, secondly, the rules which originated in the need to distinguish the spheres of special assumpsit and assumpsit on a quantum meruit.[4]

(1) *The rules which grew up in the spheres of debt and covenant, and their modification when they came to be applied in the sphere of assumpsit.*

We have seen that the right to bring an action of debt was conditional upon the gift of a thing or the doing of an act by

[1] Pollock, Contracts (9th ed.) 280.
[2] Ibid 279.
[3] Vol. vii 392-394.
[4] For an account of the sphere of these different forms of action see vol. iii 417-426, 428, 429 seqq., 446, 447.

the plaintiff, which would be regarded as quid pro quo for the defendant's promise; and that, except in the case of the contract of sale of goods, a mere promise to give or perform was not a sufficient quid pro quo.[1] It followed that the plaintiff could not recover unless he had performed his side of the bargain; and we have seen that the same rule resulted from the conditions under which, at the beginning of the sixteenth century, the action of assumpsit lay for nonfeasance in breach of an undertaking; for, till assumpsit was extended to remedy the breach of wholly executory contracts, the detriment suffered by the plaintiff on the faith of the defendant's promise must have been actually incurred.[2] On the other hand, in the case of the contract of sale of goods, the duty to pay and the duty to transfer were regarded as independent obligations, so that each could sue the other for failure to perform, whether or not he had fulfilled his part of the bargain—"contracts of debt," as Vaughan, C.J., said, "are reciprocal grants."[3] The same reasoning was applied to the reciprocal covenants of the parties in a contract under seal. This fact is illustrated by the case of *Ware v. Chappel*.[4] Ware had by deed covenanted with Chappel that he would provide five hundred soldiers and bring them to a certain port, and Chappel had covenanted to provide shipping and victual for them. Ware sued Chappel for not providing the shipping and victual at the appointed time, and Chappel pleaded that Ware had not raised the soldiers at that time. Rolle, C.J., held that this plea was no answer to the action, because "they are distinct and mutual covenants, and there may be several actions brought for them." He then pointed out that Chappel had his remedy against Ware if he raised not the men, as Ware had against Chappel for not providing the shipping. Under these circumstances it is not surprising to find that the mutual promises which, at the end of the sixteenth century had come to be enforceable by assumpsit, were treated in the same way. This fact is illustrated by the case of *Gower v. Capper* (1597).[5] In that case the defendant owed the plaintiff £20. The defendant, in consideration of a promise to deliver up the bill evidencing the debt, promised to give two sufficient sureties for the payment of the £20. The plaintiff sued the defendant, alleging that he had delivered up the bill, but that the defendant had broken his promise by producing two worthless sureties. The defendant pleaded that the plaintiff had not delivered up the bill. The plaintiff demurred, and judgment was given for him, "for the

[1] Vol. iii 420-423. [2] Ibid 441, 442.
[3] Edgcomb v. Dee (1670) Vaughan at p. 101.
[4] (1649) Style 186. [5] Cro. Eliza. 543.

alleging that he had delivered the bill was but surplusage; for the consideration was the promise to deliver it; . . . a promise against a promise is a sufficient ground for an action." The same rule was applied in other seventeenth-century cases.[1]

But these were only prima facie rules. The courts were always willing to give effect to any expressions used by the parties which indicated, or seemed to indicate, their intentions as to the order in which the mutual undertakings of the parties were to be performed. If it could be gathered that the performance by one was a condition precedent to performance by the other, the other could resist an action until performance had been made.[2] On the other hand, if performance by one was not a condition precedent, each could sue the other, whether or not he had performed his part of the agreement.[3] In the first case the promises were said to be dependent, and in the second independent. But the rules applied to determine whether, in any given case, a promise was dependent or independent, were so technical and artificial that it was almost impossible to deduce from them any certain principle.[4] As Williams says, after citing a number of sixteenth and seventeenth century cases, "the judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties."[5] As usually happens in these cases, the ingenuity of the judges resulted in the establishment of a number of very artificial rules of construction, which hindered rather than helped the elucidation of the intention of the parties in any given case.[6] They had an effect upon the interpretation of the duties of the parties to a contract similar to the equally artificial rules for the interpretation of conveyances, which those same judges were constructing at this period.[7]

In fact, so long as the judges considered that the promises to be performed by the two parties to a contract must be either

[1] Pordage v. Cole (1669) 1 Wms. Saunders 319, and the cases cited in the note thereto.

[2] Rogers v. Snow (1573) Dal. 94; Brocas's Case (1588) 3 Leo. 219; Everard v. Hopkins (1615) 1 Rolle Rep. at p. 125 *per* Coke, C.J.; Spanish Ambassador v. Gifford (1616) 1 Rolle Rep. 336; Trench v. Trewin (1697) 1 Ld. Raym. 124.

[3] Nichols v. Raynbred (1615) Hob. 88; and see the cases from 1 Rolle Rep. cited in the last note.

[4] "Almost all the old cases, and many of the modern ones on this subject, are decided on distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained what covenants are *independent*, and what *dependent*," 1 Wms. Saunders 320 n.

[5] Ibid.

[6] For these rules see ibid; Thorpe v. Thorpe (1702) 1 Ld. Raym. at pp. 664-667; and the notes to Cutter v. Powell 2 S.L.C. (10th ed.) 10-16.

[7] Vol. vii 304.

dependent or independent, it was really impossible to avoid hardship. It was as hard on a plaintiff to force him to perform as a condition of recovery, as it was on a defendant to require him to perform in spite of the plaintiff's failure to perform.[1] It was only natural that, while the law was in this state, the arguments of plaintiffs and defendants should be directed chiefly to this simple point of proving dependency or independency; and that, as cases argued on these lines accumulated the rules as to what promises were dependent and what independent should grow more and more subtle and unsatisfactory. It is clear, too, that, so long as the question was regarded from this point of view, it was difficult to decide in accordance with the substantial merits of the case, and to give effect to the real intentions of the parties to any given contract. Thus, for instance, it is difficult to see how any effect could be given to such defences as fraud or misrepresentation. If the promises were dependent, a plaintiff, though defrauded, could not hope to recover unless he could prove performance; and if they were independent, the fact that he had defrauded the defendant would be no answer to his action.

At the beginning of the eighteenth century the courts began to perceive that it was impossible to class all stipulations in contracts as dependent or independent. They began to see that in many cases contracts consisted of "mutual conditions to be performed at the same time"[2]—in other words, that conditions might be concurrent. This was recognized in 1714, in the case of *Turnor v. Goodwin*,[3] where there was a contract to pay money for the assignment of a judgment debt. Parker, C.J., said,[4] "the question is whether the plaintiff's assignment be the first act to be done or not. This differs from the other cases where the time and the consideration are mentioned. The defendant would have assigning to be first assigning, and the plaintiff would have it assigning . . . after payment. We are all of opinion that there is one way which will solve all these difficulties, and that is the assignment shall neither precede nor wait, but shall accompany the payment, and both to be done at the same time. . . . The money is here his security till the assignment; though the money be told over by the defendant and plaintiff, yet it remains the defendant's money, and the plaintiff cannot justify the taking it though laid on the table. On the other hand, the moment he has delivered the assignment, the property of the money is altered. . . . 'Tis like buying of goods, this money is yours if you deliver to

[1] Street, Foundations of Legal Liability ii 136; Mr. Street at pp. 132-140 has given a good account of this branch of the law to which I am much indebted.

[2] This is the expression used by Lord Mansfield, C.J., in Kingston v. Preston (1772), cited in Jones v. Barkley (1773) 2 Dougl. at p. 691.

[3] Fortescue 145. [4] At pp. 149-150.

me this watch; the money is his if he deliver the watch, if not 'tis otherwise."

To these concurrent conditions neither the rules applicable to dependent, nor those applicable to independent promises, were applicable. It was therefore laid down that in these cases, "if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."[1] This tended to diminish the importance of the older cases, which laid down rules as to when the promises of the parties were dependent, and when they were independent. It became more possible to pay attention to the real intention of the parties to the contract; and to develop rules as to their respective rights and duties, based upon their performance of or failure to perform their contract. When, therefore, towards the close of the eighteenth century, the rules as to the method of treating these concurrent conditions in a contract were settled, the courts began to see that the older rules as to when a condition or promise should be treated as dependent and when as independent, were too rigid and technical; and they therefore began to lay it down that these matters must be decided by "the good sense of the case."[2] In other words, the expressions used by the parties to a contract must be construed in order to discover their intentions, and effect must be given to the intention thus discovered. With the adoption of this changed attitude by the courts of law, the modern history of this branch of the law begins.

(2) *The rules which originated in the need to distinguish the spheres of special assumpsit and assumpsit on a quantum meruit.*

We have seen that these two branches of the action of assumpsit became distinct in the course of the seventeenth century, and that practical consequences were drawn from these differences.[3] Thus we have seen that it was settled in 1696 that indebitatus assumpsit would only lie where a debt had been incurred, and that therefore it would not lie on an executory contract where a promise was consideration for a promise.[4] It followed that if two parties made

[1] Kingston v. Preston (1773) 2 Dougl. at p. 691.

[2] "In ordinary cases of this kind the work is to be done before the wages are earned; but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of *Campbell v. Jones*, I thought, and still continue to be of that opinion, that whether covenants be or be not independent of each other, must depend on the good sense of the case, and on the order in which the several things are to be done," Morton v. Lamb (1797) 7 T.R. at p. 130 *per* Lord Kenyon, C.J.

[3] Vol. iii 446-447.

[4] Bovey v. Castleman 1 Ld. Raym. 69; Smith v. Aiery (1705) 6 Mod. 128.

a contract, and the performance of one was a condition precedent to payment by the other, the former could not sue the latter either by action of debt or indebitatus assumpsit, or by action of special assumpsit, if he could not allege and prove performance. He could not sue by action of debt or indebitatus assumpsit because the debt was not incurred. Thus when A was employed by B to collect his rents, and B promised to pay him £100 a year, and B died after A had acted for three quarters of a year, it was held that A could recover nothing from B's executor by action of debt.[1] It is clear also that he could recover nothing by special assumpsit, because the promise to pay was in consideration of his service for a year, and such performance he could not allege. He could only have recovered the value of his services if the testator had wrongfully broken his contract; for in that case the special contract would not be in existence, and he would therefore have been in the position of one who had done something of value for another, not under or in fulfilment of a special contract. In such a case the law would have implied a promise to pay what his services were reasonably worth, for which he could have sued by indebitatus assumpsit on a quantum meruit.[2]

These rules as to the conditions under which special assumpsit and assumpsit on a quantum meruit lay, gave rise to the rule, which was clearly laid down in 1795 in the case of *Cutter v. Powell*.[3] In that case the defendant promised to pay a sailor thirty guineas, if he "proceeded continued and did his duty" as second mate on a voyage from Jamacia to Liverpool. He died on the voyage, and it was held that his representatives could not recover on a quantum meruit. "That where the parties," said Lord Kenyon, C.J., "have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law."[4] This is still the law, if it is clear that no payment is due till the whole of the consideration for that payment has been performed.[5] But the need to distinguish between cases of this kind, to which the rule applies, and cases in which the parties have varied their contract, or have in fact accepted something not quite in accordance with it, have given rise to many complicated rules, and to "distinctions more than usually fine."[6]

The circumstances under which the special contract is rescinded, so that a person who has performed services under it is entitled to sue on a quantum meruit, falls under the next following topic—discharge of contract.

[1] Countess of Plymouth v. Throgmorton (1688) 1 Salk. 65.
[2] Vol. iii 447. [3] 6 T.R. 320. [4] Ibid at p. 324.
[5] Pollock, Contracts (9th ed.) 285. [6] S.L.C. (10th ed.) 16 seqq.

Discharge

The three ways in which contract may be discharged, with which I propose to deal, are, breach; performance or the tender thereof; and agreement.

(1) Breach.

It follows from what has been already said as to the enforcement of contracts, that the modern rules applicable to the breach of contract by failure of performance, were not ascertained during this period. If the promises of the two parties were independent of each other, failure of performance by one was not a discharge of the other's obligation. If they were dependent, the plaintiff must prove performance on his side, and it was only then that he could sue for damages if the other party failed to perform. In such a case there could be no question of the right of the plaintiff to rescind the contract, according to whether the failure of performance went to the root of the contract or not, for he had already performed his side of the contract. When, however, it came to be recognized that, where the promises of the two parties were concurrent, either might sue on proof that he was ready and willing to perform, the question arose whether or not any given failure gave the right to rescind the whole contract, or whether it did not give such a right; but only gave a right to sue for such damages as had been sustained by the failure. It is in this connection that, in the eighteenth and nineteenth centuries, the modern distinctions between conditions, and warranties, and warranties ex post facto, grew up. These expressions were used, often inconsistently, to express the differences between those terms in a contract failure to perform which gave rise to a right to rescind, those terms which did not give this right, and those terms which would have given such a right if their breach had not been acquiesed in.[1]

But failure to perform a contract may arise from many causes. It may be due, for instance, to fraud or misrepresentation; and we have seen that one of the older remedies for a fraudulent misstatement, which induced a contract, was an action in tort on a warranty, if an express warranty had been given at the time of the making of the contract.[2] We have seen, too, that, in the eighteenth century, the scope of this remedy was enlarged by the growth of the conception of an implied warranty; and that it was recognized that false or fraudulent misstatements which induced a contract might be remedied by an action on the contract.[3]

[1] Anson, Contracts (12th ed.) 330-337.
[2] Above 68.
[3] Above 68-70.

In effect, the result of such misstatements was a total or partial failure of performance; and thus it comes about that, in our modern law, the effect of fraud upon a contract is treated in much the same way as the breach of a condition which amounts to total failure of performance, and gives a right to rescind; while non-fraudulent misrepresentation is treated, according to the nature of the fact or facts misrepresented, either as the breach of a condition which amounts to total failure of performance and gives a right to rescind, or as the breach of a warranty which amounts to a partial failure of performance, and gives only a right to get damages as compensation for its breach.

Other cases of failure of performance, which cause a breach of contract, are a refusal to perform, or impossibility of performance created by one of the parties to the contract. It was recognized in this period that both put an end to the contract, and gave the party injured the right to sue for damages for its breach. That a refusal to perform a contract amounts to a breach is an obvious truism. That it was recognized as a truism can be seen from the case of *Lea v. Exelby*.[1] In that case the defendant was possessed of a lease for years, and the plaintiff owned the reversion upon it. The plaintiff promised to pay the defendant a sum of money, and the defendant promised, on payment, to surrender the lease. The plaintiff sued the defendant, alleging that he had tendered the money and that the defendant had not surrendered. It was held that the plaintiff could not recover, because he ought to have alleged, either that he had paid the money, or that he had both tendered the money and that the defendant had refused it. It was the refusal which constituted the breach of the contract for which he was suing; and as refusal had not been alleged, no cause of action arose. That impossibility of performance created by the act of one of the parties to a contract amounts to a breach of the contract is illustrated by the case of *Hulbert v. Watts*,[2] where the contrast between impossibility so occasioned, and that occasioned by the act of God, is expressly noted.

(2) Performance or the tender thereof.

Performance may take the form either of doing an act or of making a payment. The act promised must be completely performed in order to discharge the duty under the contract; and this was a rule frequently applied in cases where performance was a condition precedent to the right to enforce the fulfilment of the promise of the other party. Thus in 1619 a judgment for a plaintiff was arrested, because he failed to show complete per-

[1] (1602) Cro. Eliza. 888.

[2] (1697) 1 Ld. Raym. 112.

formance of his duty under the contract.[1] A payment was complete, so that the money was at the risk of the payee, as soon as he had accepted the coins;[2] and it was a valid payment if the money paid was legal tender, even though its value had been depreciated by the act of the crown, so that in that case the payee must stand the loss.[3] One of the rules as to payment illustrates a further advantage which assumpsit had over debt. If money was to be paid in instalments spread over a fixed period, debt would not lie for the non-payment of each instalment as it came due, but it could only be brought at the end of the period, "because all is but one contract."[4] On the other hand, assumpsit lay for each instalment as it came due. Whether or not repeated actions could be brought for each instalment as it came due, or whether, when once the action had been brought, the plaintiff lost all further right of action, was a matter upon which the courts were much divided.[5] There was at first a tendency to accept the latter view, and consequently to rule that the plaintiff, on the defendant's failure to pay any one instalment, could get damages for non-payment of the entire debt.[6] But the other and the more sensible view was adopted in 1671.[7] It was then settled that, "the action might be brought for such sum of money only as was due at the time of bringing the action, and the plaintiff should recover damages accordingly; and when another sum shall become due, the plaintiff may commence a new action for that also, and so *toties quoties.*"

Tender, or attempted performance, may take the form either of a tender of goods or of money. At the beginning of the sixteenth century a plea of tender did not discharge a defendant, unless he pleaded, not only that he had offered to convey or pay, but also that he was still ready to do so.[8] But, when Coke wrote, the law had been modified. The old rule was still applied to the tender of money; and this is still the law;[9] but in the case of the tender of goods it was sufficient to plead that the goods had been offered, without pleading that the defendant was still ready to deliver.[10]

[1] Leneret v. Rivet, Cro. Jac. 503.

[2] Canter v. Shepheard (1699) 1 Ld. Raym. 330.

[3] Pong v. Lindsay (1553) Dyer 82a.

[4] "If I sell you anything for £100 to be paid £20 per ann. in 5 years, I shall not have an action for debt till all the years be incurred, because all is but one contract," Foord's Case (1595) 5 Co. Rep. at f. 81b; cp. Rudder v. Price (1791) 1 H. Bl. 547; a good historical summary of this topic will be found in Lord Loughborough's judgment in the last cited case.

[5] In Pecke v. Redman (1556) Dyer 113 the judges were divided on the question.

[6] Beckwith v. Nott (1619) Cro. Jac. 504; but the contrary view was taken in Milles v. Milles (1632) Cro. Car. 241.

[7] Cooke v. Whorwood 2 Wms. Saunders 337.

[8] Brikhed v. Wilson (1537) Dyer 24b.

[9] Anson, Contracts (12th ed.) 314.

[10] "If an obligation of an hundred pound be made with condition for the payment of fifty pounds at a day, and at the day the obligor tender the money, and the obligee

The effect of successfully pleading a tender of money was that the plaintiff could only recover the amount tendered;[1] and, in Coke's day, if he refused it in court and took issue on the tender, and it was found against him, he lost the money for ever.[2] On the question what would amount to a valid tender the law had already acquired a number of detailed rules, principally in connection with the payment of rent. These rules were summarized by Coke in *Wade's Case*,[3] and they are the basis of the modern law.

(3) Agreement.

We have seen that English law has substantially accepted the Roman rule, repeated by Bracton, that a contractual obligation must be dissolved by the same formalities as those by which it was made.[4] As in English law the two formalities needed for making an agreement actionable are either a writing under seal, or a consideration, it follows that an agreement to discharge a contract must comply with one of these two forms. But the law has been to some extent complicated, firstly, by the fact that the contract under seal has always been regarded as a contract of a superior sort to the simple contract, so that, though a contract under seal can discharge a simple contract, the converse is not true; and, secondly, by difficulties in applying the doctrine of consideration to the discharge of simple contracts—difficulties which have, to a large extent, been caused by the gradual growth of that doctrine, and the difficulty of reconciling it, in its developed form, with earlier rules as to the discharge of simple contracts by agreement. I shall therefore, in the first place, deal with the operation of the contract under seal in discharging a contract; and, in the second place, with the operation of a simple contract. Lastly, I shall say something of a method of discharge which the growth of the simple executory contract made possible—the novation.

(i) *The operation of a contract under seal in discharging a contract.*

It was well settled in the sixteenth century that a release under seal would discharge either a contract under seal, or a simple contract. Thus Coke in *Pinnel's Case* could cite Year Book authority for the proposition that an acknowledgment of satisfaction by a

refuseth the same, yet in action of debt upon the obligation, if the defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money and tender the same in Court. . . . If a man be bound in 200 quarters of wheat for delivery of 100 quarters, if the obligor tender at the day 100 quarters, he shall not plead *uncore prist*, because albeit it be parcel of the condition yet they be *bona peritura*, and it is a charge for the obligor to keep them," Co. Litt. 207a.

[1] Pong v. Lindsay (1553) Dyer 82a, b.
[2] Co. Litt. 207a.
[3] (1601) 5 Co. Rep. 114a.
[4] Vol. ii 277 and n. 10.

deed would discharge a contract under seal, though nothing had been received in satisfaction;[1] and Croke, in the case of *Acton v. Symon*,[2] differing from Berkley, J., laid it down that, if the two parties to a simple contract afterwards made a contract under seal to the same effect, the simple contract was discharged.[3] The fact that the law has always given effect to the lawful intentions of the parties to a writing under seal, and the fact that such a writing is regarded as superior to a mere parol contract or contract made by unsealed writing, has prevented any question arising as to the efficacy of this mode of discharging any contract. We shall now see that the fact that the law, from these two points of view, treated simple contracts very differently, has resulted in raising many difficult questions as to their operation in discharging such contracts.

(ii) *The operation of a simple contract in discharging a contract.*[4]

In the first place, a simple contract cannot discharge a contract under seal. Coke's assertion, that "it appears by all our books that neither arbitrament nor accord with satisfaction is a plea when the action is grounded on a deed,"[5] was well warranted by the earlier authorities.[6] In fact, as we have seen, the strictness with which the law adhered to the view that, even payment was no discharge of an obligation under seal, without a formal release, was, in the Middle Ages, a frequent cause of applications to the chancellor.[7] Apparently there was some disposition to relax this strictness at the beginning of the sixteenth century;[8] but it did not go far, as, shortly afterwards, the rule approved of by Coke was

[1] "If a man acknowledge himself to be satisfied by deed, it is a good bar, without anything received," Pinnel's Case (1602) 5 Co. Rep. at f. 117b, citing Fitzherbert Ab. *Barre* pl. 37 (26 Hy. VI.).

[2] (1636) Cro. Car. 414.

[3] "Berkley said, if one borrow money, and promise to enter into bond to pay it at a day to come, and promise that he will keep his day of payment, and afterwards he makes an obligation for the payment of this money at the day, if he fail of the payment, debt may be brought against him upon the obligation, and he may also maintain an action of the case upon the promise; but I denied it, because the obligation determines the contract," ibid at p. 415.

[4] See generally Street, Foundations of Legal Liability ii 88-95.

[5] Blake's Case (1606) 6 Co. Rep. 43b.

[6] Y.BB. 45 Ed. III. Hil. pl. 9; 1 Hy. V. Trin. pl. 1 (p. 7) *per* Hals.; 1 Hy. VII. Pasch. pl. 1 (p. 14) where Vavisor says, "in nul cas on ne poit voider un obligation sans especialty de aussy haut nature que le fait est"; Anon. (1513) Dyer 1a. By "arbitrament" Coke means the judgment of arbitrators, which, as Mr. Street says, op. cit. ii 91, "created a duty in the nature of debt like the judgment of a court"; it therefore operated, like an accord and satisfaction, to discharge a simple contract, see below 84 n. 4.

[7] Vol. v 292.

[8] "Now in an action of debt (on an indenture) brought for the forty pounds; whether the defendant can plead payment of the twenty pounds without an acquittance or not? And it seemed to Spelman Fitzherbert and Shelley that he cannot. Yet *quære*, for there are many precedents to the contrary," Anon. (1535) Dyer 6a.

laid down in argument, and apparently acceded to by the court.[1] One mitigation of the strictness of this principle was, however, established in *Blake's Case*. It was settled that if the cause of action was not solely on the deed to recover the money due under it, but to recover unliquidated damages for the breach of some other duty, accord and satisfaction was a good discharge; "for the action is not merely grounded on the deed, but also on the deed and the wrong subsequent."[2]

In the second place, if a simple contract was still executory it could be discharged by the simple agreement of the parties. "If I promise to J.S.," said Dodderidge, J., in 1616,[3] "that if he build a house upon my land before Michaelmas, I will pay him a hundred pounds, and I countermand it before he hath done anything concerning the house, it is a good countermand"; for, as was said in *Langden v. Stokes*,[4] a promise made verbally may be discharged by words before breach, or, as Coke put it in *Peytoe's Case*,[5] "as a contract upon consideration may commence by word, so by agreement by word for any valuable consideration it may be dissolved."

In the third place, although the doctrine of consideration as thus applied to the discharge of contracts, allowed that an agreement to discharge an executory contract was good, because the promise of the one party to discharge was consideration for the promise of the other; the same reasoning made it necessary to deny the validity of a mere agreement to discharge, if it was made by a person who had fulfilled his duty under the contract. There could be no consideration for such an agreement, unless the party to be discharged had given some consideration for the promise to discharge him. In the days when a wholly executory contract was unknown, it is clear that this consideration for a promise to discharge must have been executed; for, as we have seen, neither debt, nor, in its earlier days, assumpsit, lay, unless the party suing had performed his part of the agreement. Therefore the rule was laid down many times in the Middle Ages, and repeated in the sixteenth century, that it was only an accord *and satisfaction* which would discharge a contract, or any other obligation, to which the party making the accord was already liable.[6] The rule and its

[1] "In a writ of annuity payment is plea if it be granted out of the land, otherwise not. And although the truth be that the plaintiff is paid his money, still it is better to suffer a mischief to one man, than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact," Waberley v. Cockerel (1542) Dyer at ff. 51a, 51b.

[2] 6 Co. Rep. at f. 44a.

[3] Hurford v. Pile, Cro. Jac. 483; cp. Treswaller v. Keyne (1622) Cro. Jac. 620.

[4] (1635) Cro. Car. 383.

[5] (1612) 9 Co. Rep. at f. 79b.

[6] Street, op. cit. ii 90-91, and the Y.BB. there cited; Coke summed up their effect when he said in Peytoe's Case, (1612) 9 Co. Rep. at f. 79b, "Every accord ought to be full perfect and complete: for if divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed."

reasons are clearly stated in the following passage in the Doctor and Student:[1]—"*Doctor.* And if a man promise to give another xl *li* in recompence for such a trespass that he hath done him, lyeth an action there? *Student.* I suppose nay, and the cause is for that such promises be no perfect contracts; for a contract is properly where a man for his money shall have by assent of the other partie certain goods or some other profit at the time of the contract or after: but if the thing be promised for a cause that is past by way of recompence, then it is rather an accord than a contract. But then the law is that upon such accord the thing that is promised in recompence must be paid, or delivered in hand, for upon an accord there lyeth no action." It followed that, if a sum of money was due under a contract, an agreement to pay a lesser sum followed by payment would be no accord and satisfaction, because a payment of a lesser sum, when a larger sum was due, was, as we have seen,[2] no consideration. It was only if the agreement was to do something else in satisfaction, and that something was performed, that there was an accord and satisfaction which would discharge the contract; and these principles are still part of the law.[3]

So long as only those contracts were actionable which were based on a executed consideration, these rules were a logical application of the doctrines of quid pro quo, and of consideration as then accepted, to the discharge of contracts. But we have seen that, at the end of the sixteenth century, wholly executory contracts became actionable; and that in that case the promise of the one party was accepted as being the consideration for the counter-promise by the other.[4] Logically this extension of the doctrine of consideration should have affected the law as to accord and satisfaction. If a promise for a promise is a good consideration for making a contract, a promise to pay or do anything should be a sufficient consideration for a promise to discharge.[5] This view seems to have been taken in 1602 in the case of *Goring v. Goring*;[6] and it was specifically approved in 1681 in the case of *Case v. Barber*.[7] "Of late," it was said in argument, "it hath been held that upon mutual promises an action lies, and consequently there being equal remedy on both sides an accord may be pleaded without execution as well as an arbitrament, and by the same reason that an arbitrament is a good plea without performance."[8] "To which the court agreed; for the reason of the law being changed,

[1] Bk. II. c. 24.
[2] Above 20, 40.
[3] Anson, Contracts (12th ed.) 346.
[4] Vol. iii 444-445.
[5] Street, op. cit. ii 91-92.
[6] (1602) Yelv. 11; above 41.
[7] T. Raym. 450.
[8] For arbitrament see above 81 n. 6; the reason was not the same, see Allen v. Harris (1697) 1 Ld. Raym. 122, cited below 84 n. 4.

the law is thereby changed; and anciently remedy was not given for mutual promises, which is now given." This is accepted as good law by Comyns;[1] but how far it represents modern law is perhaps a little uncertain.

There are undoubtedly a large number of cases which lay it down in uncompromising terms that it is only an accord and satisfaction which will discharge a contract.[2] This is due to several causes. To a large extent it is due, as Mr. Street has pointed out,[3] to the fact that, as such agreements generally embody concessions to debtors, they are generally made with a view to performance, and not to the obtaining of a counter-promise from the debtor, which may very likely only lead to fresh litigation. But it is also due to two other causes of a technical kind. In the first place, it is due to the weight of authority which came from a time before the enforceability of wholly executory contracts was recognized. The rule that an accord without satisfaction was no discharge had hardened into a fixed rule of law; its basis in a rudimentary stage of the history of consideration was forgotten; and the judges therefore failed to adapt it to the new developments of that doctrine.[4] In the second place, it was due to the great obscurity which long hung, and still to some extent hangs, about the law as to the status of promises to do what the promisor is already bound to do.[5] But if it is admitted that a promise by A to B to perform his contractual duty to C is a valid consideration for a counter-promise by B to A, it is difficult to see why a promise by A, who is liable to B, under his contract with him, to do something for B, should not be a good consideration for a promise by B to discharge A. And, though payment of a lesser sum when a larger sum is due is certainly not a discharge,[6] it may well be that a promise to pay a lesser sum may be a valid consideration for a promise of discharge.[7]

[1] Digest, *Accord* B 4, cited above 22-23.

[2] Thus Tindal, C.J., laid it down in Bayley v. Homan (1837) 3 Bing N.C. at pp. 920-921 that "a plea of accord to be a good plea must show an accord which is not executory at a future day, but which ought to be executed and has been executed before action brought"; after citing many cases to this effect, he said, "we think this current of authority is too strong to be met by the doubts expressed by the court in Case v. Barber"; see also the cases cited 1 S.L.C. (10th ed.) 336.

[3] Op. cit. ii 93.

[4] Thus in Allen v. Harris (1697) 1 Ld. Raym. at p. 122 the court said, "if arbitrament be pleaded with mutual promises to perform it, though the party has not performed his part who brings the action, yet he shall maintain his action; because an arbitrament is like a judgment and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous, that an accord ought to be executed, that it is now impossible to overthrow all the books. But if it had been a new point it might be worthy of consideration."

[5] Above 23-24, 41.

[6] Above 40.

[7] As it is said in 1 S.L.C. (10th ed.) 336, "the rational distinction seems to be, that if the *promise* be received in *satisfaction*, it is a good satisfaction; but if the *performance*, not the *promise*, is intended to operate in satisfaction, there will be no satisfaction without performance," cp. Edwards v. Hancher (1875) 1 C.P.D. 111 where the possibility of a promise, if received in satisfaction, being a valid discharge seems to be admitted; and see the other cases cited 1 S.L.C. 336.

Whether this is so or not is not yet settled. But there is a little authority in favour of this view ;[1] and it is to some extent supported, firstly, by some of the not very satisfactory reasons given for upholding the validity of a composition with creditors ;[2] and, secondly, by the rule that the gift of a negotiable instrument for a lesser sum than an existing debt is a good consideration for a promise to discharge that debt,[3] for a negotiable instrument embodies a promise to pay, to which peculiar incidents are annexed by the law merchant.[4]

(iii) *The novation.*[5]

The name novation is Roman ; but the institution, as recognized by the common law, is, as Ames has said, of English growth. The Roman novation in Justinian's time was effected through the stipulation ; but the common law never recognized a contract of this kind ; and therefore the English novation was evolved without reference to it, when the development of the English contract system had reached the stage at which this evolution was possible.

In the mediæval period no such contract was possible. This is illustrated by a case of the year 1432,[6] in which an unsuccessful attempt was made to induce the court to admit its validity. In that case Rolf argued in effect that, if B is indebted to C for £20, and A is indebted to B for a like amount, and "A grants to C to pay C the £20 which A owes, and that B shall be discharged of his debt to C, and C agrees to this, and B also, A shall now be charged to C for this debt by his contract and own act." But Cotesmore, J., and the whole court denied this, "for although all three are agreed that A shall pay this debt for B, still B is not discharged of his debt in any manner." This decision was inevitable in the then state of the law. As Ames has pointed out, B could be discharged of his liability to C only by release under seal, or by accord and satisfaction ; while A could be made liable on

[1] Last note.

[2] See Good v. Cheesman (1831) 2 B. and Ad. at p. 325, where Parke, J., cites the passage from Comyns's Digest *Accord* B4 (above 22-23). As Ames says, Lectures on Legal History 334-335, most of the reasons given to reconcile this decision with the rule that payment of part of a debt is no consideration for a discharge are futile ; really there are two contracts in such a composition : (1) between the debtor and his creditors, the debtor promising to hand over certain property, and the creditors promising to release him when the property is handed over to a trustee for them ; and (2) between the creditors, each promising only to exact a quota of his debt in consideration of the others promising to do the like ; it seems to me that the only way in which the validity of the first of these contracts can be upheld is by saying that the debtor's new promise is something different from his existing obligation to each creditor.

[3] Goddard v. O'Brien (1882) 9 Q.B.D. 37.

[4] For the history of negotiable instruments see below 113 seqq.

[5] See generally Ames, Lectures on Legal History 298 seqq ; Street, op. cit. ii 122 seqq.

[6] Y.B. 11 Hy. VI. Pasch. pl. 30 (p. 38) ; Ames, op. cit. 298-299 ; I have cited the translation given by Ames.

his contract to pay C only by action of debt; and to an action of debt at the suit of C he could not be liable, because he had received no quid pro quo from C. "The two essential features of a novation —namely the extinguishment of the original obligation, and the creation of a new one in its place—were therefore both wanting in the case supposed. In other words, novation by simple agreement of the parties was at that time a legal impossibility." [1]

When, however, it was recognized at the close of the sixteenth century, that an executory contract based on the mutual promises of the two parties was enforceable by assumpsit, the legal impossibility began to disappear. In 1611, in the case of *Flewellin v. Rowe*,[2] A owed money to C, and B owed money to A. It was agreed by all three that B, to discharge his debt to A, should hand over certain goods of his own to C, and that C should take them in discharge of A's debt to C. B did not hand over the goods, but converted them to his own use. C thereupon brought trover against B; and it was held that he was entitled to recover. The court treated it as, in effect, similar to the case where one has promised to bail goods to another to the use of a third. Just as the third person had a right of action in such a case to redress the wrong done to him, so here, C had suffered a similar wrong for which he ought to have his action.[3] This case, therefore, shows that by the somewhat roundabout method of an action of conversion effect could be given to a novation.

The case of *Roe v. Haugh* (1697)[4] marks a later stage in the history of the novation, and indicates the beginning of modern theory upon which such an arrangement rests. In that case B owed A £42. C, in consideration that A would accept him as his debtor for the £42 due from B, undertook to pay the £42 to A. C, having failed to pay, an action was brought against him; but, as the declaration had not alleged that A had promised to discharge B, no consideration for C's promise was apparent. On this ground three judges—Blencowe and Powell, JJ., and Ward, C.B.—thought that C was entitled to judgment; but four—Powys and Lechmere, BB., Nevil, J. and Treby, C.J.—held that, as a verdict had been found for the plaintiff, "they should do what they could to help it;

[1] Ames, op. cit. 299.

[2] 1 Bulstr. 68.

[3] "Notwithstanding the third person here to whom the goods ought to have been bailed had never the possession of them, yet this conversion and nonfeasance of that which he ought to have done, is a wrong and very prejudicial to C the third person. And for this wrong and prejudice he may have his action upon the case. . . . The whole court also clearly agreed in this—that this not bailing over, and delivery of the goods by B the first bailee unto C in satisfaction of the debt to A, and according to the agreement made between A and B, that this doth clearly amount in law to make a conversion. And that by this, he hath made himself subject and liable to an action to be brought by the party to whom he should have delivered the goods," ibid.

[4] 12 Mod. 133; S.C. 1 Salk. 29.

to which end they would not consider it only as a promise on the part of C, for as such it would not bind him, except B was discharged; but they would construe it to be a mutual promise, viz., that C promised to A to pay the debt of B, and A on the other side promised to discharge B, so that though B be not actually discharged, yet if A sues him, he subjects himself to an action for the breach of the promise." [1]

The last sentence in this judgment shows that one step was still wanting to complete the efficacy of a novation. The contract between A and C could not be directly enforced by B, because he was a stranger to it. Therefore A, if he was prepared to expose himself to an action by C for the breach of his promise, could still sue B.[2] The last stage was reached when it was recognized that the agreement between A and C operated to extinguish B's debt, so that A could no longer sue B. This was recognized in 1789 by Buller, J., who said, "suppose A owes B £100, and B owes C £100, and it is agreed between them that A shall pay C the £100; B's debt is extinguished, and C may recover the sum against A." [3] In other words, B, though he cannot sue on a contract made between A and C, can take advantage of the extinguishment of his obligation to C, which results from the contract between A and C.[4] The various applications of this principle in the law of partnership and otherwise belong to a later period in the history of the law.[5]

The manner in which the law upon these three topics—the invalidity, the enforcement, and the breach of contract—was being shaped during this period, illustrate the manner in which the English law of contract, as developed in and through the action of assumpsit, was being co-ordinated with other branches of the common law. It was being adapted to the established rules which regulated the status of such persons as married women and infants; and, just as in the growth of the doctrine of consideration, we can trace the influence of older ideas which had originated in the action of debt, so in many of these branches of the law we can trace the influence of older ideas originating in doctrines, first applied to contracts under seal and more especially to bonds, and developed mainly in connection with the land law. But, as I have already pointed out, and as we can see from the history just related, the main lines of development were shaped by the conditions under which the various branches of the action of assumpsit lay. At the end of the seventeenth century these developments were in

[1] 12 Mod. at p. 134.
[2] Ames, op. cit. 300.
[3] Tatlock v. Harris 3 T.R. at p. 180.
[4] Lytt v. Ault (1852) 7 Exch. 669.
[5] Ames, op. cit. 300-309; Pollock, Contracts (9th ed.) 218-219.

many cases as yet rudimentary. But, at that period, we can see the beginnings of another influence which, in the following period, will exercise a very powerful effect on the further developments of this branch of the law—the influence of mercantile custom. We shall see that the theory of contract, as developed in and through the action of assumpsit, was sufficient to enable the common law to keep and develop that jurisdiction over commercial law which it had acquired at the close of this period.[1] But before I deal with the beginnings of a body of law, which was destined to have so great an influence on the future development, not only of the law of contract, but also of many other branches of English law, I must say something of the latest development of the action of assumpsit, which resulted in the creation of our modern law of quasi-contract.

§ 3. QUASI-CONTRACT

We have seen that, during the mediæval period, the actions of debt and account enabled the law to recognize and to give effect to rights arising from certain relations, which, at the present day, we should style quasi-contractual. Thus debt could be used to recover statutory penalties, forfeitures under bye-laws, amercements, and money ordered to be paid by the judgment of a court; and either debt or account lay at the suit of a beneficiary to whose use money had been paid.[2] Similarly, account lay when A handed over money to B to employ for his (A's) use, or when A's factor or bailiff had received money to his (A's) use; and, at the end of the sixteenth century, it was held that if A, by reason of a mistake or in consequence of false or fraudulent representations made by B, had paid money to B, he could bring account against B.[3] We have seen, too, that in the sixteenth century the spheres of debt and account had come to be almost concurrent; and that therefore, when indebitatus assumpsit had become almost concurrent with debt, it followed that indebitatus assumpsit came to be almost concurrent with account.[4]

These developments, therefore, opened the possibility of extending indebitatus assumpsit to remedy many of those causes of action which were remediable, either by the actions of debt or account. It was in the latter part of the seventeenth century that this extension was made, and that it was used, firstly, to enforce certain of those statutory or customary duties which were enforceable by action of debt; and, secondly, to remedy cases of unjust

[1] Vol. i 558, 568-573; vol. v 140-148.
[2] Vol. iii 420, 425-428; cp. vol. ii 366-369.
[3] Vol. iii 427. [4] Ibid 428.

enrichment which were remediable by the actions of debt or account. The latter was the most fruitful line of development, and by its means the largest part of our present law of quasi-contract was constructed.

It would not however be true to say that the whole of our modern law of quasi-contract has grown up round this latest extension of indebitatus assumpsit. This action could never be brought for money due under a judgment;[1] and certain duties imposed by law on carriers, innkeepers, and others were still enforceable, as they had been enforceable in the Middle Ages,[2] by an action on the case.[3] These cases, and other similar causes of action which have arisen later,[4] are on the border line between contract and tort, and should perhaps be classed as quasi-torts, if the common law had ever recognized such a category of obligations. But it never recognized such a category, because such breaches of duty could be sued on by a form of assumpsit; and, though this form of assumpsit was, as we have seen, really delictual in character,[5] the fact that it was a form of assumpsit led the lawyers to class these obligations as quasi-contracts. Parts therefore of our modern law of quasi-contract are based on the competence of the old action of debt, and parts on innominate actions on the case.

In this section I propose to say something of the growth of that part of the law of quasi-contract which is derived from the extension of indebitatus assumpsit to this new sphere of liability. I shall divide the subject according to the two main lines on which this extension proceeded: firstly, its extension to enforce certain legal duties formerly enforceable by action of debt; and, secondly, its extension to remedy cases of unjust enrichment. Lastly, I shall indicate the manner in which, by reason of these developments, the growth of the modern law was made possible.

(1) *The extension of indebitatus assumpsit to enforce certain legal duties formerly enforceable by action of debt.*

We have seen that in *Slade's Case*[6] it was recognized that, from the existence of a debt, the law would imply a promise to pay it, which promise could be enforced by indebitatus assumpsit;[7] and that this decision naturally led to the recognition of contractual duties implied from the acts of the parties.[8] The extension of the

[1] Ames, Lectures on Legal History 160; cp. Bl. Comm. iii 158-159.
[2] Vol. iii 385-386, 448.
[3] Ames, op. cit. 161, and cases there cited; Street, op. cit. ii 236-237.
[4] See Street, op. cit. ii 237-238; as he points out the agent's implied warranty of authority recognized in Collen v. Wright (1857) 8 E. and B. 647 is a late illustration of this principle.
[5] Vol. iii 448-450.
[6] (1602) 4 Co. Rep. 92b.
[7] Vol. iii 443-444.
[8] Ibid 446-447.

idea of contractual duty implied from the acts of the parties, tended to promote the recognition of duties which diverged more and more widely from the sphere of true contract. Thus, we have seen that it had come to be recognized that an infant could be made liable to pay a reasonable price for necessaries supplied to him by action of assumpsit on a quantum meruit;[1] and this liability could be enforced, though the infant was too young to be capable of consent.[2] But as soon as the idea of consent which underlies assumpsit begins to be whittled away, it is obvious that there will be a tendency, on account of its procedural advantages, to use indebitatus assumpsit to enforce, not only those debts which arise from a contract express or implied, but also those debts which are imposed by law.

At the end of the seventeenth century the attempt to use indebitatus assumpsit in this way was made; and it was at first permitted by the courts almost without opposition. Thus in 1676, in the case of *The Mayor of London v. Gorry*,[3] assumpsit was brought for money due by custom for scavage. "The jury found the duty to be due, but that no promise was expressly made: and whether *assumpsit* lies for this money thus due by custom without express promise was the question: resolved it does." In 1679 this case was followed, and the company of Barber Surgeons of London was allowed to recover, by this form of action, a penalty imposed on a member for breach of a bye-law.[4] In 1681 it was held in the Exchequer Chamber that a customary payment known as weighage could be recovered in this way;[5] in 1689[6] the gentleman ushers were allowed to recover the customary fee due from a person who had been knighted; and in the same year the executrix of a lord of the manor was allowed to recover a fine set upon a copyholder by her testator.[7]

But in the last cited case Holt, C.J., dissented. He refused to follow the prevailing opinion, and to allow that, because debt lay, indebitatus assumpsit must therefore necessarily lie.[8] He

[1] Above 52.

[2] As Mr. Street points out, op. cit. ii 204, "insane and drunken persons are upon the same footing as infants in respect to their liability to compensate for necessaries. The law makes the contract for them, or at least imposes the legal duty on the particular facts of the case"; as he points out, loc. cit., the husband's liability to be sued by assumpsit for necessaries supplied to his wife, whom he has wrongfully deserted, rests on the same basis; as we have seen, vol. iii 530, it was in Manby v. Scott (1663) 1 Sid. 109 that it was first recognized that this liability could be enforced in this way.

[3] 2 Lev. 174. [4] The Barber Surgeons of London v. Pelson 2 Lev. 252.

[5] Mayor of London v. Hunt 3 Lev. 37.

[6] Duppa v. Gerrard 1 Shower K.B. 78.

[7] Shuttleworth v. Garnet 3 Lev. 261; S. C. Comb. 151.

[8] "It doth not follow that an indebitatus assumpsit lies because debt lies; where wager of law doth not lie, there an indebitatus assumpsit don't lie, and it is mischievous to extend it further than *Slade's Case*," Comb. 151.

objected to this extension on two grounds. In the first place, he saw that in principle there was a logical chasm between such cases as *Slade's Case*, where there was a duty imposed by the implied consent of the parties, and cases where the duty was imposed by law without the consent of the parties. This distinction was pointed out in Shower's argument in the case of the *City of York v. Toun*.[1] It was assented to by Holt, who, in another case, said that "the notion of promises in law was a metaphysical notion, for the law makes no promise, but where there is a promise of the party."[2] In the second place, he saw that to permit these penalties to be recovered by this form of action meant, firstly, allowing the plaintiff to state his case generally, so that the defendant was embarrassed in making his defence;[3] and, secondly, leaving the whole question of liability to a jury, without giving the court power to pronounce on the reasonableness of the custom or bye-law.[4] When Holt had made up his mind he was apt to express his opinion with vehemence. In the *City of York v. Toun*, on a motion being made that the action might stay till the next term, he said "that it should stay till Doomsday with all his heart";[5] and in another case he said, "away with your Indebitatus, 'tis but as a bargain and no Indebitatus lyeth."[6] He tried also to win over the other judges to his opinion. Raymond notes[7] that, a few days after the hearing of the *City of York v. Toun*, "I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house. And Holt repeated the said case to him, as a new attempt to extend the indebitatus assumpsit, which had been too much encouraged already. And Treby, Chief Justice, seemed also to be of the same opinion with Holt."

Holt did not succeed in bringing the other judges round to his opinion, or in stopping this development of the sphere of indebitatus assumpsit. In the case of *Shuttleworth v. Garnet*[8] he was in a minority of one; in the *City of York v. Toun*[9] Rokeby, J., dissented from his opinion; and Holt's successors allowed indebitatus assumpsit to be brought in these[10] and similar cases.[11] In fact, they saw that the scope of the action had been so extended

[1] "How can there be any privity or assent implied when a fine is imposed on a man against his will," (1700) 5 Mod. 444.

[2] Starke v. Cheeseman (1700) 1 Ld. Raym. at p. 538.

[3] "An indebitatus assumpsit is laid generally, and the defendant can't tell how to make his defence, but debt is laid more particularly," Comb. 151.

[4] "It is hard that customs, bye-laws, rights to impose fines, charters, and everything should be left to a jury," City of York v. Toun (1700) 5 Mod. 414.

[5] 1 Ld. Raym. 502. [6] Anon. (1695) Holt. 35. [7] 1 Ld. Raym. 502.

[8] 3 Lev. 261. [9] 1 Ld. Raym. 502.

[10] See e.g. Mayor of Exeter v. Trimlet (1759) 2 Wils. 95; Seward v. Baker (1787) 1 T.R. 616.

[11] Thus it was held in Dupleix v. De Roven (1705) 2 Vern. 540 that indebitatus assumpsit lay on a foreign judgment.

in the seventeenth century, that this further extension, though illogical if regarded from the point of view of the original theory on which the action was based, was inevitable. Even if Holt's views had prevailed, and the right to bring indebitatus assumpsit in these cases had been denied, many cases would have been left, in which the supposed agreement upon which it was brought was equally fictitious. That this was so we shall see if we look at the manner in which this form of action had been applied to remedy cases where one man had enriched himself unjustly at the expense of another.

(2) *The extension of indebitatus assumpsit to remedy cases of unjust enrichment.*

Ames has very truly said that "the most fruitful manifestations of the doctrine that one person shall not unjustly enrich himself at the expense of another, are, in early law, to be found in the action of account."[1] It is because account and debt had become largely coterminous, that it was possible to extend indebitatus assumpsit to this new sphere. That this was so we shall see if we look at two sixteenth-century cases, which turned on the sphere of assumpsit, and compare them with the very different notions as to its sphere which were growing up in the seventeenth century.

In 1573, in *Tottenham and Bedingfield's Case*,[2] it was held that, where a defendant had carried off and sold certain tithe produce belonging to the plaintiff as parson, account did not lie. The defendant, it was pointed out, was merely a wrongdoer. There was no privity between him and the plaintiff, as in the case where one had received another's money as bailiff or agent for him. He had assumed to take property as owner, and in such a case account was not a proper remedy.[3] In 1595, in the case of *Howlet v. Osbourn*,[4] it was held that assumpsit did not lie where A delivered £10 to the defendant to deliver to the plaintiff, and the defendant, after promising the plaintiff to pay it to him, failed to do so. But it is clear that both these were cases in which one man had been enriched at the expense of another; and, as we shall now see, the extensions made in the scope of indebitatus assumpsit during the seventeenth century, provided a remedy both for them and for other analogous cases.

We can distinguish three main classes of cases:—(i) actions to recover money upon a total failure of consideration; (ii) actions

[1] Lectures on Legal History, 163.

[2] 3 Leo. 24.

[3] "The action doth not lie, for here is not any privity; for wrongs are always done without privity. . . . As soon as the tithes were severed by the parishioners, there they were presently in the plaintiff, and therefore the defendant by taking of them was a wrongdoer, and no action of accompt lieth against him," ibid *per* Manwood, J.

[4] Cro. Eliza 380.

to recover money paid to a person to whom it was not due; and (iii) actions to recover money from a person who had wrongfully taken it.

(i) By the beginning of the eighteenth century, it was well established that the action would lie to recover back money paid under a contract, where the consideration had wholly failed. In *Brigg's Case*[1] (1624) A promised to make a lease to B, and B paid A a large fine for the lease. Before the lease was made A was evicted from the land. It was held that B could sue by action on the case to recover damages for the loss of his bargain; and it should be noted that the court declined to prohibit the Council of Wales from hearing the case, because "ceo case est mixt ove equity." Holt was willing to follow this case, and to rule that in such cases of total failure of consideration an action on the case could be brought; but he at first refused to allow that indebitatus assumpsit lay. He considered that the cause of action was in tort, and therefore remediable by an action in tort, and not by a form of action which seemed to imply that the liability was somehow contractual.[2] Thus in 1696, in the case of *Dewbery v. Chapman*,[3] the defendant, representing falsely that he was a freeman of London, took the plaintiff's son as apprentice, and promised to make him a freeman of London. In consideration thereof the plaintiff paid him £30. The defendant could not fulfil this promise as he was not himself a freeman. Holt ruled that the plaintiff could not recover his £30 by indebitatus assumpsit, but that he must bring an action on the case;[4] and in 1698 he gave a similar ruling.[5] But a little later, in the case of *Holmes v. Hall* (1705),[6] he altered his opinion, though it would seem somewhat unwillingly.[6] He there held that, where an executor had paid X a sum of money for the delivery up of certain writings belonging to his testator, and X then refused to deliver them up, the executor could recover the money so paid by indebitatus assumpsit. "Many such actions," he said, "have been maintained for earnests in bargains when the bargainer would not perform, and for

[1] Palmer 364.

[2] "Where upon a reckoning, a man receives more money from me than he ought, an indebitatus will lie; nay, it hath prevailed further, where money was paid for fees which were not justly due (though it is hard to maintain that), but where there is a bargain, tho' a corrupt one, or where one sells goods that were not his own, I will never allow an indebitatus," Anon. (1698) Comb. 447.

[3] Holt 35.

[4] "The defendant hath cheated the plaintiff of his money, and the plaintiff hath no remedy, unless by special action of the case for not making him a freeman," ibid.

[5] Comb. 447, cited above n. 2. [5] 6 Mod. 161.

[6] "These cases of *indebitatus* for money received to use have been carried too far, and nobody would more willingly check them than I would," ibid; in the report of this case in Holt at p. 36, counsel cited a similar case, where Holt had non-suited the plaintiff—"which Holt utterly denied."

premiums for insurance when the ship etc. did not go the voyage."[1]

(ii) In the course of the seventeenth century indebitatus assumpsit was allowed to be brought by A, when he had paid money to B which was not in fact due, under such circumstances that B had no right to retain it. In the earlier part of the century it was thought that in this case, as in the case of failure of consideration, the proper remedy was action on the case. Thus it was held in the case of *Cavendish v. Middleton* (1629)[2] that, where a vendor of goods, who had already been paid, exacted payment a second time, case lay to get back the amount thus wrongfully exacted. But it was held in 1657 that indebitatus assumpsit lay to get back money paid to X, who was afterwards proved to have had no right to receive it;[3] and in the latter part of the century the principle became established, and was applied to a large number of different cases. Thus it was said in 1692 that, if money was paid to a stakeholder to abide the result of a wager, the winner could recover it from him by this action, as it was money received by the stakeholder to his use.[4] Similarly, money could be recovered back which had been paid under a judgment which was void, because the court had no jurisdiction;[5] or money paid by mistake, fraud, or extorted by duress.[6] But money paid under a contract void for illegality could not be recovered back if the plaintiff was particeps criminis.[7] It would seem that Holt was averse to some of these extensions of the action;[8] but it is clear from the cases decided in his time and later that his opposition did not stop the development of this principle.

(iii) As early as 1573 Harper, J., had, in his dissenting judgment in *Tottenham and Bedingfield's Case*,[9] expressed the

[1] Holt at p. 36.

[2] Cro. Car. 141.

[3] Bonnel v. Foulke 2 Sid. 4—"Si jeo pay monies in satisfaction del duty et come duty, et il a qui est pay nad title de ceo receiver, et issint le duty n'est satisfie, il a qui est pay est in debt a moy, et issint jeo maintainer action vers luy."

[4] Case cited by Holt, C.J., in Martin v. Sitwell 1 Shower, K.B., at p. 157 as adjudged by Wyndham, J.

[5] Newdigate v. Davy (1694) 1 Ld. Raym. 742—the money had been paid under a sentence of James II.'s illegal court of High Commission.

[6] Tomkyns v. Barnet (1694) Skin, 412 *per* Holt, C.J.; "The cases of payments by mistake or deceit are not to be disputed" *per* curiam Astley v. Reynolds (1732) 2 Stra. at p. 916; it was held in that case that the action lay for money extorted by duress of goods.

[7] Tomkins v. Bernet (1693) 1 Salk. 22; some of the reported reasons for this decision were disapproved by Lord Mansfield in Smith v. Bromley (1760) 2 Dougl. 697 n., though he did not dissent from the general principle; cp. Clarke v. Shee (1774) 1 Cowp. at pp. 199, 200; in fact the general principle is stated quite clearly by Holt in the report of Tomkyns v. Barnet in Skin. 412; the case of Wilkinson v. Kitchin (1697) 1 Ld. Raym. 89, in which Holt is reported as having laid down the contrary rule, is obviously wrong.

[8] Comb. 447, cited above 93 n. 2; cp. Skin. 412.

[9] 3 Leo. 24; above 92.

opinion that a wrongdoer might be made liable in account, by charging him with taking the property as the rightful owner's agent.[1] This view prevailed in the latter half of the seventeenth century; and it was held that indebitatus assumpsit could be brought by A against B, where B had taken or acquired money or other property which in fact belonged to A. Thus in 1676, in the case of *Woodward v. Aston*,[2] indebitatus assumpsit was brought by the joint holder of an office against his fellow who had taken all the profits, and no one objected to the form of the action; and when, in the following year, this objection was made in a case of a similar kind, the objection was over-ruled.[3] In 1678, in the case of *Howard v. Wood*, the court, though it doubted the correctness of these decisions, declined to over-rule them, as it considered that the law was too well settled.[4] Holt, at first reluctantly, acquiesced in them.[5] But in 1706, in the case of *Lamine v. Dorrell*,[6] he applied the principle to the case where an administrator, acting under a grant of administration which was afterwards revoked, had sold debentures belonging to the deceased. He held that the rightful administrator could waive the conversion, and sue in indebitatus assumpsit for their value, as for money received to his use. In his judgment he recalled the great doubts which eminent lawyers had had as to the application of indebitatus assumpsit to these cases.[7] But he made it quite plain that these controversies were then settled. "If two men reckon together, and one over pays the other, the proper remedy in that case is a special action for the money over paid, or an account; and yet in that case you constantly bring an indebitatus assumpsit for money had and received to the plaintiff's use. . . . So the defendant in this case, pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator."[8] And, at a later day, he said "that he could not see how it differed from an indebitatus assumpsit for the profits of an office by a rightful officer against a wrongful,

[1] "The plaintiff may charge the defendant as his proctor, and it shall be no plea for the defendant to say that he was not his proctor," 3 Leo. 24.

[2] 2 Mod. 95. [3] Arris v. Stukeley (1677) 2 Mod. at p. 262.

[4] "If this were now an original case we are agreed it would by no means lie; . . . but because judgments have been upon it, and that on solemn arguments, and many judgments, though some passed *sub silentio*, yet others have been debated and settled, and particularly in the Exchequer, we are therefore willing to go the same way," *per* Scroggs, C.J., delivering the opinion of the court 2 Shower, K.B., at p. 24.

[5] Comb. 447, cited above 93 n. 2. [6] 2 Ld. Raym. 1216.

[7] "These actions have crept in by degrees. I remember in the case of Mr. Aston, in a dispute about the office of clerk to the papers in this Court, there were great counsel consulted with; and Sir William Jones and Mr. Saunders were of opinion an indebitatus would not lie, upon meeting and conferring together, and great consideration," ibid at p. 1217.

[8] Ibid

as money had and received by the wrongful officer to the use of the rightful."[1]

(3) *The beginnings of the modern law.*

It is clear from these cases that, though in an indebitatus assumpsit a promise to pay was supposed to have been made, the promise was very much of a fiction. It is clear, therefore, that Holt's objections on this score to allowing the action for breaches of bye-laws and customary duties could hardly be sustained. The action had come to be regarded as the proper remedy for a mass of miscellaneous duties imposed by law. But what was the principle upon which these duties were thus enforced? The form of the action implied that they were enforced because the party liable had agreed to pay. But that was notoriously false. Blackstone, it is true, by the help of the original contract, tried to give some colour to this fiction.[2] A person was liable to be sued in debt on a judgment or a penal statute, or in indebitatus assumpsit on a bye-law, because of "an implied original contract to submit to the rules of the community whereof we are members."[3] In other cases an agreement was implied "from natural reason and the just construction of the law."[4] For instance, it is on this ground that we are liable to pay for work done at our request, or to pay over money received to another's use, or to remunerate a person who has spent his own money for our benefit at our request, or to pay what is due on an account stated, or to show adequate skill in any office or employment. It is clear that Blackstone, in thus endeavouring to give colour to this fiction of agreement, hopelessly mixed up cases where there is a real but an implied contract, with cases where there is no real contract, but merely an obligation implied by law—in other words, a quasi-contract. But the fact that Blackstone could seriously put forward such a theory, both illustrates the somewhat haphazard way in which these various duties had come to be enforced, either by the actions of debt or account, or by successive expansions of various forms of assumpsit, and shows that, owing to this haphazard development, the law had not attained a coherent theory of quasi-contract.

It was easy enough to see that in many of these cases the obligation, being imposed by law, had nothing contractual about it. It was obvious, for instance, that the obligation to make a customary payment, or to pay a penalty for the breach of a bye-law, was simply imposed by law; and the same fact was equally

[1] 2 Ld. Raym. 1217.
[2] Comm. iii 158-165.
[3] Ibid 159.
[4] Ibid 161.

obvious in many of these cases in which the law imposed an obligation to pay, in order to remedy an unjust enrichment. But these cases were numerous and varied, and the principle which underlay them badly needed to be stated. Here Lord Mansfield had his chance. He was not faced by a coherent body of principles like the doctrine of consideration,[1] or the rules as to disseisin,[2] or the rule in *Shelley's Case*.[3] He found an incoherent set of rules stated in a number of heterogeneous cases; and if there was any one principle at their back, it was the innate feeling of the judges that it was just and equitable that a convenient remedy should be given in these cases. This was a situation with which he was eminently qualified to deal. In the passage in his judgment in *Moses v. Macfarlan*,[4] in which he laid down the conditions under which an action would lie for these cases of unjust enrichment, he summed up and thereby gave precision to the principle underlying the earlier cases. The actual decision in that case is erroneous;[5] but the principles there laid down are the starting point of the modern development of what is the largest and most important part of the law of quasi-contract; and their acceptance has done much to liberalize the common law. "This kind of equitable action," he said,[6] "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him in any course of law; as in payment of a debt barred by the statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law, he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

It was thus in the action of indebitatus assumpsit that the larger part of our modern law of quasi-contract has originated.

[1] Above 29-30.
[2] Vol. vii 44.
[3] Vol. iii 109-110.
[4] (1760) 2 Burr. 1005.
[5] 2 S.L.C. (10th ed.) 413.
[6] 2 Burr. at p. 1012

But, as we have seen,[1] there were also a certain number of quasi-contractual obligations which had never come within its sphere. On a judgment only debt could be brought; and there were a certain number of obligations still only remediable by actions on the case. It is not till forms of action are things of the past, that the products of these various parallel developments will be able to be grouped together into a uniform law of quasi-contract. It is not till these procedural changes have taken place that the fiction of a promise, and with it the confusion between implied contracts and contracts implied in law, will be got rid of, and the law of quasi-contract will be able to emerge as a distinct branch of the law.

We must now turn to that field of mercantile law in which this new law of contract will necessarily play the most important part, in which it will be developed in many different directions, and in which, as the result of these developments, many kinds of particular contracts, each governed by their own peculiar rules, will grow up.

[1] Above 89.

CHAPTER IV

THE LAW MERCHANT

I HAVE already said something of the manner in which England had, during this period, become a commercial nation. We have seen that, since the new commercial needs of the modern English state were similar to the commercial needs of the great mediæval trading centres of Italy and South Western Europe, the commercial mechanism which had been there developed spread, first to the commercial cities of the Netherlands, and later to England; and that the legal doctrines, devised by the mediæval canonists and civilians to give expression to the forms and working of this commercial mechanism, and to solve the problems to which it gave rise, were necessarily received, together with the commercial mechanism, to which they owed their origin and development. We have seen, therefore, that these doctrines formed the basis of those new rules of the Law Merchant which were making their appearance in England at the beginning of the sixteenth century; and that, though they were necessarily modified by their contact with the rules of English law, they are the foundation upon which modern mercantile law rests both in England and elsewhere.[1] In this chapter we must consider the origins and the English development of some of the principal doctrines of the Law Merchant. I shall deal, in the first place, with certain doctrines of commercial law, secondly with certain doctrines of maritime law, and, thirdly, with a topic which has close relations with both commercial and maritime law—the topic of insurance.

I

COMMERCIAL LAW

The necessity of eluding the rigid mediæval prohibition of usury had a large influence on the legal forms which commercial ideas and institutions took, when they first made their appearance; and the modification of this prohibition was the condition precedent to the transition from mediæval to modern commercial ideas.

[1] Vol. v 60-154.

I shall therefore begin the history of this branch of the law with a short account of the mediæval attitude towards usury, the gradual modification of that attitude brought about by the usury laws, its total rejection in the nineteenth century, and its partial restoration in the present century. Usury having been permitted under conditions, the modern mechanism of exchange could be freely and rapidly developed; for much of that mechanism depends, to borrow a phrase from Bagehot, upon "the diffused habit of lending things." [1] Thus we get the rise and development of negotiable instruments and banking, the formation of all kinds of commercial societies, and some signs of the future development of the modern law of agency. With these topics I shall deal under the four following heads. At the same time, and as a result of these developments, it became necessary to make provision for cases where merchants, either from their fault or their misfortune, were unable to meet the liabilities which the new mechanism of commerce had enabled them to incur. Thus we get the beginnings of the law of bankruptcy, with which this part of this chapter will conclude.

§ 1. Usury and the Usury Laws [2]

At no time can the state be wholly indifferent to the use which the owners of property make of their property. More especially must it interest itself in the actions of those who, having a sum of ready money at their disposal, seek, without risk to themselves, to exploit the needs of poorer or less fortunate men, and to exact from them a reward for the loan of this money. Thus, at all times, the relations of the lenders of money on onerous terms to those in need of pecuniary assistance, require to be watched carefully, lest the processes of the law be used for the purposes of the most grievous oppression. In this country a very short experience of the consequences of allowing lenders and borrowers to make what bargains they please has been sufficient to demonstrate this fact; [3] and this century has seen the state resume a control, which it had abandoned under the influence of the a priori theories of Bentham,

[1] Economic Studies (Silver Library Ed.) 218.

[2] Much the best English account of the evolution of the mediæval, and the growth of the modern ideas on this subject, will be found in Ashley, Economic History vol. i Pt. I chap. iii; Pt. II chap. vi; the introduction to Tawney's edition of Wilson on Usury gives a good account of the transition from the mediæval ideas to those of the sixteenth and seventeenth centuries; for a good account of the whole subject, from the point of view of foreign law, see Brissaud, Cours d'histoire generale du droit français 1422-1434; see also Malynes, Lex Mercatoria Part II chaps. x-xv; Bl. Comm. ii 454-464; Stephen H.C.L. iii 194-199; Bellot, Bargains with Money Lenders (2nd ed.) 1-82.

[3] See the evidence of Mathew, J., given to the Select Committee on money-lending in 1898, cited Bellot, op. cit. 70, 71.

and of the pseudo-scientific laws of the school of *laissez faire* economists.[1] In this, as in other cases, these so-called laws placed obstacles in the way of necessary legislative changes, some time after the purely temporary political and economic conditions, from which they were deduced, had ceased to exist.[2]

We have seen that in the Middle Ages the state, and the different communities through which the power of the state was exercised, considered that they were very much interested in seeing that property was used in accordance with the current notions of morality and justice.[3] And it is clear that when trade was in its infancy, when, therefore, there was little opportunity for profitable investment, the relation of lender and borrower must be very strictly supervised. For, in such a state of society, borrowers of money were more often than not either the extravagant or the needy. The money was borrowed, as Sir William Ashley says, not for productive but for consumptive expenditure.[4] There was therefore some justification, both for Aristotle's view that all interest was unlawful because money did not breed money, and for the literal acceptance of the Scriptural prohibitions of usury.[5] If we remember these facts, we shall not be surprised that the church and the canon law[6] condemned all lending of money as a sin; that the civil law and the laws of the states of Western Europe endorsed and sanctioned this condemnation;[7] that all transactions were carefully sifted to see whether they were tainted with its presence; and that the prohibition of usury thus became, as Brissaud has said, the keystone of the political economy of the Middle Ages.[8]

From the earliest times the law of the English state was based

[1] Bentham's Defence of Usury was published in 1787; and Sir William Ashley has pointed out, in a review of Mr. Tawney's book, that Leslie Stephen has said that Bentham's tract "became one of the sacred books of the economists."

[2] The usury laws were repealed in 1854, 17, 18 Victoria c. 90; the Money-lenders Act was passed in 1900, 63, 64 Victoria c. 51.

[3] Vol. ii 468-469; vol. iv 316-326.

[4] "Where money was borrowed it was, in the vast majority of cases, not for what is called productive expenditure, but for consumptive; not to enlarge the area of tillage, or to invest in trade or industry, but to meet some sudden want due to the frequent famines, or to oppressive taxation, or to extravagance. The money that was lent was money for which it would otherwise have been exceedingly difficult to secure an investment. The alternative to lending was allowing it to remain idle," Ashley, op. cit. i Pt. II 435; cp. Brissaud, op. cit. 1423-1424.

[5] Ethics v; Politics i. 10; Luke vi 35; Cunningham, Industry and Commerce i 252 n. 1; Malynes, op. cit. chap. x.

[6] See Clement V.'s canon of 1311, cited Ashley, op. cit. i Pt. I 150-151.

[7] Ibid Pt. II 382-383; Brissaud, op. cit. 1425-1426.

[8] Op. cit. 1424—"Les casuistes cherchent à le proscrire partout; par suite de leur intransigeance, la défense de l'usure prend une extension invraisemblable, et devient comme la clef de voûte de l'economie politique du moyen âge; vente, payement, dommages intérêts, société, banque, lettre de change, autant de matières où on s'en pré-occupe particulièrement."

upon these ideas.[1] Glanvil tells us that usury was both a sin and a crime. In the usurer's lifetime he was dealt with by the ecclesiastical courts as a sinner; but, if he died unrepentant, the king asserted a claim to his goods.[2] This was also the law in Bracton's day;[3] and it was restated in 1341. A statute passed in that year enacted that, "The king and his heirs should have the cognisance of the usurers dead; and that the Ordinaries of Holy Church have the cognisance of the usurers in life, as to them appertaineth, to make compulsion by the censures of Holy Church for the sin, and to make restitution of the usuries taken against the laws of Holy Church."[4]

As we might expect, the temptation to fall into this sin was felt most keenly in the great commercial towns. In 1363 the city of London, encouraged thereto by the king,[5] issued an ordinance against it;[6] and in 1391 further provisions were made.[7] The object of the latter provisions was to declare more precisely what kinds of contract were usurious;[8] and it was further enacted that brokers, through whom such bargains were usually negotiated, should be obliged to take an oath, and to give £100 as a security, that they would not meddle in any usurious transactions.[9] The case of Ralph Cornwaille, which occurred in 1377, shows that this legislation was no dead letter;[10] and, that it was in accordance with the public opinion of the day, is clear from the fact that in 1376 the Commons petitioned that the ordinances against usury made by the city of London should be enforced in all other towns.[11] As late as 1487 the legislature passed two statutes on the lines of these ordinances. The first made all "bargayns groundyt in usurye" void, and subjected those who made them to a penalty of £100, in addition to any punishment which might be inflicted by

[1] The apocryphal laws of Edward the Confessor c. 37 (Lieberman, Die Gesetze der Angelsachsen i 668) treated usury as a crime—"si aliquis inde probatus esset omnes possessiones suas perderet et pro ex lege haberetur."

[2] Bk. vii 16—"Usurarii vero omnes res, sive testatus sive intestatus decesserit, domini Regis sunt; vivus autem non solet aliquis de crimine usurae appellari nec convinci. . . . Si quis aliquo tempore usurarius fuerit in vita sua, et super hoc in patria publice defamatus; si tamen a delicto ipso ante mortem suam destiterit et penitentiam ejerit, post mortem ipsius ille vel res ejus lege usurarii minime censebuntur"; cp. Dialogus de Scaccario, Stubbs, Sel. Ch. (6th ed.) 229.

[3] At ff. 116b, 117. [4] 15 Edward III. st. 1 c. 5.

[5] Liber Albus (R.S.) iii 142, 143; for the French text see ibid i 267, 268.

[6] Ibid iii 143-146; i 368-371. [7] Ibid iii 161-163; i 399-401.

[8] "Whereas the same Ordinance (that of 1363) is too obscure and it is not comprised or declared therein in especial what is usury or unlawful chevisance," ibid iii 162.

[9] Ibid iii 163.

[10] Ibid i 394-399; see Cunningham, op. cit. i 360-361, for a full account of this case; a loan of £10 was negotiated through brokers for which the lender wished to charge 50%, and, on non-payment, he sued for the money; on complaint to the Mayor and aldermen, Ralph Cornwaille, the borrower, was freed from his obligations, and the lender was imprisoned till he had paid double the interest as a penalty to the city.

[11] R.P. ii 350 (50 Ed. III. no. 158).

the ecclesiastical courts.[1] The second inflicted penalties on brokers who made these usurious contracts.[2]

At the latter part of the fifteenth and in the sixteenth centuries economic conditions were changing.[3] The growth of trade was making it clear that traders could make a productive use of borrowed money, and that therefore a payment for the use of borrowed money might be advantageous both to the parties to the contract and to the state. The result was, not the repeal of the general prohibition of usury, but the growth of a large number of rules, which were designed to distinguish between those payments for the use of money which were usurious and illegal, from those which were permissible.

The basis of these rules was the distinction drawn, as early as the first half of the thirteenth century, between a mere payment for the use of money, and a payment made to compensate the lender for some loss actually occasioned by non-payment (*damnum emergens*), or for failure to realize some expected gain in consequence of his not having the money in hand (*lucrum cessans*).[4] A payment on account of *damnum emergens* was recognized as valid by Aquinas;[5] and, as the opportunities for profitable investment increased, a payment on account of *lucrum cessans* gradually came to be regarded as lawful. Sir William Ashley says that in the fifteenth century its legality was generally accepted by the best theologians.[6] But it should be noted that the loss must actually be proved;[7] and it was necessary that, in the first instance, the loan should have been gratuitous. Technically, the payment was made, not for the loan, but for non-payment of a gratuitous loan at the date promised.[8] Gradually, however, in the case of traders, the loss came to be presumed; and, with the shortening of the period of the gratuitous loan, the making of it gratuitously for a short period came to be a mere formality.[9] But this development did not take place till after the close of the mediæval period;[10]

[1] 3 Henry VII. c. 5. [2] 3 Henry VII. c. 6. [3] Vol. iv 316-319.

[4] Ashley, op. cit. i Pt. II. 399; Brissaud, op. cit. 1427.

[5] Ashley, op. cit. i Pt. II. 399.

[6] "Even some of the contemporaries of Aquinas among the canonists had held this opinion; so that during the following century, the fourteenth, it could hardly be regarded as distinctly under the ban of the Church; and in the fifteenth it was certainly very generally accepted by the best theologians," ibid 401.

[7] Siraccha, De Mercatura, Pt. IV., De contractibus mercatorum § 3 (Tractatus Universi Juris vi Pt. I. 298b) says, "Probare debes quod mercator habuit prae manibus merces quasdam quibus fuisset lucratus . . . , et quia caruit pecunia, non potuit emere, vel alio modo potuit constare, quod si habuisset illam pecuniam, certe lucratus esset."

[8] Ashley, op. cit i Pt. II. 401, 402. [9] Ibid 402.

[10] Ibid 403; Malynes, Lex Mercatoria 243, clearly states the view of his own day on this matter—"A man may take a benefit for his money two manner of ways, which is *ex damno habito*, when he hath sustained a loss, or *ex lucro cessante*, when his benefit or profit hath been taken away or prevented for want of his money, which he might have bestowed in some wares to furnish his shop at convenient time, and in both these the party is not active but passive."

and, by that time, the application of the strict mediæval principle had been weakened by the manner in which this idea of compensation for loss had been applied to render legal many kinds of commercial contracts.

One of the commonest of the mediæval commercial contracts was the *Commenda*—a form of societas, and the direct ancestor of those limited partnerships of continental law which have lately been introduced into this country.[1] A, a merchant, stays at home, and entrusts goods or money to another that he may trade with them in foreign lands, in return for a share of the profits resulting from this trade; or, A, the travelling merchant, borrows capital from the merchant at home, that he may trade with it, in return for a share of the profits.[2] In these cases the risk run by the lender entitled him to a payment for the use of his capital. The London ordinance of 1391 makes it quite clear that such lending for gain, if accompanied by risk, was not punishable as usury.[3] Exactly the same considerations applied to loans on bottomry. The lender risked the loss of his money if the ship did not arrive safely, and for this risk he was entitled to be paid.[4] Insurance also could be similarly justified.[5] In all these cases payment was made, not for the loan of money, but for the loss or risk of loss run by the lender. It was only if the lender contracted to receive payment for his money in any event that he fell under the ban of the law.

A further step was made towards the weakening of the general principle when men began to reflect upon these various transactions which were thus held to be lawful, and to extend them by inference and deduction. We see an illustration of this in the *contractus trinus* of the late fifteenth century, which distinguished theologians and canonists of the sixteenth century asserted to be legal.[6] Sir William Ashley has very clearly described this contract; and I shall copy his description.[7] "An ordinary contract of partnership sharing risk and profit was justifiable; so was also a contract of assurance. A man could enter into partnership with B; and he could insure himself with C against the loss of his capital; and he could insure himself with D against fluctuations in the rate of profit [by the machinery of selling his uncertain

[1] Below 195-197.

[2] Ashley, op. cit. i Pt. II. 413-415; as Brissaud has said, op. cit. 1426, "On ne preta plus, mais on associa."

[3] Liber Albus (R.S.) iii 161—"If any person shall lend or put into the hands of any person gold or silver to receive gain thereby, or a promise for certain *without risk*, let such person have the punishment for usurers."

[4] Below 261-263.

[5] Below 275-276; cp. Straccha, De Assecuratione, Introd. §§ 43, 44, Tractatus Universi Juris vi Pt. I. p. 360b.

[6] Ashley, op. cit. i Pt. II. 440-447; see Scaccia, De Commercio et Cambiis § 3 Gloss. 3 no. 36.

[7] Ashley, op. cit. i Pt. II. 440-441; cp. Brissaud, op. cit. 1427 n. 4.

profit for a less but certain profit].[1] If all this was morally justifiable, why should not A make the three contracts with the same man B? or, to put it in a different way, why should not A place a certain sum in the hands of B, agreeing to receive only a low rate of interest, in consideration of a promise on B's part (*a*) to restore the capital, and (*b*) to pay a particular rate of interest in any case, whether the gains were high, low, or even absent." It is clear, as Sir William Ashley says,[2] that "under the forms of partnership, the contract had become nothing more nor less than a loan on interest; the essential element in partnership, participation in risk, had been contracted away."

Another device, whereby a landowner could in substance borrow money at interest, was the creation of a rent charge on his property;[3] or, as we have seen, the grant of a lease by the borrower to the lender at a nominal rent.[4] This was never accounted usury—possibly because the transaction was, in early times, regarded as the creation or conveyance of a *res*, and therefore quite distinct from a loan.[5] It was only if the creditor, to whom land had been thus conveyed in mortgage, took the profits of the land and did not set them off against the debt, that the transaction was usurious.[6] In the latter part of the fifteenth century the nature of these transactions was more closely analysed. In substance they looked very like loans of money at interest.[7] The landowner, or the shop-keeper, who created a redeemable rent charge on his property in return for a capital sum of money, in substance borrowed that capital sum at interest.[8] But the church held that, so long as these charges were only created upon bona stabilia which produced an income, so long as the rent charge bore a reasonable relation to the capital sum paid for it, and so long as the debtor retained the right to redeem, the transaction

[1] For the device of using the machinery of a sale to effect an insurance see below 277-278; the contract consisted, as Brissaud shows, of contracts of partnership, insurance, and sale.

[2] Op. cit. 441.

[3] Ibid 405-411; Brissaud, op. cit. 1429-1434; cp. also Select Pleas in the Star Chamber (S.S.) i lxxxiii-lxxxv.

[4] Vol. iii 129.

[5] As Brissaud says, op. cit. 1429—These rents "ont commencé par être un mode d'exploitation des terres et nullement une opération de crédit"; "la rente apparaissait comme un être moral distinct des arrérages, produisant des revenues à la facon d'un fonds de terre, 'de durée à tourjours'; lorsque le débiteur remboursait le capital qu'il avait reçu, on disait qu'il rachetait la rente," ibid 1432.

[6] Vol. iii 128; Glanvil x 8; Dialogus de Scaccario, Stubbs, Sel. Ch. 229, 230.

[7] Ashley, op. cit. i Pt. II. 408-409.

[8] "The canonist theory put no obstacle in the way either of a landed proprietor, or of an artisan with a shop or stall and the trade rights that usually went with it, who wished to borrow capital to put into his land or his business by means of the sale of a redeemable rent charge," ibid 410-411; cp. Select Cases in the Star Chamber (S.S.) i lxxxiv.

was lawful.[1] It is perhaps possible that this last condition may have had some influence upon the growth of the doctrine as to redemption which, in the sixteenth century, the Court of Chancery was beginning to make an essential part of all mortgage transactions.[2]

If we look at these various methods by which in substance it had become possible to borrow money at interest; if we remember that many of the Italian states borrowed money and contracted to pay interest on their loans;[3] that in many of the Italian commercial towns litigants were prohibited from invoking the aid of the laws against usury;[4] that the Franciscans had in some of these states established, with the approval of the church, *montes pietatis*, or funds from which loans were made to the needy in return for a low rate of interest[5]—we shall see that many inroads from many different sides had, at the close of the mediæval period, been made on the general principle that all usury was sinful.

But the principle was still accepted. Usury was still denounced in the old terms; and those who wished to evade the law made use of various devices to cloak their real intentions.[6] We shall see that when the legality of the contract of insurance was in doubt, recourse was had to the expedient of a sale and resale to cloak the real bargain;[7] and that the machinery of the contract of exchange or cambium was largely used to effect the same object.[8] We are reminded of the various expedients which

[1] Ashley, op. cit. i Pt. II. 409, 410.

[2] Vol. v. 293, 330-331; vol. vi 664; this condition seems to be much more closely connected with the equitable prohibition of clogging the equity of redemption than the general law against usury, ibid n. 6.

[3] Ashley, op. cit. i Pt. II. 447-448; below 179, 207-208.

[4] Vol. v 80 n. 2; cp. Bensa, Histoire du Contrat d'Assurance au moyen age (Translated by Valéry) 4—"même à diverses reprises les législateurs municipaux s'efforcèrent d'empêcher que les prescriptions du droit canon . . . fussent appliquées ou même fussent seulement invoquées; ils menaçaient en effet de peines rigoureuses quiconque chercherait à s'en prevaloir pour se soustraire aux suites de ses engagements"; we may note that in the Select Cases in Chancery (S.S.) no. 95 (1408) we see an Englishman at Verona doing a money-lending business with Englishmen visiting that city.

[5] Ashley, op. cit. i Pt. II. 449-451; Brissaud, op. cit. 1427 n. 7; cp. Malynes, op. cit. Pt. II. chap. xiii for an account of the Mons Pietatis at Bruges,—an institution which he would have liked to see established in London; he also advocated, ibid 235, a strict regulation of pawnbrokers, which regulation had been already begun by the statute 1 James I. c. 21.

[6] For an interesting case of a fictitious contract made to conceal usury see a bill in Chancery of Edward IV.'s reign, printed by Tawney and Power, Economic Documents, ii 133-134.

[7] Below 277-278.

[8] Ashley, op. cit. i Pt. II. 426-427; cp. Liber Albus iii 147—a letter under the Privy Seal of 1366 says that, "many merchants and others dwelling in our city of London, colourably and subtly have made, and do make from day to day, divers exchanges of money and of other things that do not concern the dealings of lawful merchandise"; the practice under the name of "dry exchange" is alluded to in

can be used at the present day to evade the laws which declare wagering contracts to be void. Such expedients are the best evidence of the existence of the general prohibition. But, it may be asked, why was it that this general prohibition was still maintained, seeing that the exceptions to, and the evasions of it, now covered so much ground? No doubt this was partly due to the authority of the church; but, as Sir William Ashley has pointed out, there was a substantial justification for this use of the church's authority. No doubt in the trading centres the modifications of the rule almost went to the length of repealing it; but the merchants were but a small fraction of the people who owned allegiance to and sought protection from the church. "By far the greater part of the population of Western Europe continued to be engaged in the old unchanging pursuits of agriculture: a declaration that payment could be taken for the loan of money would have meant the delivering them into the hands of the spoiler. The church, caring for the masses of the people, for the weak and stupid, might think it well to maintain a prohibition which imposed no restriction on the activity of the traders in the towns, who were well enough off to take care of themselves. The original prohibition had really aimed at preventing the oppression of the weak by the economically strong. The gradual exemption from the prohibition of methods of employing money which did not involve oppression, instead of obscuring the original principle, may be said to have brought it out more clearly."[1] That this was the point of view taken by the English legislator we can see from a statute of 1495,[2] which replaced that passed in 1487. Its object was to distinguish between cases where a reward could lawfully be taken for a loan and cases where it could not. Thus it allows, "lawful penalties for the non-payment of money lent." It condemns the sale of goods and their repurchase for a less sum, only if the transaction was with a person "in necessity." It condemns a loan of money in return for the rents and profits of land, only if the lender incurred no "adventure," or if he was to have the rents and profits of the land for a time certain.[3]

3 Henry VII. c. 5; Tawney, op. cit. 73-74; as Bensa says, op. cit. 8, "Le change était bien moins un contrat *sui generis* qu'une forme ou mieux encore un déguisement dont ou revêtait toutes sortes de transactions pécuniaries pour les mettre à l'abri des lois portées contre l'usure"; see below 126-130 for the contract of cambium.

[1] Ashley, op. cit. i Pt. II. 438-439. These principles continued to be applied to the types of credit transactions entered into by peasants and small masters, Tawney, op. cit. 17-30, and by needy gentlemen, ibid 31-42; the former class of borrowers were protected till 1854 by the usury laws, and the latter class were also protected by the growth of the equitable doctrines as to mortgages, and as to catching bargains.

[2] 11 Henry VII. c. 8.

[3] Above 105-106; the current view of the usurious character of such dealings in land is illustrated by two cases of 29 and 31 Henry VIII. abridged by Brooke, Ab. *Usurie* pl. 1 and 2; cp. Burton's Case (1592) 5 Co. Rep. 69a; Sharpley v. Hurrel (1609) Cro. Jac. 208; Roberts v. Tremayne (1619) ibid 507.

When this stage had been reached, it was inevitable that further developments should be made. Clearly all loans of money at interest could not be condemned. The methods employed to evade the penalties for usury were coming to be merely colourable devices. The maintenance of the law, which rendered these devices necessary, increased the lender's risk, and therefore the interest required by the borrower. The legislator was, as we have seen, coming to regard commercial dealings not so much from the point of view of their moral rectitude as from the point of view of their bearing upon the power of the state;[1] and from this point of view it was clearly desirable, in the interests of commercial development, to encourage loans of capital by permitting interest to be taken.[2] On the other hand, it was clear that to leave persons free to make what loans they pleased at any interest they pleased would lead to oppression. As Bacon said, "two things are to be reconciled: the one that the tooth of usurie be grinded, that it bite not too much; the other that there be left open a meanes to invite moneyed men to lend to the merchants for the continuing and quickening of trade."[3] The reconciliation of these two things "produced a controversy hardly less acute than that which accompanied the rise of machine industry in England two centuries later."[4]

In 1535 Thomas Cromwell contemplated drawing a statutory distinction between cases in which the expedients which enabled interest to be contracted for were used as a mere cloak for usury, and cases in which the parties were engaged in a bona fide commercial transaction.[5] But the project came to nothing. Probably it was found to be impracticable. In 1545 a less logical but more workable solution was devised. A statute passed in that year[6] saved the face of the older doctrine by a condemnation of usury in the old terms, but at the same time recognized the new conditions by repealing all the former statutes, and by permitting persons to lend money at a rate of interest not exceeding ten per cent without being liable for the penalties for usury.[7] Any

[1] Vol. iv 318.

[2] Bacon says in his Essay on Usury that, "howsoever usury in some respects hindereth merchandising, yet in some other it advanceth it; for it is certain that the greatest part of trade is driven by young merchants upon borrowing at interest; so as if the usurer either call in or keep back his money, there will ensue presently a great stand of trade"; cp. Tawney, op. cit. 43 seqq.

[3] Essay on Usury. [4] Tawney, op. cit. 105.

[5] L. and P. ix ii no. 725—"that an act may be made against usury which is cloaked by pretence of law."

[6] 37 Henry VIII. c. 9.

[7] The preamble states that, "before this tyme diverse and sondrie Actes . . . have bene . . . made for the punyshment of Usurye, beinge a Thinge unlawfull . . . which Actes . . . ben soe obscure and darke . . . and upon the same soe many doubts . . . have risen . . . and the same acts . . . bene of so litle force and effect, that by reason thereof litle or noe punyshment hath ensued to thoffendors of the same, but rather hath encouraged them to use the same."

attempt to evade the act by sales and repurchases, or by mortgages in return for rents and profits, was punished by the forfeiture of treble the value of the property sold, or the profits contracted for; and, in addition, fine and imprisonment. In 1551-1552[1] this statute was repealed—the Protestants were no more inclined to favour usury than the Catholics. It was declared that usury was utterly prohibited by the word of God, and the taking of any kind of interest was forbidden in the most comprehensive terms.

But in Elizabeth's reign other counsels prevailed. Protestant opinion had wavered. Though Luther had supported the general prohibition, Melancthon had seen that traders must be allowed to borrow at a moderate rate of interest;[2] and Calvin, though not perhaps prepared to go quite so far as Melancthon, admitted that there might be circumstances in which the taking of interest was lawful.[3] Among both Protestants and Catholics, "the moral distinction was tending more and more to become one between excessive demand and moderate demand, rather than between gratuitous and non-gratuitous loan."[4] In 1571[5] a statute was passed repealing the statute of Edward VI., and reviving that of Henry VIII. Usury was still branded as a detestable sin punishable in the ecclesiastical courts; and in the temporal courts it was declared to be an offence which rendered those guilty of it liable to the penalties of a præmunire. But it was provided that no one should be liable to these punishments if the rate of interest did not exceed ten per cent.[6] On the other hand, though a person who took less than ten per cent was not liable to these punishments,

[1] 5, 6 Edward VI. c. 20; Crowley, Information to Parliament (E.E.T.S.) 172-174, voices the prevailing conservative view; cp. Ashley, op. cit. i Pt. II. 465.

[2] Ibid 456-458.

[3] Among the conditions laid down by Calvin as justifying usury are the following:—"That usury should not be demanded from men in need; nor is it lawful to force any man to pay usury who is oppressed by need or calamity"; and that, "he who receives a loan on usury should make at least as much for himself by his labour and care as he obtains who gives the loan," cited ibid 459; as Mr. Tawney says, op. cit. 111, Calvin approached the question from the standpoint of a man of affairs who assumed the existence of capital and credit, and wished to moralize the commercial institutions of his day; his "indulgence to moderate interest, like Adam Smith's individualism, was remembered when the qualifications surrounding it were forgotten," ibid 120.

[4] Ashley, op. cit. i Pt. II. 451; cp. Grotius, De jure Belli et Pacis ii 12. 22 (cited Bl. Comm. ii 456)—"If the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, it's allowance is neither repugnant to the revealed nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though municipal laws may give it impunity, they never can make it just."

[5] 13 Elizabeth c. 8, made perpetual 39 Elizabeth c. 18; for an attempt to legislate in this way in 1563 see Tawney, op. cit. 158; for some cases on the statute see Burton's Case (1592) 5 Co. Rep. 69a; Clayton's Case (1595) ibid 70a; cp. Cunningham, op. cit. ii 153, 154.

[6] That no distinction was drawn by the Act of Edward VI. between different rates of interest was noted in 13 Elizabeth c. 8 as one of the reasons for repealing it.

he was liable to forfeit the interest if proceedings were taken to recover it.[1] This clause in the Act seems to have been a dead letter;[2] and it was not repeated in the Act of 1623, which lowered the rate of interest to eight per cent.[3]

It was far from being a logical rule—"you may perceive," said Malynes,[4] "what laws and prohibitions are made against usury; and nevertheless the practice of it is most usual in many kingdoms and commonweals, and the laws are also made accordingly"; and it was naturally distasteful to the rigid moralists. Their views found expression in the treatise on usury, written in 1569 by Dr. Wilson, Master of Requests,[5] and first published in 1572.[6] "At the last," he says,[7] "you come to a rate, and woulde in any wise have ten or twelve upon the hundred eyther appointed or tollerated. . . . But I am not of your mynde, because God is against you, and therefore I do abhorre all toleracion of usurie . . . but rather I would wishe that there were as straite lawes to forbid usurie as there bee to forbid felony or murther." On the other hand, following the mediæval distinction, he would allow a payment of interest for loss sustained as distinct from usury.[8] That Wilson took the old-fashioned view is, I think, due to the fact that he was an Anglican, a canonist, and an ambassador. As an Anglican, he naturally magnified, as many Anglican writers magnified,[9] the literal words of the Bible, and he was naturally inclined to oppose the more liberal opinions of Calvin. As a canonist, he was inclined to stress those texts of the canon law which were in harmony with the words of the Bible—they were the parts of the canon law which, being in harmony with Anglican teaching, the English church had received.[10] As an ambassador, he approached the world of commerce from the standpoint of the diplomatist; and English diplomatists have generally, from that day to this, been somewhat of amateurs in financial and commercial matters.

The moral question continued to be much discussed by many

[1] 13 Elizabeth c. 8 § 4; cp. Tawney, op. cit. 160-161. [2] Ibid 165-166.

[3] 21 James I. c. 17; reduced to six per cent by 12 Charles II. c. 13. Bacon in his essay on usury had advocated a reduction, and the measure was approved by Malynes, Lex Mercatoria 231-232.

[4] Op. cit. 228.

[5] For some account of Wilson see Tawney's edition of his book, 1-15; for his speech against the Act see ibid 159.

[6] The Epistle to the Earl of Leicester prefixed to the book is dated July 25th, 1569, and the title page bears the date 1572; cp. Tawney, op. cit. 10.

[7] At f. 73.

[8] "For you must understande that usurie is oneley geven for the onely benefitte of lendynge for time. Whereas interest is demanded when I have susteyned losse through another man's cause," ibid f. 133; cp. to the same effect Malynes, op. cit. 228-229; and this was the original distinction between the words—interest is "that which is between or the difference between the creditor's present position and what it would have been had the bargain been fulfilled," Ashley, op. cit. i Pt. II. 399.

[9] Tawney, op. cit. 112-113, 116-117. [10] Vol. i 504.

English[1] and continental writers in the seventeenth century.[2] Some, including Malynes[3] and Marquardus,[4] advocated the retention of the mediæval idea, that in considering whether any given bargain to give or receive interest was lawful, regard should be paid to the condition of the borrower and the purpose of the loan. It would however have been difficult to give effect to this principle by direct legislation, and no attempt was made to give effect to it in this way. In fact, economic theory was tending to the view that in the case of the contract of loan, as in other cases, persons should be free to make what bargains they pleased[5]—"having for centuries," as Mr. Tawney says, "argued with little reason that interest was oppressive in all circumstances, within half a century of Wilson's death they were to argue with even less reason that it was oppressive in none."[6] But in the sixteenth and early seventeenth centuries the mediæval idea was to some extent recognized by the Council;[7] and later in the seventeenth century it found expression in the growth of the equitable control over bargains with persons under the pressure of necessity, or with heirs, reversioners, or others entitled to expectant interests in property.[8]

We have seen that § 4 of the Act of Elizabeth was not repeated in the Act of James I.; and the later debates upon this

[1] Cunningham, op. cit. ii 156-159.

[2] Ibid; Ashley, op. cit. i Pt. II. 453; cp. Marquardus, De Jure Mercatorum et Commerciorum (ed. 1662) ii 8, 32, 37, 46, 47, 53, 64; iv 4, 8, 10-12.

[3] Op. cit. p. 243—"As there are three sorts of dealing amongst men, that is Gift, Bargaining, and Lending; so are there three sorts of men, the stark beggar, the poor householder, and the rich merchant or gentleman. To the first you ought to give freely, not only to lend freely; to the second you ought to lend either freely or mercifully, and not to feed upon him with excessive usury: but with the third you may deal straightly, and ask your own with gain especially when he gaineth by your money; using in all these a conscience with discretion."

[4] Op. cit. iv 4, 8, 10-12—"Usurarum autem prohibitarum rursum duo sunt genera; unum ex parte et ratione debitoris; alterius respectu creditoris. Respectu et ratione debitoris usurae sunt illicitae et prohibitae, quarum exactione debitor gravatur et paulatim quasi consumitur: hoc est quando debitor inops et pauper factus est, non ex delicto suo et prodigalitate, sed fortunae injuria. . . . A non pauperibus vero, qui propter indigentiam suam praesentem non inopiam, sed vel lucrum aliamve instantem necessitatem sumunt, usurae licitae exiguntur. . . . Fieret enim alias debitor locupletior cum creditoris jactura. Respectu creditoris illicitae usurae tum sunt, quando debitor quidem pauper non est, sed creditor nihilominus plus justo interesse exigit, nomine sortis principalis non solutae."

[5] Vol. vi 356-360.

[6] Op. cit. 60; as is there said, doctrines designed to protect the peasant or craftsman were not applicable to clothiers, ironmasters, and other capitalists who could protect themselves; a modification was needed, for the same reason as, in our day, a modification of the equitable doctrine of clogging the equity of redemption was needed.

[7] Thus in 1600 one Clarke of King's Lynn was accused of extreme and unconscionable dealing against Bellingham of Peterborough; certain persons were appointed to reduce Clarke to some compromise, and to make him restore to Bellingham his copyhold; if he will not do so they were to certify the Council, Dasent xxx 366; cp. Tawney, op. cit. 162-165.

[8] The leading cases are Chesterfield v. Janssen (1750) 1 Atk. 339; Earl of Aylesford v. Morris (1873) L.R. 8 Ch. 484; on the whole subject see Bellot, Bargains with Money Lenders Chap. iv.

question show how rapidly public opinion had changed since 1571. "The House of Commons had debated anxiously, if unprofitably, under Elizabeth as to the correct interpretation of Scripture: in 1640 it is much more concerned with the danger of driving capital abroad."[1] An Act of Anne[2] finally reduced the rate to 5 per cent; and this and subsequent Acts excepted certain transactions from the operation of the law.[3] Subject to these modifications and exceptions, the scheme of the Elizabethan statute, supplemented by the rules of equity, was the basis upon which the law rested down to the repeal of the usury laws in 1854,[4] under the influence of Bentham and the economists.[5] When, in 1900, the Legislature saw fit to resume some control over the operations of moneylenders, it directed the courts to apply these equitable doctrines as to harsh and unconscionable dealings, when they were considering the question whether a borrower was entitled to relief.[6] By so doing it has again brought our modern law into touch with the policy which commended itself to the lawyers and statesmen of the sixteenth and seventeenth centuries, and with the elements of substantial truth and justice which underlay the mediæval condemnation of usury.

The modification of the mediæval prohibition of usury, and the consequent growth of the law as to when usury was permissible and when it was not, show us that, in the sixteenth century, the organization of commerce and industry upon a capitalistic basis was an established fact. This new organization of industry was naturally the cause of great changes and developments in commercial law—indeed, it is the ultimate cause of the shape which it has assumed. Two of its most important consequences were the rise and growth of negotiable instruments and the institution of banking. At the present day negotiable instruments provide for the safety of capital, by affording means for obviating the risks attendant upon the physical transport or exchange of the precious metals; and the bank provides, in the first place, a place where capital can be stored, and, in the second place, a convenient and safe mechanism by which this stored up capital can be used as and when required.[7] Both in this way bear to cash payments some-

[1] Tawney, op. cit. 171. [2] 12 Anne st. 2 c. 16.

[3] For these acts see Bellot, op. cit. 44, 45.

[4] 17, 18 Victoria c. 90. [5] Above 100-101.

[6] 63, 64 Victoria c. 51—The court must be satisfied (§ 1. 1) that "the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief."

[7] Thus Marquardus, De jure Mercatorum et Commerciorum, ii 12. 33, says of bills of exchange, "in summa adeo Reipublicæ necessaria et utilia sunt cambia, ut, si cessarent, omnia fere mercaturæ officia destruerentur. Et sublata negociationi cambiorum e medio tolli omnes mercaturas et nundinas"; and ibid ii 14. 3, he says of payments

what the same historical relation that cash payments bear to barter —they mark a more advanced stage of commercial organization. Both also began to assume their modern forms and functions in the mediæval trading centres of Southern Europe and the mediæval fairs; and both during this period spread over Europe, and added important chapters to the national law of many states. In dealing with both therefore we must consider, in the first place, their mediæval origins and continental development, and, in the second place, their introduction into England and the manner in which they were received and developed by the common law.

But though from many points of view we can rightly regard these institutions as connected phenomena; though each has helped forward the development of the other; yet their origins are very dissimilar in date and in kind. One of the roots of the negotiable instrument must be sought in the need to circumvent some very primitive restrictions found in many bodies of archaic law; but banks and banking do not appear till commerce and commercial law have attained a relatively high degree of development. From the historical point of view, therefore, they must be treated separately. I shall therefore deal with them separately in the two succeeding sections.

§ 2. Negotiable Instruments

When these instruments came to the notice of the English courts in the sixteenth century, they had already attained a development which enables us to see in germ the main features of the negotiability of our modern law. If, therefore, we would understand the nature of these instruments, which were then introduced to English lawyers, we must first examine their mediæval origins and continental development. It will then be possible to relate the history of their introduction into England and their development by the common law.

Mediæval Origins and Continental Development

Before I begin to discuss the question of the origins of these instruments, it will perhaps be useful to concentrate attention upon the object of our search, by recalling the characteristic features of negotiability in our modern law. They are three in number: (i) Negotiable instruments are transferable by delivery if made payable to bearer, or by indorsement and delivery if made payable to

made through a bank that, "consuetudo tamen et stylus mercantilis in Italia et Germania viget, ut quælibet promissio, facta in banco, cedat loco solutionis."

order; and the transferee to whom they have been thus delivered can sue upon them in his own name. (ii) Consideration is presumed. (iii) A transferee, who takes one of these instruments in good faith and for value, acquires a good title, even though his transferor had a defective title, or no title at all. Thus the questions which I must try to answer are, first, what were the germs from which instruments having these qualities were developed; and, secondly, what were the technical processes by which this development took place?

In order to solve these questions I must start by giving some account of certain documents, in which a person places himself under a liability to pay or perform something, either (*a*) to the creditor or to someone else nominated by the creditor and producing the document, or (*b*) to the nominee of the creditor producing the document, or (*c*) to the creditor or the producer of the document, or (*d*) to the producer of the document simply. These documents come from a very early period in the history of law, and were not necessarily confined to mercantile transactions. But, with the development of commerce, they necessarily came to be used most frequently in these transactions. However, in the sixteenth century, their commercial usefulness was almost entirely destroyed, because the lawyers, under the influence of the technical conceptions of the civil law, so construed them that they lost the negotiable characteristics which they had formerly possessed. The merchants were therefore obliged to evolve some other expedient. This expedient was found in the adaptation of another kind of instrument which, in the late thirteenth and early fourteenth centuries, had been invented for the purpose of effecting an exchange of money without incurring the risks of its physical transportation. This instrument was the Bill of Exchange. This new and essentially commercial document gradually attracted to itself some of the qualities which these older documents had originally possessed; and, as it was in connection with these bills of exchange that the characteristic features of the negotiability of our modern law obtained their final form and recognition, they naturally came to be regarded as the type and model of the negotiable instrument. Naturally this development led to a revival of the negotiable qualities of some of those older instruments which had lost their negotiable characteristics in the course of the sixteenth century.

I shall therefore group my account of these developments under the two following heads: firstly, the early documents authorizing the debtor to pay the creditor or his nominee, or the creditor or the producer of the document; and, secondly, the origin and development of the bill of exchange.

(1) *The early documents authorizing the debtor to pay the creditor or his nominee, or the creditor or the producer of the document.*

Even in modern times the legal consequences of negotiability are exceptions to the ordinary rules of law. In ancient law anything approaching a negotiable instrument was legally impossible, for three reasons. Firstly, ancient systems of law do not allow one man to represent another in litigation before a tribunal. When this prohibition began to be relaxed, representation was at first an exceptional privilege, and the representative must be formally and solemnly appointed.[1] Secondly, ancient systems of law do not allow a creditor to assign his right to another.[2] That the relation of debtor and creditor was a strictly personal relation is obvious from the strictly personal character of the creditor's remedy—he could even imprison the debtor. Therefore it was only just that the creditor and the creditor alone should be able to enforce his claim.[3] Thirdly, such a transfer, even if otherwise permissible, was impossible, because there could be no transfer of anything without a physical delivery of possession; and how can the right to enforce the payment of a debt be physically transferred?[4]

In Northern Italy many of these difficulties were circumvented by the Lombard lawyers of the eighth and ninth centuries. They resorted to two different sets of expedients. In the first place, they drew up documents in which the person liable promises performance not only to a specified creditor, but also to any one who produces the document as the creditor's nominee.[5] Thus in 771 a monk made over to a church the right to avenge his death if he

[1] Brunner, Les Titres au porteur français du moyen âge, N.R.H., x 12-16; cp. vol. ii 315-317; Professor Wigmore has pointed out to me that Brunner's conclusions have been combated in an essay by Brandileone, published in 1903 by J. Vallardi, Milan, which is a reprint from vol. i of Rivista di diritto commerciale e maritimo; but that Brunner's views have been vindicated in a later essay by Mario Palazzo, La question dell' origine del titolo a portatore (1905, Torino, Tipografia Salesiana, Via Cottolango, 32) at pp. 54, 87, 115.

[2] Brunner, op. cit. 16-19; vol. vii 518, 520-521; for the manner in which the influence of the civil and canon law made for a modification of this rule, see below 117, 123.

[3] "Pas plus qu'on ne s'explique aujourd'hui un changement du débiteur sans l'assentiment du créancier, pas plus on n'aurait compris autrefois la substitution d'un créancier à un autre. Cela tenait encore à ce que les durs moyens de coercition dont les créanciers étaient armés, la contrainte par corps, par exemple, pouvaient être maniés de façon très diverse, suivant l'humeur des personnes qui avaient à les faire valoir," Brissaud, Hist. du droit français, ii 1434; as Marquardus, De Jure Mercatorum et Commerciorum, says (ii 7, 10) speaking of later law: "Nec enim creditoris petitio ipso invito immutari aut ipsi alius debitor obtrudi, licet debitoris actio et chirographum a creditore invito debitore alii cedi possit, cum ejus non intersit cui solvat."

[4] Vol. iii 92 n. 10; vol. vii 518; cp. Jenks, Essays, A.A.L.H., iii 65, 66.

[5] Brunner, op. cit., 31; Jenks, op. cit., 61, 62; many examples can be found in the Codex Cavensis, a collection of deeds from the archives of the Cluniac monastery at La Cava near Salerno, and now published (see Jenks, op. cit. 60, 61); the other collection which illustrates this expedient will be found in vol. v of Memorie e Documenti per servire all' istoria del Ducato de Lucca; it contains a reprint of the cathedral documents from the seventh to the tenth centuries (Jenks, loc. cit.).

should be murdered, and the right was to be enforced, "per se vel per illum hominem cui ipse hanc cartulam dederit ad exigendum."[1] Similarly it was provided that a performance should be made to a creditor, "vel cui istum breve in manu paruerit in vice nostra."[2] In the second place, they drew up documents in which the person liable promises performance, sometimes to the creditor or the producer of the document, sometimes to the producer of the document simply.[3] Thus, in the middle of the ninth century, a person promised, "tibi aut eidem homini qui hunc scriptum pro manibus abuerit,"[4] or "mihi seu ad hominem illum apud quem brebem iste in manu paruerit";[5] and in the middle of the tenth century a person promised, "ad hominem apud quem iste scriptus paruerit."[6]

It should be noted that these clauses are to be found in many various kinds of documents. They are to be found in wills and conveyances as well as in documents which acknowledge indebtedness. Thus an example of the year 1036 is thus described by Professor Jenks:[7] "A certain 'comes Petrus' by his will left the guardianship of his wife and all belonging thereto to his *germani* Malfred and John, or *illi viro cui scriptum in manu paruerit.* Thirty years later, a certain clerk John appeared in court as guardian of the widow, and was accepted as such without a question on production of the document." But it is clear that they could be used in documents which acknowledged that the debtor owed money to a creditor, just as easily as in documents in which a testator or a settlor conveys benefits to a named person. And that documents of this kind spread over Europe in the thirteenth century there is much evidence. Brunner has shown that both varieties were well known in France in this and the following centuries.[8] In England they were known to Bracton under the name of *missibilia.*[9] In the fair courts we meet with *scripta obligatoria*, which could be enforced sometimes by the certain attorney or the *nuncius* of the creditor, sometimes by the producer of the document.[10] In the Mayor's Court in London in 1304-1305 an action of detinue was brought for two bills of £70 15s. 11d., "which the plaintiff had bought from William Foundepe, merchant."[11]

The effect given to these clauses helped to get over the three difficulties which prevented the recognition of anything like a negotiable instrument.

1. If a debtor had promised to pay the creditor or his attorney or *nuncius*, many of the difficulties attaching to the representation

[1] Jenks, op. cit. 61. [2] Ibid 61, 62. [3] Ibid 62 [4] Ibid.
[5] Ibid. [6] Ibid. [7] Ibid 63, 64.
[8] Brunner, op. cit. 32-36 (examples of clauses to bearer); ibid 162-169 (examples of clauses to order); cp. Brissaud, op. cit. ii 1438.
[9] At f. 41b; P. and M. ii 225. [10] Vol. i 543; vol. v 114.
[11] Thomas, Calendar of early Mayor's Court Rolls 172.

of a litigant before a tribunal disappeared. It is true that the title of the plaintiff to be the representative of the principal must be proved. It is true also that in these early days he must be formally appointed like any other representative. But the fact that the debtor had bound himself to pay to the creditor or his nominee prevented him from raising any objection to the appointment.[1] In these cases, however, it is clear that the instrument can hardly be said to have had anything like a negotiable character. The nominee sued as the creditor's agent. Defences good against the principal were good against him.[2] The death of the principal put an end to his authority;[3] and the representative could not delegate his powers to another representative.[4] Probably the rights of the nominee were larger, he had a more independent position of his own, if the debtor had promised to pay any one nominated by the creditor, and the nominee sued, not as agent, but in his own name. As the debtor could not question his authority or his title to the instrument on which he sued, an instrument with the clause permitting the nominee to sue in his own name probably did possess certain negotiable characteristics.[5] At any rate, we shall see that this was the case in the thirteenth and fourteenth centuries.[6] But it was the instruments enforceable by the creditor or the producer, or by the producer simply, which possessed these negotiable characteristics in a far higher degree.

2. Instruments containing this clause got over the difficulty that a debt could not be assigned, and sometimes put the assignee in a better position than his assignor. If a debtor had promised to pay to the creditor or the producer of the instrument, or to the producer simply, the producer could sue in his own right as if he were the creditor.[7] He was the "dominus litis," or the "seigneur de la chose,"[8] as a French custumal calls him. The death of the original creditor did not affect his right to sue.[9] He need not show

[1] Brunner, op. cit. 169, clearly explains the advantages of this; when the right to represent another was restricted, the consent of the defendant to be sued by the plaintiff's representative would get over the difficulty: "seulement ce consentement était probablement très difficile à obtenir, lorsqu'il n'était demandé que dans le but de commencer le procès, car le défendeur avait tout intérêt à ne pas faciliter la procédure au demandeur. Mais si le créancier s'était assuré d'avance le consentement du débiteur dans le contrat même, si le débiteur s'était obligé par la reconnaissance de payer éventuellement au mandataire ou procureur du créancier, le débiteur poursuivi en justice ne pouvait pas s'opposer à l'admission du représentant du demandeur."

[2] Ibid 170. [3] Ibid op. cit. 18; cp. Brissaud, op. cit. ii 1438 n. 5.

[4] Brunner, op. cit. 174.

[5] Ibid 169, 179; cp. Debray, Thèse, De la clause à ordre [1892] 30-32—in some of the French provinces he was allowed to sue on his own account, though a stranger to the original contract; Debray, op. cit. 31-32, points out that as late as 1437 the custumal of Anjou and Maine stated that "Ne aucun ne peut recevoir convenance pour autre si ce n'est pour son prouffit *ou si ce n'est de son commandement.*"

[6] Below 120; last note.

[7] Brunner, op. cit. 39, 40, citing Bouteiller, Somme Rurale.

[8] Ibid. [9] Ibid 41.

how he came by the document.[1] Defences available against the original debtor were probably not available against him.[2] He was in a sense a party to the contract because he is the producer of the instrument, and it was the producer that the debtor had contracted to pay. When he sues upon the instrument he is therefore asserting a right of his own,[3] and can sue either personally or by agent.[4] It follows that these instruments, and the rights conferred by them, could freely circulate from hand to hand.

3. The third difficulty in the way of transferring a right to receive a debt—the difficulty that there can be no transfer without the physical delivery of some *res*—was removed by the growth of the idea that there can be a symbolical transfer, by the delivery of the charter which witnesses the transfer.[5] The Anglo-Saxon land book may have been used, not merely as the evidence of a conveyance, but as the conveyance itself;[6] and though in later times the royal courts in England refused to allow this efficacy to a deed, abroad this method of conveyance was well recognized.[7] It was certainly so recognized in Lombard law,[8] and the influence of Roman law made for its extension.[9] Now it is clear that this conception is capable of development; and it is the more possible to develop it in primitive systems of law, in which the lines between property and obligation, between conveyance and contract, are by no means clearly drawn. In this primitive period the charter which made a contract was regarded as the contract itself; and its *traditio* clinched the bargain.[10] Therefore any one into whose hands this charter came could present it to the debtor and demand its

[1] Brunner, op. cit. 43, 44, 148.

[2] Ibid 44, 45, 151, 152; on this point Bouteiller is silent; Brunner says that he could not be met by the plea of set-off, as this plea was excluded in all personal actions, and only permitted to a debtor as a special privilege given by the king; and at pp. 151, 152, probably not by any defence if he had taken in good faith.

[3] "Puisque le porteur d'icelle a encommancé la cause et petition des dictes lettres en court, il est fait seigneur de la poursuyte et action d'icelles entierement, et en peut faire comme il luy plaist, perdre ou gaigner en jugement, *si comme pure et principale partie*, et faire quittance ou don, comme bon luy semble," Bouteiller, Somme Rurale, f. 151, cited Brunner, op. cit. 40; as Brunner says (ibid 47): "A l'égard du débiteur le porteur est regardé comme créancier; c'est lui qui intente l'action et conclut à la condamnation du débiteur aux dépens."

[4] Ibid 40; of course, he cannot transfer after proceedings have been begun, ibid.

[5] Vol. iii 222-223; "La charte est placée souvent sur la même ligne que la *festuca* ou le *wadium*, sans doute parce qu'elle a la même efficacité: on fait tradition par le rameau ou par la charte," Brissaud, op. cit. ii 1395 n. 3.

[6] Vol. ii 77; vol. iii 223.

[7] Ibid 223-225.

[8] Jenks, op. cit. 65.

[9] Brissaud, op. cit. ii 1284, 1302-1305.

[10] "On s'oblige *per cartam* comme par la *festuca* ou le *wadium*, et, l'influence germanique agissant, ce n'est pas seulement la rédaction de l'acte qui est prise en considération, c'est sa remise matérielle au créancier. . . . L'ignorance et la défiance . . . ne durent pas peu contribuer à rapprocher la *carta* des symboles matériels en usage pour le transfert de la propriété et la formation des contrats," Brissaud, op. cit. ii 1395.

enforcement, if the charter had so provided.[1] Thus, by means of these charters, in which the debtor had promised to pay the creditor or producer, or the producer simply, the property in a debt could be transferred with the writing from hand to hand.

In these ancient documents, therefore, we can see that methods had been devised for breaking down the archaic formalism of primitive law, which would otherwise have prevented the growth of anything like a negotiable instrument. But as yet these methods were crude and unformed. They must be developed by legal theory and commercial practice before the negotiable instruments of our modern law could be evolved from them. And legal theory, for a time, was hostile to their development. In many different places, and at many different times, the lawyers have been slow to learn that their technical rules must, in the long run, accommodate themselves to business needs—that commercial law exists primarily to settle mercantile disputes, and not to dictate to the merchants the modes in which they shall carry on their business. These instruments were absolutely necessary to commerce; and it was therefore inevitable that legal technicalities should, in the long run, yield to mercantile necessities. But the marks of the conflict can be plainly read in the law which resulted; and it is, therefore, not till this conflict has been fought out and decided, that the modern incidents of the negotiable instrument appear. The first stages of this conflict can be read in the history of the development of these clauses in favour of the creditor's nominee, or of the producer of the document, which we have just been discussing.

The clauses in favour of the creditor's nominee.—We find in the Middle Ages many varieties of these clauses. They fall into two main classes. (i) There is the class in which the representative character of the nominee is not prominent, and (ii) there is the class in which it is clearly emphasized.[2] And in both classes the clause is sometimes alternative, i.e. the promise is to pay to the creditor or his nominee; and sometimes simple, i.e. the promise is to pay to the nominee.[3]

(i) Instances of clauses of the first class are promises to pay to you, the creditor, *vel cui mandaveris;* or to pay *mandato tuo*, or *tibi vel mandato tuo*, or *tibi vel certo mandato;* or to pay to X or *à son command*, *son certein command*, *son commandement*, or *mandement;* or to pay to X *ou à son command ces lettres portant;*

[1] Brunner, op. cit. 150, 151, compares his position with that of the Salman: "Le porteur, simple mandataire, est regardé comme créancier, le salmann, également simple mandataire, est regardé comme propriétaire. . . . Le porteur, de même que le salmann, n'agit pas, en ce qui concerne la forme, comme fondé de pouvoir du mandant, mais en vertu de son propre droit, le porteur comme créancier fiduciaire, le salmann comme propriétaire fiduciaire"; for the Salman see vol. iii 563-564; vol. iv. 410-412.

[2] Brunner, op. cit., 169, 170.

[3] Ibid 162-169.

or to pay *ei quem mihi ordinaveris*.[1] It was this last formula—to pay to the order of—which was destined, as we shall see, to supersede the others.[2]

(ii) Instances of clauses of the second class are promises to pay to X *vel procuratori suo, ou à leur procureur pour eulx et en leur nom, suo attornato, certo nuncio suo;* or to pay *nuncio* or *attornato litteras deferenti*, or *à son certain message qui ces lettres apportera*.[3]

It is probable that in the thirteenth and fourteenth centuries the legal effects of these two classes of clauses were very different. A nominee who sued in his own name on a document which contained a clause of the first class, could rely on the promise of the debtor to pay such a nominee. He need not prove any *causa* for the transfer to himself. He need not prove his title to sue as agent, or his title to the instrument, for he is in effect suing as creditor under the instrument. On the other hand, a nominee who sued in his creditor's name on a document which contained a clause of the first class, or a nominee who sued as agent on a document which contained a clause of the second class, was treated strictly as an agent. He must prove his authority, and all defences good against the principal were good against him.[4] Whichever clause was used, the nominee could not transfer his rights to another. In this respect it differed entirely from the document made payable to the producer, which could pass from hand to hand to an unlimited extent.[5]

[1] Brunner, op. cit. 162-166.

[2] The clause "vel cui ordinaverit" is found in a Genoese document of May 18, 1160: "Nos Bonusiohannes Tinea et Adalasia jugales accepimus a te Wilhelmo Burone libras X den. januens, quas tibi vel tuo misso per nos vel nostrum missum dabimus . . . si non in Sicilia dabimus nuncio tuo Jonathe Cerriolo *aut ei quem mihi ordinaveris* uncias auri vi," Mon. patriæ Chart. II., no. 882, col. 650, cited N.R.H. x 165; as Brunner says (ibid 165, 166), the clause to order became the usual clause in bills of exchange in the seventeenth century, and "Comme en France, la formule 'à l'ordre,' qui vient d'Italie et qui est maintenant devenue internationale, a aussi supplanté presque complètement en Allemagne les anciennes clauses à ordre nationales, parmi lesquelles la formule, 'oder an den getreuen Inhaber (ou au fidèle porteur),' avait été la plus usitée dans les derniers temps."

[3] Brunner, op. cit. 167, 168.

[4] "Le command et le procureur diffèrent en ce point que le premier avait une plus grande liberté d'agir. Le command peut plaider en son nom propre . . . il peut fonder son action sur le fait qui sert de cause à la tradition de la lettre. Mais la cause peut aussi rester occulte vis-à-vis des tiers, car le débiteur a promis de payer à la personne dénommée ou à celui '*cui mandaverit*.' Le command peut donc invoquer le seul ordre du principal de payer au command, sans indiquer la cause de la tradition. Quand le command agit en ce sens, la différence qui existe, pour le fond, entre le représentant et le créancier, disparaît dans le procès. . . . Le procureur n'est pas aussi libre que le command dans la manière de fonder son action. La teneur même de la clause de procuration l'oblige d'intenter l'action au nom du principal et d'invoquer la procuration que le principal lui a donnée à l'effet de se faire représenter en justice. . . . Les exceptions nées de faits personnels au principal peuvent être opposées au représentant," ibid 169, 170.

[5] "Le titre pourvu de la clause *à ordre* n'admettait qu'une seule transmission, car le command était obligé de prouver que le titre lui avait été remis par la personne dénommée. Ordinairement il établissait cette preuve par un *mandatum* écrit de la

These clauses in favour of the creditor's nominee had become rare in the fifteenth century; and in the sixteenth century they had disappeared.[1] In the first place, the lawyers, under the influence of the technical conceptions of the civil law, ignored the older difference between these two classes of clauses, and laid it down that the creditor's nominee could sue only in the capacity of the creditor's agent.[2] In the second place, the greater convenience of the clauses enabling the producer of the document to sue caused them to supersede these clauses in favour of the creditor's nominee.[3] It was not till the seventeenth century that these clauses reappear, in the form of the clause to order of our modern law, in connection with an entirely different class of instrument.[4] But in order to understand the reasons for this new development we must know something of the history of the clauses in favour of the producer of these documents.

The clauses in favour of the producer of the document.—Just as from the clauses in favour of the creditor's nominee the clause to order of our modern law is ultimately derived, so from these clauses in favour of the producer of the document springs our modern clause to bearer. The position of the producer of one of these documents, in the thirteenth and fourteenth centuries, almost exactly corresponds to the position of the bearer of a negotiable instrument. I shall, therefore, for the future speak of him under his modern name of bearer.

We have seen that the bearer was allowed to sue upon the contract in his own right, because the debtor had contracted to pay the creditor or the bearer of the document, or the bearer of the document simply.[5] This was his position in France, and probably in other countries also, till the end of the fourteenth century.[6] But, at the end of the fourteenth century, we can see that the same body of doctrine which had destroyed the independent position of nominee of the creditor is beginning to affect the position of the bearer. As with the creditor's nominee so with the bearer, the lawyers were beginning to reduce him to the position of the agent of the creditor.[7]

This change in the position of the bearer is due, as Brunner

personne dénommée. Le titre à ordre ancien se distinguait, à cet égard, essentiellement du titre au porteur, qui pouvait circuler par plusieurs mains," Brunner, op. cit. 174.

[1] Debray, op. cit. 35-37, "Au xvie siècle elle a disparu; toutes les formules qui la contenaient l'ont remplacée par la clause au porteur; la comparaison entre la *Summa artis notariæ* et *le Stile des notaires* est saisissante à ce point de vue."

[2] "On n'y vit plus qu'un mandat," ibid 36. The form of the clause "vel cui mandaveris"—helped this development.

[3] Ibid 35.

[4] Brissaud, op. cit. ii 1440.

[5] Above 117-118.

[6] Cp. Brissaud, op. cit. ii 1438 n. 1.

[7] The history of this process in France is worked out in great detail by Brunner, op. cit. 130-147.

has pointed out,[1] to the fundamental difference existing between the Germanic and the Roman procedure. As he says, "The Germanic procedure does not ask, What is the right of the plaintiff? Its point of view is the duty of defence, and the means of defence open to the defendant. The main question in these personal actions is the question whether the defendant is or is not bound to pay; and his obligation to pay the bearer is the direct consequence of the form of his promise to pay." But in the procedure of the civil and canon law the point of view is the right of the plaintiff. The assertion of that right is the object of the action. Thus, "this system, in which the first question is always, Has the plaintiff a right of action? made it necessary for the French lawyers to find some explanation of the bearer's right of action. They found it necessary to discover some legal basis on which they could rest it." Probably this difficulty was especially keenly felt by the French lawyers, because the Renaissance school of jurists, which was especially influential in France, endeavoured to get back as far as possible to the classical texts.[2] They therefore rejected many of those modifications of pure classical doctrine, which the influence of the older customary law, and commercial convenience and practice, had caused the school of the glossators to accept. But the difficulty was not confined to the French lawyers. It was felt in Italy, and indeed in all countries in which Roman law was received, in proportion to the extent to which the doctrines of that law gained supremacy.[3] The lawyers were at once learned in the classical texts of Justinian's Corpus Juris, and ignorant of the modern mechanism of commerce. They did not hesitate, therefore, to sacrifice commercial convenience on the shrine of legal orthodoxy—even suggesting that the merchants purposely adopted obscure forms in order that illegal transactions might pass unnoticed.[4] On the other hand, the technical difficulty was not felt so keenly in Northern Europe,[5] nor, as we shall see,

[1] Brunner, op. cit. 154, 155. [2] Vol. iv 225-228.

[3] Below 123 nn. 3 and 5.

[4] Scaccia. Tractatus de commerciis et cambio (§ 1 Quaest. ii 16), explaining the difficulty of this branch of the law, says that difficulties arise "Propter concisos et nostris jurisconsultis incognitos terminos quibus negotiatio hæc brevissimis conficitur litteris, adeo quod materiam istam cambii esse in se difficilem intellectu . . . et esse difficilem propter extraneos terminos quibus mercatores utuntur . . . imo posset quis probabiliter dubitare, cambiorum negotiatores de industria hunc concissum abstrusum et perplexum loquendi, contrahendique modum excogitare, ut jurisconsulti, aliique docti viri, ignoratis cambiorum terminis, ea damnare nesciant."

[5] Thus Marquardus, De jure Mercatorum et Commerciorum (ed. 1662) ii 14. 9, says: "Notandum et hic per clausulam vulgatam, *Vive qui hanc fert*, ex more inter mercatores frequentissimo syngraphis inseri solitam, latori non solum adjecto recte, solvi, sed et actionem ei a creditore mandatam cessamque præsumi . . . imo nec eum titulum ostendere nec bonam fidem probari necesse habere"; cp. ibid ii 7. 8-10, where he explains that an unlimited number of indorsements may be made; "Delegans mercator et creditor Dantiscanus per cambii solutionem tertio

in England. It is probable that in these places the older ideas lived on, and saved the lawyers the trouble of finding a new speculative basis, consonant with the doctrines of Roman law, upon which the peculiar characteristics of negotiable instruments could be based.

The difficulties felt by the lawyers of the sixteenth century were solved by another adaptation of the theory which had proved fatal to the usefulness of the clauses in favour of the creditor or his nominee.[1] The old French law had allowed that a stipulation in favour of another, in the form of a promise to pay the bearer, was valid.[2] But in Roman law such promises in favour of a third person were not valid; and therefore the school of the commentators denied their validity.[3] Promises in this form were, however, comparatively rare. It was more usual in the Middle Ages for these promises to be drawn up in favour of the promisee or bearer.[4] These promises were valid because the promise was made to the other contracting party as well as to the bearer, and the bearer could be regarded as a person *solutioni adjectus*. But it followed that he had no original or independent right of action on the contract.[5] This solution was, after a period of controversy, adopted in France, and ousted the older customary law, which had allowed the bearer an original and independent right of action.[6]

mercatori Hamburgensi faciendam, debitori suo Lubecensi novum creditorem constituere potest vice sua; rursumque fieri potest ut huic tertio. Hamburgensi novus quoque constituatur creditor; quam delegationem stylus et observantia mercatorum vocat inductionem."

[1] Above 121.

[2] Debray, op. cit. 31-32, citing the custumal of Anjou and Maine; above 117 n. 5.

[3] Brunner, op. cit. 140: "Bartolus, Baldus et d'autres jurisconsultes font, dans les contrats qui ont pour objet le paiement à faire à un tiers, une distinction entre le *verbum obligativum seu obligationis*, *promissionis stipulationis*, d'un côté, et le *verbum executivum seu executionis*, d'autre côté. Si la stipulation était conçue dans ces termes: *promittis illi quod dabis illi?* le *verbum obligationis* portait sur le tiers et la stipulation était regardée comme nulle. La stipulation portait-elle: *promittis mihi ut dabis Titio?* le *verbum obligationis* se rapportait au stipulant, le verbum *executivum* au tiers et le contrat était valable"; after a period of hesitation it would seem that in France a promise made to the bearer simply was treated as a promise to the promisee or bearer, ibid 160, 161.

[4] Ibid 148.

[5] Straccha, De Adjecto, Pt. iv 8. 1 (Tractatus Juris vi Pt. I, 400): "Quæro, octavo, solent mercatores se debitores constituere in hæc verba:—Lucius Titius obligavit se Maevio ad mille ex causa mercium habitarum, solvereque promisit calendis Febuariis eidem Maevio, seu ei qui chirographum exhibuerit, et (ut ipsi dicunt) à chi il presentara. Finge modo Sempronium habere chirographum, et exhibere. Num adjectus constitutus censeatur, seu magis jus agendi Sempronio competat? Quæstio hæc et quotidiana et utilis est valde, in qua prima fronte respondendum videatur adjectum Sempronium constitutum . . . unde sequitur hunc petitionem non habere"; Scaccia, op. cit. § 2, Gloss. 7. 41: "Etiam si adjectus haberet penes se scripturam, in qua stat adjectus, illamque in judicio produceret, quia illa habitio et productio non sunt apta ad acquirendum obligationem, et consequenter remaneret adjectus, qui nomine proprio non potest agere."

[6] Brunner, op. cit. 139-147; Brissaud, op. cit. ii 1438-1439.

This development was assisted by the fact that even in the old customary law Roman phrases importing agency appeared. Payment was to be made to X or bearer or agent.[1] Gradually more and more stress was laid upon these phrases. The bearer ceased to be described, as some of the older authorities describe him, as an agent of a very peculiar kind, in that his authority need not be proved and could not be revoked.[2] He sank to the position of an ordinary agent. The result was that, whether he was regarded as a person *adjectus solutioni*, or as an agent, he had no independent right of action. In order to sue he must prove,[3] or it must be presumed,[4] either that he has been appointed the agent of the creditor, or that the creditor has transferred to him his rights by making him a procurator *in rem suam*.[5]

The result was that the negotiable character of these instruments disappeared. If the bearer sued as agent his authority to sue must be proved, and it could be revoked. In any case it was revoked by the death of the creditor—"home mort n'a porteur de lettres."[6] If he sued as transferee an act of transfer must be proved —"un simple transport ne saisit point," i.e. the mere delivery of the instrument gives the bearer no right to sue for the debt; and the transfer must be notified to the debtor.[7] Before notification of

[1] Brunner, op. cit, 155: "Il est très probable que la clause *au porteur et procureur* . . . doit son origine aux tendances faites pour mettre hors doute l'action contestée du porteur par l'addition du mot procureur, parce qu'une disposition des Institutes regarde comme valable la stipulation *mihi aut procuratori meo*."

[2] Ibid 39-49.

[3] Scaccia, op. cit. § 2, Gloss. 7. 41: "Intelligo tamen quod non potest [*sc.* petere] proprio nomine, secus autem nomine procuratorio."

[4] Straccha, op. cit. Pt. iv 8. 8-10, admits that if a person produced an instrument authorizing payment to be made to the bearer, a presumption of agency might arise from the possession of the instrument, and that such person could sue without being obliged to give the *cautio de rato;* Scaccia, op. cit. § 2, Gloss. 7. 55, agrees, though it appears (ibid 55-66) that the point was controverted; but he concludes, "quicquid possit dici in puncto juris non est recedendum ab extensione quia servatur in praxi"; for similar rules in France, see Brunner, op. cit. 142-144; but this was only a presumption which could be rebutted, e.g. if it were proved that the creditor had forbidden the debtor to pay the bearer, ibid 144.

[5] Straccha, op. cit. Pt. iv 17. 36 (Tractatus Juris vi Pt. I 404b): "Reliquum est ut illud non ignoremus et ipsi adjecto actionem competere quando constitutus esset adjectus in rem suam"; Brunner, op. cit. 146, 147, citing Dumoulin and Charondas de Caron; the latter, commenting on Bouteiller, Somme Rurale, says: "Ce qu'il dict icy du porteur de lettres *mihi probari non potest* . . . faudroit pour agir en son nom et en exclure le principal créancier qu'il eût cession et transport de luy *aut mandatas actiones. Et ainsi nous en usons.*"

[6] This maxim appears in both parts of a collection of Parisian judgments, customs, and maxims by Jean Desmares which comes from the latter half of the fourteenth century, Brunner, op. cit. 49; it is quite contrary to the rules contained in the first part of that compilation, and other writers, e.g. Bouteiller, deny it, or explain it: "Elle n'a donc pas toujours été en vigueur dans le droit français: elle doit, au contraire, son origine à l'application faite aux titres au porteur des principes du droit romain sur mandat," ibid 50.

[7] For this maxim and its meaning see ibid 27-29; Brissaud, op. cit. ii 1435-1436; it appears in the Coutume de Paris of 1510, art. 170, and its meaning, as explained in La Nouvelle Coutume of 1580, art. 108, is that mere delivery of the

the transfer to the debtor, the debtor can pay the transferor; and a later transferee, who is the first to give notice, can gain priority over an earlier transferee who has omitted to give notice. From this point of view some lawyers expressly contrasted a transfer of property, for which a mere *traditio* sufficed, with the transfer of a debt, for which a mere delivery of the instrument creating the debt did not suffice.[1] Finally, whether the bearer sues as agent or as transferee, the defences good against the creditor are good as against him.[2]

It is hardly necessary to say that the commercial world was seriously inconvenienced by these developments of legal doctrine. The older instruments made payable to the creditor or his nominee had disappeared, and given place to these instruments payable to bearer; and now the negotiable character of these instruments to bearer had been destroyed. The merchants at first had recourse to instruments in which the name of the creditor was left blank, so that the ultimate transferee could fill in his own name.[3] But in France these instruments were declared illegal by several decrees of the Parlement of Paris;[4] and in 1716 instruments payable to the bearer only (except those issued by the state or by Law's bank) were declared to be illegal.[5] But in 1721 it was found necessary to repeal the edict of 1716, and to permit expressly

instrument will not operate as an assignment without notice to the debtor or some act equivalent thereto; its origin is not very clear; under the influence of the canon and civil law the instrument constituting the debt came to be regarded as the proof of the debt merely, not the debt itself, Brissaud, op. cit. ii 1436 n. 3; Brunner, op. cit. 180, 181; it followed that a mere transference of the instrument could not transfer the right to collect the debt—something more was needed, equivalent to a livery of seisin in the case of property; in France, as in England, some physical act was needed to transfer an incorporeal thing, such as a rent, vol. iii 97-99; Brunner suggests that this rule was applied to debts—notice to the debtor being recognized as a sort of livery of seisin. We thus get a curious parallel to the English rules as to the effect of notice given by the assignee of a chose in action to the debtor, and the rule in Dearle v. Hall (1828) 3 Russ. 1 as to the effect of notice to the trustees upon the priority of equitable charges on a trust fund of chattels personal; the history of the latter rule would seem to show that it was arrived at quite independently, see Ward v. Duncombe [1893] A.C. *per* Lord Macnaghten; perhaps the existence of this foreign parallel shows that there is more substantial justice in it than Lord Macnaghten was inclined to allow.

[1] Straccha, De Adjecto, Pt. iv 8. 3, cites authority for the proposition that *traditio* suffices for corporeal things, "sed si traderem tibi instrumentum in quo continetur nomen debitoris mei ex traditione hujusmodi instrumenti non videor actionem cessisse, quæ mihi contra debitorem meum competebat"; but he does not agree with this, and points out that the cession of such an instrument *animo donandi* may operate as a cession of the right of action; or, if the *animus donandi* is not proved, it may raise a presumption that the assignee has been made the agent of the assignor to sue for the debts—but it is clear that the mere transfer will not enable the assignee to sue in his own name.

[2] Brunner, op. cit. 144, 156-157; as he says (ibid 147), "les titres au porteur furent mis au même rang que les titres à personne dénommée"; for his position see above 123.

[3] Brissaud, op. cit. ii 1438-1439; Brunner, op. cit. 159.

[4] Ibid. [5] Ibid

instruments payable to bearer.[1] Long before this, however, the development of the negotiable character of the bill of exchange had supplied the want created by the destruction of the negotiable character of these older documents.

(2) *The origin and development of the bill of exchange.*

In dealing with this much controverted subject I shall consider (i) the mediæval contract of *cambium;* (ii) the machinery devised for giving effect to this contract; and (iii) the development of the negotiable character of the bill of exchange.

(i) *The mediæval contract of cambium.*

The contract of *cambium* was a special variety of the innominate contract *permutatio;* for while *permutatio* was concerned with exchange generally, *cambium* was concerned with the special case of the exchange of money for money. Baldus neatly expressed the difference between them when he said that *permutatio* was a contract by which a species of one genus was exchanged for a species of another genus, while *cambium* was a contract by which a species of one genus was exchanged for another species of the same genus.[2] As trade expanded, and as the machinery of trade grew more elaborate, this contract tended to occupy a sphere of ever-increasing importance,[3] and to develop a number of different forms —some, according to mediæval notions, lawful, and others unlawful. We must here notice three of the most important of these forms.

(*a*) It might be merely a contract by which A bargains to give B coins of one denomination in return for coins of another denomination (*cambium minutum*). There was nothing illegal in this transaction even if A made a small profit on it.[4] In England it was not a trade in which anyone could engage. Till Henry VIII.'s reign it was in the hands of exchangers authorized by the king.[5] After his reign the trade was thrown open; and state control was never resumed, though the project of resuming it was

[1] "Nous voulons, etc. . . . qu'en tous commerces et négociations que pourront faire nos subjets pour prêt d'argent, vente de marchandises ou autrement, ils puissent et qu'il leur soit loisible d'en stipuler par lettre ou billet le payement au porteur sans dénomination de personnes certaines," cited Brunner, op. cit. 160.

[2] Cited Marquardus, op. cit. ii 12, 22, "hoc tantum interesse inter cambium et permutationem quod hæc propria sit speciei ad speciem, illud autem speciei quoque ad genus"; cp. Scaccia, op. cit. § 1, Quæst. iv 1, 2.

[3] "Quinimo cambia adeo sunt Reipublicæ utilia et necessaria, ut si cambia cessarent, omnia pene mercaturæ officia dissiparentur ac destituerentur," Scaccia, op. cit. § 1, Quæst. vi 14.

[4] Thomas De Vio, De Cambiis 1. 1 (Tractatus Juris vi Pt. I. 405): "Vocatur autem cambium minutum quum campsor pro aureo ducato monetam dat consuetam in patria illa expendi, vel e converso, aliquid minus dando quam recipiat. Hoc enim continet naturalem æquitatem, ex quo quod industria et opere campsoris ratio habenda est."

[5] Cunningham, Industry and Commerce i 283-284, 362, 432 n. 6; Malynes, Lex Mercatoria 260, 261; Tawney, Wilson on Usury 138-141.

favoured by Malynes, and several attempts were made to adopt it, the last of which was in 1627.[1] Abroad this business was largely in the hands of the banks; and in England, in the early seventeenth century, it seems to have got into the hands of members of the Goldsmiths' Company,[2] who, as we shall see,[3] shortly after this period began to do a certain amount of banking business.

(*b*) Under the names of *cambium siccum* and *cambium fictivum* the contract was entered into in order to circumvent the prohibition of usury; and these varieties of the contract were unlawful. They did not cease to be used when the usury laws permitted moderate interest,[4] for they could be employed to conceal the fact that more than the statutory rate of interest was being charged. Wilson's treatise on usury gives us a very clear account of *cambium siccum*. This "secke or drye exchange," he tells us,[5] "is practised when one doth borrowe money by exchaunge for a straunge region, at longer or shorter distaunce of time . . . not myndynge to make anye reall payment abroade, but compoundeth with the exchanger to have it returned backe agayne, accordyng as the exchaunge shall passe from thence to London, for such distaunce of time as they were agreed upon: and yet to colour this matter, there shall billes of exchange be devised and sent to some of his frendes that lent the money by exchaunge, with letters of advise, to return the byls back againe, and a testimoniall howe the exchaunge commeth from thence . . . which retourninge of billes by testimoniall, doth ever cost the partye that dealeth with this sorte of exchaunge, after the rate of sixteene and twenty in the hundred for the yere . . . and some time above five and twenty or thirty in the hundred for the yere. And bylles by this kinde of exchaunge are made . . . for a colour onelie to get the parties hand to them, to shew (if neede be) that suche moneye so lente, was taken up for him by exchaunge, the said billes being never sent out of London." *Cambium fictivum* seems to have been a loan at usurious interest, disguised under the form of a sale of goods in return for a price which, being supposed to have been borrowed abroad, was therefore enhanced by the costs of exchange. Malynes gives us a good description of this device[6] A merchant, he tells us, not being able to borrow money, is driven to buy goods "for a shift." The persons to whom he applies for a loan, "feign that they have need of money, and must sell their commodities for ready money, provided always (say they with loving protestations) we will pleasure you thus far, look what the goods come unto, we will take it up for you

[1] Cunningham, op. cit. ii 164; Tawney and Power, Tudor Economic Documents ii 167-173; Tudor and Stuart Proclamations i no. 1512; below 185.
[2] Tudor and Stuart Proclamations i no. 1512.
[3] Below 185-186.
[4] Above 108-110.
[5] At ff. 117b, 118a; see above 106 n. 8.
[6] Lex Mercatoria, 261.

by exchange for Venice, Lyons, or some other place, so as you will pay us for exchange, rechange, or any other incident charges: whereunto the merchant agreeing, then shall he be sure to pay soundly for the use of the money, and lose exceedingly upon the wares."

(*c*) Historically the most important variety of *cambium* was the contract by which A agreed with B to transport a sum of money from one place to another, and to deliver it safe at its destination.[1] It is, historically, the most important, because the devices by which the risks of physical transportation were avoided have a close connection with the origins of many of the institutions of the modern world of commerce, and of many important branches of commercial law. In particular it must be regarded as the direct ancestor of the two institutions with which we are concerned in this section and the next—the modern mechanism of exchange and banking.

So soon as commerce between distant nations began to be developed, it became clear that some system of adjusting accounts was a far safer and easier way of making payments in distant places than the primitive method of handing over the actual money due. And, by the end of the twelfth and the beginning of the thirteenth centuries, the various parts of the machinery needed for making these adjustments were at hand. The lawyers and the merchants soon showed that they had sufficient ingenuity to assemble them.

In the first place, the exchangers, whose business it was to give coins of one state in exchange for the equivalent value of coins of another state, were necessarily experts in calculating the comparative value of the various debits and credits owed by or to the merchants of different countries, and in expressing them in the coinages of different states.[2] It was only natural that merchants who owed money to foreign creditors should entrust the exchangers with the money needed to make their payments, and authorize them to pay it over; and, conversely, that merchants entitled to receive money from foreign debtors should authorize the exchangers to receive it and pay it over to them. In the second place, instruments which were made payable to the creditor or his agent, or to the creditor or bearer,[3] or instruments which authorized payment to be made either by the debtor or by his agent, afforded a convenient

[1] Huvelin, Travaux récents sur l'histoire de la Lettre de Change 4, 5—it is there pointed out that the term Cambium has (1) a large sense when used to mean all transactions relating to money—"contrats sur agent et sur crédit par opposition aux transactions portant sur des marchandises"; and (2) a narrow sense in which it means the contract to transport money from place to place; this transport might either be "ad riscum maris et gentium," i.e. the carrier takes no risks, or "salvum in terra," i.e. the carrier undertakes the risks of carriage; and "c'est la dernière forme qui porte presque exclusivement, d'assez bonne heure, le nom de cambium."

[2] See Huvelin, Le Droit des Marchés et des Foires, 543-544.

[3] Above 115-121.

means by which these payments could be made to or by these exchangers. The exchanger was appointed the agent or *nuntius* of the creditor or debtor, and was the bearer of the instrument. In the third place, the great fairs afforded such convenient meeting places for the adjustment of these accounts, that it was a common practice to make debts payable at these fairs. Thus, from an early date, they became the clearing houses of Europe. The earliest fairs to fulfil this function were the fairs of Champagne.[1] When they began to decline, in the course of the fourteenth century, the fairs of Lyons, Anvers, and Genoa succeeded to this position.[2]

Professor Huvelin has so clearly and succinctly explained the manner in which this machinery was used to obviate the necessity of a physical transportation of money, that I cannot do better than copy his description[3]:—"That we may the better understand this system, let us take an example. Genoa has business relations with London and Geneva. Goods have been bought and sold in all these places. From all of them there are debts to be recovered. To effect this object is it necessary to resort to the dangerous and costly process of transporting money? The merchants soon discovered the expedient of regulating their business relations by means of letters of exchange payable at the same fair. They stipulated for letters of exchange payable at the fairs of Bar, of Provins, &c. Suppose that a Genoese was obliged to receive a hundred livres from his London correspondent. The latter promised to pay this sum at the fair of Bar, for instance, and remitted to the Genoese the document in which he acknowledged that he owed this sum and promised to pay at a fixed date at the fair of Bar. He then chose in London a banker going to the fair of Bar, to whom he gave an authority to pay the debt in his name when it fell due. The Genoese on his side chose at Genoa a banker going to the same fair. Thus the two bankers played the part of *nuntii* or *missi* of these two parties. When they came to the fair the one was the bearer of an order to pay, the other of an order to receive payment of the debt.

"But each of these bankers who came to the fair had many payments to make and to receive; and the duty to make and the right to receive these payments originated in obligations made in a large number of places. If the bankers of Genoa and London were obliged to pay and receive exactly the same sums from each place, the settlement would be very easy, since all the debts would be

[1] Le Droit des Marchés et des Foires, 556, "C'est un usage très général depuis le XIIe siècle, de souscrire des effets de change payables en foire. Les foires de Champagne sont de bonne heure, selon le mot de Goldschmidt, *le domicile de change de toute l'Europe*. Nous possédons des lettres de change de 1190, 1248, 1251, etc., payables aux foires de Champagne."

[2] Ibid.

[3] Ibid 557-558.

extinguished by set-off. But it may well be, and this is the most common case, that one of these places owed the other more than it is entitled to receive. Genoa, for instance, may have an adverse balance as against London. Therefore, if we were only considering these two places, there would be a considerable debt still owing which would not be extinguished by set-off.

"But these two places are not the only places represented at the fairs. All the places of Western Europe are represented there. Now if Genoa has an adverse balance as against London, it may well have a favourable balance as against Ypres, Paris, or Geneva. Genoa has, therefore, a balance of payments to receive from these places. An unfavourable balance on the one side, a favourable balance on the other, obviously admits of set of. Genoa can draw on the bankers of Paris, Ypres, or Geneva to pay her London creditors. The sum to be liquidated will be the difference left after all these operations have been carried out. Thus . . . thanks to the principle of set-off, thanks to the practice of making letters of exchange payable at the same fair, the work of making payments will be simplified and shortened. The amount to be paid in money will generally be insignificant."

Now, it is clear that it is to these developments of the contract of *cambium*, that we must look for the origins of the bills of exchange and the banks of our modern commercial life. We shall see that the earliest bills of exchange were instruments devised to obviate the risks of the physical transport of money; and that the earliest bankers were the mediæval exchangers who dealt in money.[1] Merchants who wished to transport money, in order to liquidate their foreign debts, handed over the necessary sum to an exchanger, and he drew a bill upon his correspondent or agent in the foreign country. Conversely, merchants who were entitled to receive money abroad, made an exchanger their agent to receive the money due on these bills. To these exchangers, therefore, naturally fell the business of adjusting accounts between different countries; and it was through the use made by them of these bills that they developed into bankers, to whom the merchants entrusted money to be dealt with according to their instructions. Thus the origins of bills of exchange and of banking are almost inseparably connected. In fact, we shall see that it is to the commercial needs which originated these bills of exchange that we must look for the explanation of the rise and growth of banks and banking.[2]

It is clear from the recently published Calendar of the early rolls of the Mayor's Court of the City of London[3] that the Italian merchants in England were making use of this machinery. In

[1] Below 131-132, 177. [2] Below 177-178. [3] Edited by A. N. Thomas.

1300 there is a case in which Geoffrey Beble, chaplain, complained that Antony, rector of Hurtts, while staying in his house, had stolen £17. He alleged that Antony had taken the money to Brachius Lumbard of the Society of the Pulci of Florence, and had asked that it might be paid out to him by the Society in Paris. It appeared that Brachius had received the money, and that he had given Antony a letter addressed to the Society of Paris asking them to pay it. Brachius, when summoned, "admitted the receipt of the money, and said that it had not been paid out in London or Paris, but that he did not know whether it had been paid by the Society elsewhere. As the said Antony was not in Court, and as the Society in Paris had written to the other Societies not to pay the money, and as it was not known whether any other Society had already paid, Brachius was forbidden to pay the money until further orders."[1] The letter written by Brachius to the Society at Paris was clearly a bill of exchange, and the later happenings clearly amounted to an attempt to stop the bill. In 1305 there is another case in which the same machinery of payment was adopted. Peter de Maners sued Vilanus Stolde and the Society of the Peruzzi of Florence for 100 marks, which had been entrusted to them to be paid at Andvers in Brabant a week later, or failing that in London at Midlent. The receipt of the money was admitted, but it was alleged that "they had sent a letter to a partner, John Vyleyn, at Andvers, by John de Maners, the plaintiff's brother, to pay the money, which they supposed had been done; but if the plaintiff would return the letter and prove that payment had not been made, they would satisfy him."[2] Similarly in a case of 1302 there is a reference to payment through an agent at the fair of Turruk.[3] These instances, I think, make it clear that this machinery of payment through bills of exchange was well known at the beginning of the fourteenth century.

At this point we must return to the contract of *cambium*, and examine in detail the manner in which the machinery for giving effect to this variety of it, gave rise to our modern bills of exchange.

(ii) *The machinery devised for giving effect to the contract of cambium.*

The machinery devised for giving effect to this contract of *cambium* was the bill of exchange. The earliest bills of exchange are in the form of a letter addressed by B to C, asking C to pay to a third person D a sum of money, which A has entrusted to B for this purpose. This letter is handed by B to A, who sends it on to D; and D presents it for payment to C. We have an

[1] Op. cit. 94. [2] Ibid 200-201. [3] Ibid 129.

example of these bills as early as 1339;[1] they are referred to in the Florentine statute of the *Calimala* of 1332; and the English cases in the Mayor's court would seem to justify us in assigning to them an even earlier date.[2] It is clear, therefore, that they were known in Italy at the beginning of the fourteenth century.[3] Whence did they originate?

On this point it cannot be said that there is yet any definite agreement. But to my mind the most probable hypothesis is that they originated in the method employed by the Italian merchants who had entered into a contract to transport money. Such a contract would be contained in an *instrumentum ex causa cambii*.[4] The method employed to carry it out was by writing a "letter of payment" to a correspondent living in the place where the payment was to be effected. In favour of this hypothesis it may be remembered that the earliest specimens of bills of exchange come from Italy; that their wording, when they appear in England in the sixteenth and early seventeenth centuries, is almost identical with the wording of the Italian bills of the fourteenth century; and that the analogy of many other institutions and doctrines of our modern commercial and maritime law would lead us to suppose that it was in Italy that this, the most remarkable institution of our commercial law, originated.

That this is the most probable hypothesis as to the origin of the bill of exchange will be clear, if we look at some of the other hypotheses which have been suggested. But, before dealing with these hypotheses, we should do well to remember that in this, as in other branches of law, the argument from analogy is dangerous. It is quite clear that so soon as commerce begins in any degree to develop, methods will be found of avoiding the risks attendant upon the physical transport of money. These methods of solving the same problem will naturally possess a superficial similarity. But the existence of this similarity is very far from proving any derivative relationship.

In the first place, it is clear that there is nothing in Roman law which in any way resembles the bill of exchange. No doubt the *adstipulatio*, the *delegatio*, and the *novatio* could be made to

[1] Below 135 n. 2. [2] Above 131.

[3] Huvelin, Travaux récents, etc., 7 and n. 4, "Les lettres . . . sont appelées *lettere di pagamento* (lettres de paiement). Théoriquement, la *lettera di pagamento* peut servir à effectuer le paiement de toute obligation, quel qu'en soit le fait générateur (p. ex. vente des marchandises, commande, etc.). Et le statut de *Calimala* de 1332 constate l'emploi de *lettere di pagamento di mercantia, acomendigia etc.* Mais, très généralement, dans la pratique, elle sert à effectuer le paiement d'une obligation née d'un contrat de transport d'argent. Elle prend alors le nom de *lettera di pagamento di cambio*, et, plus brièvement, de *lettera di cambio* . . . On reconnaît dans la *lettera di pagamento* la première forme de la traite moderne"; cp. Brissaud, op. cit. ii 1440-1441.

[4] For the relation of this instrumentum to the letter see below 136-137.

fulfil some of the functions fulfilled by the bill of exchange; but we cannot find in the classical texts any institution which resembles it in form, or in mode of operation.[1] No doubt reasoning based upon such topics as *adstipulatio*, *delegatio*, and *novatio*, was sometimes used by the civilians of the fourteenth and fifteenth centuries to explain the legal position of the parties to a bill of exchange. They naturally tried to explain, in the technical language of their own system, the legal relations created by these commercial instruments, just as in the sixteenth century the English common lawyers tried to explain them in their technical language. But, as we shall see, it was impossible to make all their incidents fit precisely the technical conceptions of either system. Under both systems it was necessary to modify these technical conceptions in order to give them their full effect. Without such a modification (which, as we have seen, the school of the post-glossators was in general far more ready to make than the school of the Renaissance jurists) neither the bill of exchange, nor certain other institutions and doctrines of our modern commercial law, could have been evolved. As we have seen,[2] a too rigid adherence to these technical conceptions destroyed the negotiable characteristics which the mediæval instruments to bearer or to order had possessed.

In the second place, claims have been made for an Arabic origin.[3] It is certain that in the eighth century A.D., long before anything like the bill of exchange appeared in Italy, something very much like the modern bill of exchange was known. It could pass from hand to hand by something very much like an indorsement; and, to use modern terms, the payee had a right of recourse against the drawer in the event of non-payment by the acceptor. The influence of Arabic conceptions on Western commerce, especially in the reign of Frederic II. (1212-1255), is undoubted.[4] The evidence of language alone is conclusive.[5] But, as Professor Huvelin has pointed out, the existence of this analogous Arabic institution is not so conclusive as it might at first sight appear. The Arabic bill is far more fully negotiable than the Italian bill of the thirteenth century. It can pass indefinitely from hand to hand by what corresponds to an indorsement; but it was not till

[1] Huvelin, Travaux récents, etc., 7. [2] Above 121-125.

[3] For a very full discussion and explanation of this theory (put forward by Grasshoff, Das Wechselrecht der Araber) see Huvelin, Travaux récents, etc., 23-28.

[4] See ibid 27, 28; cp. Nys, Les Origines du droit international, 160, 163, 281, 282.

[5] "Au moyen âge, le commerce arabe, très actif et très perfectionné, est un élément fécondant pour le commerce d'Occident, sur lequel il marque son empreinte. Signe caractéristique de cette influence, le langage du commerce occidental est plein

agasin; tarha = tare (poids); douane; simsar = sensalis, courtier)," Huvelin, op. cit. 24.

some centuries later that our modern bills of exchange acquired this quality.[1]

In the third place, Dr. Freundt[2] has put forward the theory that, among the northern nations, the bill of exchange may have been evolved from the letters patent and letters close by which rulers did much of their governmental business—financial or otherwise;[3] and Professor Jules Valéry advocates a theory closely analogous to that of Dr. Freundt.[4] He too finds the origins of the bill of exchange in documents used in public law,[5] such as letters patent or letters close or writs of liberate,[6] dating from the thirteenth century or earlier. In these documents the king or other ruler orders an official, having control of his money, to pay a fixed sum to a payee or his agent producing the document.[7] Professor Valéry points out that the rulers of states, especially at the time of the Crusades,[8] often had occasion to remit large sums of money.[9] He thinks it likely that the laconic and imperative style of these state documents suggested the form taken by the bill of exchange;[10] and that documents thus drawn up were distinguished by their style from ordinary letters requesting the recipient to make a payment.[11]

But we must distinguish between these public documents. Some are merely instructions to a royal official to pay a royal debtor; and, as Professor Huvelin has pointed out,[12] the economic function of the bill of exchange is very different from the economic function of many letters patent and letters close executed with this object. The primary function of the first was to operate as a transport of money in the interest of the creditor. The primary

[1] Huvelin, Travaux récents, etc., 27. [2] Das Wechselrecht der Postglossatoren.
[3] Huvelin, op. cit. 9-11.
[4] Une Traite de Philippe le Bel, Contribution à l'histoire de la lettre de change.
[5] Op. cit. 5-7, 25-28, 35-45.
[6] Ibid 17, 18: "Depuis assez longtemps déjà des auteurs qui se sont occupés de l'histoire de la lettre de change ont signalé l'existence de titres, extrêmement nombreux, connus sous le nom de *liberate*, par lesquels les rois d'Angleterre avaient coutume d'ordonnancer les payements à faire avec les deniers de la Couronne."
[7] The following is the document which Professor Valéry takes as his text: "Phillippus Dei gratia Francorum rex ballivo Caleti vel eius locum tenenti salutem. Mandamus vobis quatinus Radulpho de St. Oein decenario aut eius mandato presentes litteras defferenti undecim libras et decem solidos turonensium in quibus eidem tenemur de residuo tam vadiorum suorum in facto guerre nostre Vasconie anno presenti acquisitionem quam restauri cujusdem equi, absque dilacione quacunque ad instantem mediam quadragesimam de nostro integre persolvatis quam pecunie summam in nostris computis volumus allocari et penes vos presentes litteras remanere. Actum Parisius die lune ante Candelosam anno Domini M°CC° nonagesimo sexto."
[8] In connection with the Crusades it is interesting to note that the Templars in the thirteenth century acted as royal financial agents, and that they developed what was essentially a deposit banking business, and an exchange business, see Bruce Williamson, History of the Temple chap ii; if they had survived, the Templars, with their various branches throughout Europe, might have developed a banking and exchange business on the same lines as the great Italian financial houses.
[9] Op. cit. 14. [10] Ibid 26-28.
[11] Valéry, op. cit. 40. [12] Travaux récents, etc., 11.

function of the second (when used to effect the payment of a debt) was often to effect a payment in a place most convenient to the debtor. It is no doubt true, as Professor Valéry has pointed out, that the commercial dealings of the state were often extensive; and the forms and usages of the state machinery may have had some influence on the forms and usages of the commercial world. On the other hand, it is at least as likely that in many cases the influence was reverse, and that the state used the established mechanism of commerce. Professor Valéry admits that private letters, written in the ordinary course of commercial correspondence, were used to do the same work as these public or quasi-public documents;[1] and we shall see that the forms of the earliest bills of exchange in England are far more analogous to the former than to the latter class of documents.[2] No doubt at all periods the necessities of the state have had a great influence upon the development of commercial law; but, generally, those needs have been supplied by adaptations of existing commercial customs, rather than by borrowing from the machinery of the state an idea or a form wholly new to the merchants. The history of the development, both of transferable shares in joint stock companies, and of negotiable instruments in England in the latter part of the seventeenth century, supplies an illustration of this truth.[3] We shall see that at that period both these shares and bills of debt and bills of exchange were part of the ordinary mechanism of commerce in England. But there is no doubt that their development was assisted by the growth of the system of borrowing on the security of the revenue, which, after the Revolution, gave rise to the Bank of England and the National Debt. These creditors of the state owned shares in the stock which they had advanced to the government, and they were empowered by statute to transfer these shares.[4]

[1] "La rédaction de ces lettres de change ne présente aucune particularité; leur style ne diffère en rien de celui des missives ordinaires; on y trouve les mêmes formules de politesse; fréquemment elles sont relatives à plusieurs objets différents. Elles constituent donc tout simplement une partie de la correspondance commerciale. . . . Voici donc une double série de titres appartenant à la même époque et ayant le même objet puisqu'ils se ramènent tous à des délégations consenties par un créancier au profit d'un de ses propres créanciers. Seulement les uns sont fournis par le droit public, tandis que les autres rentrent uniquement dans le domaine du droit commercial," op. cit. 25, 26-27.

[2] The following is an Italian bill of exchange of the year 1339, cited Valéry, op. cit. 23 n. 2: "Al nome di Dio, amen. Bartalo e compagni, Barna da Lucha e compagni salute. Di Vignone, Pagherete per questa lettera a dì xx di, novembre 1339 a Landuccio Busdraghi e compagni da Lucha fiorini trecento dodici e tre quarti d' oro per cambio di fiorini trecento d'oro, che questo di della fatta n'avemo da Tancredi Bonaquinta e compagni, a raxione di iii e quarto per c. alloro vantaggio; e ponete a nostro conto e ragione. Fatta dì v d'ottobre 1339.—Francesco Falconetti ci a mandati a paghare per voi a gli Accianioli scudi ccxxx d'oro. Bartalo Casini e compagni in Pisa." See below 152-153 for some specimens of the earliest bills of exchange which appear in the English records.

[3] Below 150-170, 211-212, 214,

[4] Below 188, 211.

Obviously these transferable shares helped to familiarize the wealthier classes of the community and the lawyers with the idea of transferable choses in action; while the Bank of England notes, established in 1696 by the same statute as that which established the National Debt and the Bank of England itself,[1] familiarized them with choses in action which were soon recognized as negotiable.[2] But it could hardly be contended that the idea of a joint stock divided into shares, or the idea of a negotiable instrument, originated in the fiscal expedients which were then adopted by the state. And something like this, I think, happened in the Middle Ages. State needs no doubt helped the development of the bill of exchange. The forms of public documents may possibly have influenced its form. But I should be inclined to take the view that the idea of the bill of exchange originated in the customs of the Italian commercial cities;[3] and there is no doubt that its legal development took place under the influence of the Italian commercial lawyers.[4]

I think, therefore, that the origin of the bill of exchange must most probably be sought in the Italian letter of payment. At first it was only the satellite, so to speak, of a formal *cautio* or *instrumentum ex causa cambii*—the contract by which A contracted with B to transport money for B to another place, in order that that money might be paid over to C. This formal contract *ex causa cambii* is simply one of many uses to which these *cautiones* or instruments were put.[5] This instrument is described by Scaccia as a public instrument, whereby the person receiving money for exchange promises to pay the agreed amount of the money to be exchanged to another, who is named in the instrument by the creditor who has advanced the money, that other being usually the correspondent of the creditor; and he further promises to send the public instrument to the creditor; and, if he does not fulfil his contract, he promises to repay to the creditor, with interest, the sum received in the place where he received it.[6] But, for the purposes of exchange,

[1] Below 174 n. 2, 188.
[2] Below 170-173.
[3] Cp. Valéry, op. cit. 22.
[4] Below 137 seqq.
[5] "Lorsqu'un contrat quelconque, vente, prêt, *cambium* etc. a été conclu, il arrive souvent que l'on rédige un instrument pour constater les obligations qu'il fait naître . . . Un pareil instrument, rédigé pour un cambium, ne diffère pas de celui qui serait rédigé pour une vente ou pour un prêt. Seule la *causa* du titre diffère," Huvelin, travaux récents, etc., 5.
[6] Scaccia, De Commerciis et Cambiis § 1, Quaest. v 11, "Primus modus concipiendi scripturam in contractu cambii est per instrumentum publicum; cum scilicet accipiens cambio . . . promittit pretium cambii conventum solvere . . . alicui certæ personæ, in ipso instrumento a creditore nominatæ, quæ solet esse correspondens ipsius creditoris, qui dat pecuniam cambio, et ulterius promittit solutionis, quam faciat, transmittere publicum et authenticum testimonium seu fidem, infra certum alium terminum, eidem qui dedit cambio, in tali loco, alias, si defecerit in non solvendo, et in solutionis testimonium non transmittendo, promittit solvere in loco contractus eidem creditori una cu[illegible]."

this formal instrument gradually dropped out, and, in the course of the fourteenth century, its place was taken by the letter or bill by means of which the contract of transport was actually fulfilled.[1] Thus, by that date, the bill of exchange had, through this development of mercantile practice, emerged as an independent contract possessing some very peculiar features of its own. It therefore became necessary for the lawyers to elucidate and to give technical expression to the legal relations subsisting between the various parties to the bill.

That we may understand the manner in which they approached this problem, it will be perhaps as well to recall the part played by the different parties to the bill.

(i) There is A, who wishes to remit money to a foreign country to be paid over to D (the payee). (ii) There is B (the drawer), probably an exchanger, to whom A pays over this money for the purposes of transmission. B, thereupon, to carry out this contract to transmit the money, writes a letter to C (the drawee), who lives in this foreign country, asking him to pay this sum of money to D. (iii) There is C (the drawee), who, on being requested by B to pay this money which he (B) has received from A, admits his liability to do so by accepting the bill. (iv) There is D (the payee), to whom C (the acceptor) has been requested to make this payment. Thus it was necessary to consider (*a*) the relations of the person who has paid over the money, which he wishes to remit, to the drawer who has received it; (*b*) the relations of the drawer and the drawee; (*c*) the relations of the acceptor and the payee; (*d*) the relations of the payee and the drawer.

(*a*) *The relations of the person who has paid over the money, which he wishes to remit, to the drawer who has received it.*—It is clear that the drawer, who receives money under these circumstances, is bound by his contract to pay the money to the person designated by him who has handed it over to him (the drawer) for this purpose. It is in effect a *constitutum;* and, if the person who has handed the money to the drawer owes the money to the payee (which is the most ordinary case), it will be a *constitutum debiti alieni.* According to ordinary principles of Roman law, the drawer is bound to the man who has handed him over the money to pay it to the payee.[2]

[1] Debray, op. cit. 43, 44; Brissaud, op. cit. ii 1441; the result was, as Scaccia, op. cit. § 2 Gloss. 7, 68 (cited Debray, loc. cit.), says, "Etsi ex formula litterarum cambii nulla appareat promissio seu obligatio de solvendo illi, qui est appositus solutioni, tamen subintelligitur quod haec promissio fuerit facta numeranti pecuniæ . . . nam si ex istis litteris non resultaret contractus cum promissione et obligatione, accipiens cambio non posset adstringi ad solutionem."

[2] Huvelin, Travaux récents, etc., 11-13: "C'est, en effet, le système que dégagent les postglossateurs. Balde, chez qui nous en trouvons l'expression la plus complète, insiste sur cette idée que le fait de remettre au preneur une lettre contenant la mention de *valeur fournie* vaut pour ce preneur promesse de payer."

(*b*) *The relations of drawer and drawee.*—Originally the drawee was, in most cases, either the principal or the partner of the drawer. He must pay because he is bound by the contract of agency or partnership to obey the instructions of the drawer.[1] But later this kind of relationship did not necessarily exist between them. How, then, could his liability be explained? Professor Huvelin thinks that it came to be based on the idea that the drawer has put the drawee in funds for this purpose, that in substance there is a contract of *commenda* between them, which bound the drawee to pay.[2] If he could show that he had not been thus put in funds he was not liable, even though he had accepted the bill.[3]

(*c*) *The relations of the acceptor and the payee.*—By accepting the bill[4] the drawee recognizes that he is bound to obey the instructions of the drawer. In the course of the fifteenth century it was recognized that, unless he entered a protest immediately, he would be held to have accepted;[5] but in later law acceptance became so much the rule that it was left to the payee to make this protest in case of non-acceptance or non-payment.[6] In earlier days this acceptance amounted to a recognition of the contract of agency or partnership existing between drawer and acceptor; and, in later days, to an admission that he had property of the drawer, with which he must deal according to the drawer's instructions.[7] But this does not give the payee any right to enforce that contract. He is a stranger to the contract between drawer and acceptor. How then can he enforce his rights? To explain this we must introduce ideas other than those based upon the Roman law of

[1] Huvelin, op. cit. 14, "Jusqu'au xive siècle il en est ainsi, et, lorsqu'un tiré ne paie pas, la raison qu'il allègue est toujours et uniquement qu'il n'est pas *socius* du tireur."

[2] Ibid 14, 15: "Le tireur qui fournit provision au tiré le constitue originairement son *commendatarius*."

[3] Scaccia, op. cit. § 2, Gloss. 8. 1: "An exceptio pecuniæ non numeratæ possit opponi contra litteras cambii. Respondeo affirmative quod potest opponi"; as Brissaud says, op. cit. ii 1441, "Par l'acceptation, sans que le tireur soit libéré, le tiré s'engage envers le porteur; il le fait plutôt au nom du tireur qu'en sien, ce qui lui permet de se prévaloir (jusque vers le xvie siècle) des exceptions que le tireur pouvait opposer au preneur (par exemple, celui-ci ne lui avait pas fourni de valeurs)"; but we shall see that when Scaccia wrote the broad principle which he lays down was limited by some very wide exceptions, below 143.

[4] This acceptance could be made verbally, or *per retentionem litterarum*, or in writing, Huvelin, op. cit. 21; and that acceptance could take these three forms as late as the middle of the seventeenth century is clear from Marquardus, op. cit. ii. 12, 76.

[5] Brissaud, op. cit. ii 1441; Huvelin, op. cit. 15, 16.

[6] Scaccia, op. cit. § 7, Gloss. 2. 12: "Quæro quid sit redire litteras cum protestatione. Respondeo: redire litteras cum protestatione dicimus quando mandatarius debitoris litterarum cambii non acceptat, seu non solvit litteras, et mandatarius creditoris idcirco protestatur contra debitorem de interesse, damnis et expensis"; as early as 1448 there is an instance at Avignon of the payee making the protest, see the case of Spinula v. Camby, Jenks, Essays, A.A.L.H. iii 57.

[7] Huvelin, op. cit. 16, 17.

obligations. The drawer has received money—property—from the person who wishes to transmit the money. This money the drawer wishes to hand to the payee, and puts the drawee in funds for this purpose. If the drawee, who has admitted this liability by accepting, does not fulfil it, he is in effect keeping property which belongs to the payee. The payee can sue the acceptor to recover what is in effect his property.[1]

(*d*) *The relations of the payee and the drawer.*—From an early period it was recognized that, if the acceptor did not pay, there was a recourse by the payee against the drawer.[2] But at first sight it would seem difficult to justify this on principle. How could a third party, the payee, take advantage of a failure by the acceptor to fulfil his duty to the drawer? The letter by itself did not prove that the drawer had received money from a third person to pay over to the given payee.[3] Logically this was so; but commercial convenience made it necessary to depart from strictly logical principles. Jurists of the thirteenth and fourteenth centuries, with an eye to the needs of the merchants, laid it down that the intention of the parties must be regarded; and, it was said, that the intention of the parties was shown by the fact that this letter was sent, not to the person who was required to make the payment requested by it, but to the person who had given value.[4] This, it was said, showed that the sender of the letter (the drawer) had in effect promised to pay the man who had given value, and that therefore he could sue on this promise if he were not paid by the acceptor.[5] But, it will be said, this gives no rights to the payee. It only gives rights to the man who has furnished value to the drawer. The answer is, that in some cases the man who gave the value was simply the agent of the payee; and that in other cases

[1] Huvelin, op. cit. 17: "En réalité, le tireur se comporte vis-à-vis de la provision comme s'il avait sur les espèces qui la représentent un droit de propriété et non pas comme s'il en était créancier. Le tiré qui a reçu provision apparaît à plus d'un égard comme un détenteur d'une valeur d'autrui . . . L'idée de vente, qui est l'idée fondamentale du change manuel, persiste dans le change tiré. Seulement il y a là une conception très différente de la conception romaine, puisqu'il s'agit d'une vente qui n'est pas purement productive d'obligations, mais qui transfère un droit de propriété sur des espèces non encore individualisées"; the right of the payee to sue was still a question discussed when Scaccia wrote—some regarded him as merely *adjectus solutioni*, see op. cit. § 2, Gloss. 7, 66-80; Scaccia favours his right to sue and one of his grounds is exactly that taken by Prof. Huvelin, "Quia adiectus solutioni litterarum cambii eo animo, ut illi iure dominii sit donatum, seu cessum, vel alio nomine, et titulo in eo translatum ius, et actio cambii, potest agere eo iure, et quo iura cambii sunt in eo translata," loc. cit. 71.

[2] Scaccia, op. cit. § 2, Gloss. 5. 322: "Respondeo, Debitorem qui litteras fecit non esse liberatum . . . nisi ipsæ litteræ sint realiter solutæ secundum eandem mercatorum Genuensium consuetudinem, et quod faciens litteras cambii sit obligatus restituere pecuniam cum apparaverit eius litteras vel non esse acceptas, vel non esse completas . . . Si cambium solvendum non acceptatur vel non solvatur, teneatur creditor"; cp. Marquardus, De iure Mercatorum et Commerciorum ii 12, 53, 55.

[3] Huvelin, Travaux récents, etc., 12. [4] Ibid. [5] Ibid

(where, e.g., the man who gave value was the debtor of the payee) the lawyers agreed that this right of recourse must belong to the *dominus negotii*—to the man, that is, for whose sake this contract of *cambium* had been entered into.[1]

In this way the bill of exchange developed at the close of the mediæval period into a contract of a very special kind. But as yet it possessed none of the characteristics of a negotiable instrument. Thus (i) even if the payee had an independent right to enforce the contract, that right was no more and no less assignable by the payee than any ordinary contract.[2] (ii) We have seen that the rights of the payee depended upon the fact that value had been given by the person who wished to remit the money to the drawer, and that this value had been passed over to the drawee for the benefit of the payee. It followed that if the drawer had never received this value he could not have passed it to the drawee; and that the drawee, even if he had accepted, could plead this fact as a defence to any action by the payee.[3] (iii) Similarly the acceptor could urge any other defence against the payee which could have been urged by the drawer.[4] How then did the bill of exchange acquire its negotiable characteristics?

(iii) *The development of the negotiable character of the bill of exchange.*

We have seen that there are three main characteristics of negotiability—assignability; presumption of value received, or, in English law, consideration; and the acquisition of a good title by a bona-fide holder for value, irrespective of any defects in or want of title on the part of his assignor. We must therefore examine this question under these three heads.

(i) The manner in which the bill of exchange became assignable is connected (*a*) with the application to the bill of exchange of the clause directing payment to be made to a payee or to any one to whom he might order payment to be made on his account; and (*b*) with the practice and effect of indorsement.

[1] Scaccia, op. cit. § 2, Gloss. 7. 70: "In [litteris] cambii quæ vocant ex reditu nundinarum, ut plurimum ii, quibus nominatim in litteris cambii fieri debet solutio, sunt veri domini pecuniarum et cambii, quare dans tunc cambio est simplex minister, et adiectus solutioni est dominus"; as Huvelin says, op. cit. 13, "Il convient, nous disent Balde et Scaccia, d'apprécier, d'après la qualité des personnes et les circonstances, qui est le *dominus negotii*. Jusqu'à preuve contraire, c'est le présentant qui est réputé l'être."

[2] And this was so whether it was made payable to the payee or order, or to the payee or bearer, or to the bearer simply, above 120, 124-125; cp. the case of Spinula v. Camby, cited Jenks, Essays, A.A.L.H. iii 57-58; the plaintiff was non-suited as the action should have been brought in the name of the assignor.

[3] Above 138 and n. 3.

[4] "L'acceptant pouvait lui (the payee) opposer toutes les exceptions que le tireur aurait pu faire valoir lui-même contre l'exécution du constitut (p. ex. exception *non numeratæ pecuniæ*). Il en fut effectivement ainsi jusque vers le xvie siècle," Huvelin, op. cit. 20.

(*a*) We have seen that an instrument made payable to a creditor, or to any one to whom he might order it to be paid, prevented the debtor from raising any objection to being asked to pay to the agent of the creditor who produced the document. But we have seen that the payee designated by this order must be in a position to prove, either that the creditor had appointed him his agent, or that he had ceded to him his right to receive the debt. This burden of proof was gradually lightened by the practice of indorsement, and by the legal effects which were attributed to it.

(*b*) The word "indorse" means literally to place on the back (*sur dos*) of. Thus the purchaser of land indorsed on the back of the charter of feoffment the fact that the lord had made livery of seisin to him. A receipt was indorsed on the back of the obligation by a creditor to whom a debtor had paid the sum due under the obligation.[1] In Italy, in the latter half of the sixteenth century, the practice sprang up of indorsing upon bills of exchange, and later upon some of the older instruments made payable to a payee or order, the order that payment should be made to X, the agent of the payee. The production of a bill with this order indorsed upon it created a presumption that the payee had handed it to X, the indorsee, and had authorized him to sue upon it. It thus dispensed with the necessity of proving a special authority given by the payee to X to act as his agent.[2] But the order so indorsed merely operated as an authority to X, in whose favour the order was given, to act as the payee's agent. The form of the clause to order prevented, as Brunner has pointed out,[3] any further transmission. The debtor has only promised to pay the payee or any person in whose favour the payee has given his order. There is therefore no promise to pay the person in whose favour, not the payee, but the indorsee has given his order. Such a person is the agent, not of the payee, but of the payee's agent—*delegatus non potest delegare*.

So far, therefore, the bill of exchange has only attained a very limited degree of assignability. It can be indorsed and delivered once, but that is all. The questions then arise: When did it become completely assignable by means of repeated indorsements and deliveries? What was the legal reasoning by which this change was effected? What was the legal position of the various indorsees *inter se?*

There is evidence that the Italian merchants were attempting

[1] Brunner, Les titres au porteur français au moyen âge, N.R.H. x, 174, 175.

[2] Brissaud, op. cit. ii 1439, 1440: "L'endorsement dispensa de produire une procuration spéciale, puisqu'il constituait un vrai mandat écrit au dos du titre"; Debray, Thèse de la clause à ordre, 42, 46, 47.

[3] N.R.H. x 176-177; Debray, op. cit. 47.

to make bills of exchange completely assignable by repeated indorsements as early as 1560. The practice was alluded to in a law passed at Venice in 1593; and it was forbidden at Naples in 1607 and 1617.[1] Neither the treatises of Scaccia (1618) nor of Rafael de Turri (1641) allude to the practice.[2] But the treatise of Marquardus[3] shows that it was recognized in northern Europe by the middle of the seventeenth century; and the treatise of Ansuldus (1689) shows that it was generally recognized in Italy in the latter part of the same century.[4] In France it was recognized before the middle of the same century; and it was regulated by the Ordonnance of 1673.[5]

The legal reasoning by which this change was effected appears to have turned upon a different construction which was placed upon the effect of the order. So long as the person in whose favour the order was given, was obliged to prove that he was the agent of the payee by special act of procuration constituting him agent, either *in rem suam* or *in rem alienam*, the representative character of the indorsee was emphasized. But when this special act of procuration was dispensed with, and the indorsement of the order was accepted as sufficient, the representative character of the indorsee became less prominent.[6] It came to be allowed that the indorsee, though a procurator, was a procurator, not *in rem alienam* but *in rem suam*. In effect, therefore, he became the actual transferee entitled to collect the debt on his own account. It followed that he could in a similar way appoint another procurator *in rem suam*, and so on indefinitely.[7] Thus the as-

[1] Debray, op. cit. 47.

[2] Ibid.

[3] De Jure Mercatorum et Commerciorum, ii 15, 7-10.

[4] De Commercio et Mercatura, Disc. II. 31; the case cited shows several indorsements.

[5] Debray, op. cit. 50, says of this rule, "Si elle ne naquit pas en France, elle y prit vite racine, et plus facilement que dans d'autres pays. Tandis qu'à Venice, en Allemagne, à Piedmont, à Naples, aux foires de Noue, la multiplicité des endossements demeura longtemps interdite, l'ordonnance de 1673 ne songea même pas à en contester la validité."

[6] Ibid 47, 48. When Straccha wrote (De Adiecto Pt. 4, 8, 9, Tractatus Juris, vi Pt. I, 400b) a person who produced an instrument, which permitted payment *ei qui exhibuerit*, was presumed to be agent, and admitted to sue *absque cautione de rato*; this perhaps marks the beginning of the process which, by insisting less strongly on the representative character of the holder, began to give him the more independent position assigned to him in later law; thus Marquardus, op. cit. ii 15, 18, can say, "Nos autem de delegatione per assignationem, transportationem, seu inductionem, ut mercatores loquuntur, facta; quo in passu delegans seu transcribens cambium delegato acceptante ulla retractatione mandati aut alio quovis modo prædiudicari non potest."

[7] "Or pourquoi le procurator in rem suam ne pourrait-il transférer lui-même le droit dont il a été investi et par le même mode? Il peut, cela n'est pas douteux, constituer un tiers cessionnaire au moyen d'une procuratio; mais puisque l'ordre ici remplace la procuratio, l'insertion dans l'endossement de la clause à ordre va produire le même effet que dans la lettre elle-même; le tiers va se trouver constitué, par un second endossement, procurator in rem suam, sans qu'il soit besoin de procuration spéciale pour ce second endossement pas plus que pour le premier," Debray, op. cit. 48.

signability, formerly allowed to the older instruments made payable to a creditor or his nominee, was restored. As M. Debray has pointed out, the attainment of this result, at the close of the seventeenth century, was due, partly to a larger appreciation of the needs of the world of commerce, partly to the decline of the influence of the school of the Renaissance jurists.[1]

The legal position of the various indorsees *inter se* was naturally dictated by the legal reasoning which made several indorsements possible. The principal must indemnify his agent for all expenses to which the agent has been put. If, therefore, X, a payee, in consideration of a sum of money, makes Y his procurator *in rem suam* by indorsing and delivering to him a bill, and Y cannot get paid by the acceptor, X must indemnify him; and if Y indorses to Z, the same principle will apply as between Y and Z.[2]

(ii) The presumption that the acceptor of a bill had received value for it was gradually admitted. We have seen that Scaccia laid it down that the acceptor could plead the *exceptio pecuniæ non numeratæ*;[3] but he accompanies this admission with many exceptions and limitations. Thus he admits that if the letter contained the clause "for value received," the defence could not be pleaded.[4] As this was, and is, the general form of bills of exchange, it was not difficult to arrive at the rule laid down by the French lawyers that "l'acceptation suppose la provision,"[5] and by our modern Bills of Exchange Act that "every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value."[6]

(iii) It was not difficult to enlarge this presumption. If consideration is presumed, why not presume that other necessary

[1] Op. cit. 50, "Il n'existait plus de jurisconsultes comme Dumoulin ou Charondas dont l'esprit d'analyse pût décomposer les éléments de la clause à ordre et en faire une construction juridique en désaccord avec les besoins de la pratique"; cp. Huvelin, Travaux récents, etc., 16, 17, "Or l'on n'a pas assez remarqué combien l'emploi de la terminologie et des conceptions romaines s'applique mal en nos matières, combien il fausse les résultats auxquels on aboutit, et combien l'intervention des postglossateurs et des jurisconsultes postérieurs élevés à l'école de Justinien a rendu plus difficile la doctrine de notre institution"; for this school see vol. iv. 225-228.

[2] Ansaldus, op. cit. Disc. II. 17 "Iam enim diximus et probavimus quod girata seu cessio non sit contractus mercati sed mandati"; ibid 30 ["Girata litteræ cambii] æquipollere pecuniæ numeratæ, sed dum modo subsequatur solutio, alias datur regressus adversus trahentem seu scribentem."

[3] Above 138 n. 3.

[4] Op. cit. § 2 Gloss. 8, 5, 6 "Limita primo eandem regulam, ut non procedat, quando campsarius, id est debitor, confessus esset in litteris cambii numerationem pecuniæ. . . . Declara, explicando uberius hanc limitationem, ut in civitate Genue ex communi mercatorum observantia campsarius dicatur confessus numerationem pecuniæ in litteris cambii, quando in litteris sunt opposita illa verba, *per la valuta havauta di contanti*."

[5] Brissaud, op. cit. ii 1441; Huvelin, Travaux récents, etc., 20.

[6] 45 and 46 Victoria c. 61, s. 30, 1.

elements of the validity of the bill are present? It would seem that this presumption was made in France in the seventeenth century; and it followed that defences good against a payee were not necessarily good against an indorsee.[1] But could this presumption *omnia rite acta* be rebutted? It seems to have been settled in the latter part of the seventeenth century that it could not, if the person entitled under the bill took in good faith; and good faith was always presumed.[2] This conclusion seems to have been arrived at by basing the acceptor's liability to the payee on quite a different ground from that taken by the older law. It was thought that, by accepting, he personally promised to pay to the payee or anyone who appeared as indorsee. His contract was therefore with the indorsee who appeared with the bill.[3] This liability could not be affected by any equities existing as against any one else, because to the contract between the acceptor and the ultimate indorsee any one else was a stranger.[4]

Thus the bill of exchange gained, in the middle of the seventeenth century, many of the negotiable characteristics which the older instruments payable to order or bearer had lost in the sixteenth century. It was not difficult, in those countries in which the bearer of these instruments still retained an independent right of action, and later in all countries in which his independent position had come to be recognized, to make these bills also payable to bearer. Under the influence of a school of lawyers less enslaved to the classical texts than the Renaissance jurists, and more alive to the interests of commerce,[5] the bill of exchange was permitted to supply the want caused by the disappearance of the negotiable character of the older instruments. And thus, though much younger than these instruments, though originally mere letters without any legal significance, they have become the type and

[1] Debray, op. cit. 57, and authorities there cited; cp. Brissaud, op. cit. ii 1441-1442.

[2] See Brunner, op. cit. 143-144.

[3] Ansaldus, op. cit. Disc. I. 10, "Tunc per eandem acceptationem censetur acceptans sese fecisse debitorem ex causa propria, vel tamquam fideiussorem scribentis, ut dicunt in ratione decidendi *Authoritates* mox recensitæ"; ibid Disc. IV. 3 "Qui huiusmodi litteras acceptando nulla sese valent exceptione tueri, sed compelluntur solvere, ac si per solemnem stipulationem sese soluturos præfixo tempore promisissent et obligassent."

[4] Ibid Disc. II. 37-39 'Recepta propositio, quod exceptio, quae obstat cedenti vel giranti non obstat cessionario vel giratario, de qua in terminis mandatarii acceptantis mandatum de solvendo alicui tertio, quod non possit solutionem denegare giratario, non solum si non sit debitor, sed etiam si sit creditor girantis . . . De eo, qui cum fecisset cedulam, seu, ut dicitur, *Pagaro*, quod non possit iste recusare solutionem giratario, quantumvis fuisset creditor illius, qui receperat, et respective giraverat idem *Pagaro*, dum modo giratarius foveat causam onerosam, et non representet tanquam simpliciter adiectus personam girantis"; cp. ibid Disc. LXXII 5 "Exceptio, quae competeret contra excommunicatum cedentem, obiici non valeat cessionario, veluti vitium mere personale."

[5] Above 143 and n. 1.

model of the negotiable instruments known to our modern law; and, as Brissaud has pointed out, they have in consequence come to perform a new function in the modern world of commerce. They have become modes of payment and instruments of credit—a species of currency, in fact, among merchants. The value which they represent is incorporated in them; and the ingenious device of modern commercial practice has thus curiously revived the formal *carta* of the early mediæval period.[1]

How the negotiable characteristics of these instruments can be reconciled with legal principle is a matter upon which there has been much speculation.[2] Such speculation is outside the sphere of legal history; but I think that the history of their growth would seem to suggest that these characteristics cannot be explained by reference to the principles solely applicable either to the law of property or to the law of contract. It suggests rather that they are a judicious mixture of those parts of the principles underlying both these bodies of law, which are the most favourable to safe, easy, and rapid circulation. If we look at the law of property we see that there is no difficulty in assigning property, provided that the assignor has a good title. But "nemo dat quod non habet." If we look at the law of contract we see that there is no difficulty about the binding force of a contract to convey another person's property. The promissor is obviously bound personally if he chooses to make such a contract. But difficulties begin when we attempt to assign the benefit of a contract. The negotiable instrument avoids both the proprietary and the contractual difficulty by a judicious mixture of principles taken from both these branches of law. It borrows from the law of property the easy method of assignment by means of an indorsement and delivery, or a delivery merely of the instrument. It borrows from the law of contract the principle that the person primarily liable is personally bound by his contract to pay the indorsee or bearer producing the bill; and that, therefore, no defence, which he might have had to claims by other persons, and no question of title to the bill, can be any answer to an indorsee or bearer

[1] Op. cit. ii 1442: "Elle ne servit d'abord qu'à éviter un transport d'argent: on en fait un moyen de payement et un instrument de crédit, une sorte de monnaie entre commerçants; la valeur qu'elle représente s'incorpore à elle et la pratique savante des temps modernes revient ainsi par un détour inattendu à la *carta* formaliste d'époque barbare."

[2] For some account of this discussion see Huvelin, Travaux récents, etc., 17-21; he favours the idea that the bill of exchange is primarily a *vente d'espèces*, but, as he admits, writers of the seventeenth century regarded it also as a *cession de créance*; on the other hand, the German law regards the thing ceded as a *dette abstracte* which the acceptor is personally bound to pay to the holder. As we can see from the foregoing discussion, both ideas have played their part in fashioning the modern law; for what we may call the proprietary idea see above 142-143; for what we may call the contractual idea see above 143-144.

producing the bill, who has acquired it in good faith and for value. In addition, it borrows from mercantile custom the principle that, normally, good faith and value will be presumed.

By the end of the seventeenth century continental lawyers had substantially come to these conclusions. We shall now see that their development in England closely followed their development on the Continent.

Introduction into England and development by the Common Law

The negotiable instrument came to England from the Continent; and its adventures in England present some analogies to its adventures in the countries from whence it came. Therefore, although its history in England is in some respects unique, neither that history nor the law resulting therefrom, can be understood without the help of the light thrown upon them by continental analogies.

There are some indications that instruments payable to a creditor or his nominee, and perhaps instruments payable to a creditor or bearer, were known in mediæval England;[1] and possibly these instruments possessed certain negotiable characteristics. But cases turning upon them did not come before the common-law courts; and there is reason to think that, if they had done so, these negotiable characteristics would have been as strange to the common law as they were to the civil law.[2] No doubt the bill of exchange was well enough known to the mercantile world; and the cases from the Mayor's Court in London, which have been already cited, show that it was well enough known to the English merchants.[3] But it is not till the sixteenth century that there are any indications that its existence had become known to English lawyers. In the course of the following century it was received into English law, and recognized as possessing the same negotiable characteristics that it had acquired abroad. It was therefore in connexion with the bill of exchange that the common law first became acquainted with negotiability.

During the seventeenth century some lawyers were inclined to follow mercantile usage, and to attribute this quality of negotiability to certain other bills or notes, containing promises to pay money to a creditor or order or to a creditor or bearer. But in the last years of that century the courts, under the influence of Holt, C.J., decided that negotiability was the peculiar property of the bill of exchange. This led to such serious inconvenience that, at

[1] Vol. i 543; vol. v 114; above 116, 130-131.
[2] Below 147. [3] Above. 116, 130-131.

the end of this period, the Legislature declared that these promissory notes were and always had been negotiable.

This summary of the early history of negotiable instruments in England indicates the main lines of development. I shall relate that history under the following heads: (1) the older instruments payable to a creditor or his nominee, or to a creditor or bearer; (2) the bill of exchange; and (3) the promissory note.

(1) *The older instruments payable to a creditor or his nominee or to a creditor or bearer.*

We have seen that there are a few slight indications that the courts of the mediæval English fairs knew of these older instruments.[1] But, in the printed collections of these cases, there is only one case in which such an instrument is made payable to bearer; and in that case it was the party to whom it was made payable, and not the bearer, who sued upon it.[2] In other cases these instruments were made payable to the *certo attornato* or *nuncio* producing them.[3] Similarly, we get in Madox's collection a certain number of instruments in which there is a promise to pay to a creditor or to his "certain attorney";[4] and in two of these precedents the money is to be paid to the certain attorney "producing the instrument."[5] The inference would seem to be that the assignable instruments, which we find on the Continent, were unknown to or ignored by the mediæval common law. No doubt, as the power to appoint an attorney came to be generally permitted, the creditor could enforce his right through his attorney duly appointed—probably whether this fact were mentioned in the instrument or not.[6] But, from the fact that the common law never recognized the assignability of any chose in action, we may infer that it was only the creditor himself or his duly appointed attorney who could enforce them.[7] Therefore if such instruments had been known to the mediæval common lawyers, they would probably have been treated by them much in the same way as they were treated by the civilians abroad.[8]

It is probable, however, that these instruments were well enough known to those few English merchants who were engaged in foreign trade. At any rate, the records of the court of Admiralty show us that, from the beginning of the sixteenth century, they

[1] Vol. i 543; vol. v 114; above 116.
[2] Select Pleas in Manorial Courts (S.S.) 152. [3] Above 116.
[4] Formulare Anglicanum, nos. 641, 642, 645, 647, 648, 649, 651.
[5] Ibid nos. 643 and 653; in the latter the creditor is Robert Rede, Justice of the bench, and the payment is to be made "Roberto aut suo certo attornato hoc scriptum ostendenti, haeredibus executoribus suis"; it is dated March 8, 1501; and the money is stated to have been lent "pro mercandisis in Stapula Westmonasterii emptis."
[6] Vol. ii 316-317. [7] Vol. vii. 533, 534-537. [8] Above 121-125.

were an ordinary part of the machinery of commerce. Thus in 1533 we find the following document:[1] "Be it known to all men that I Thomas Thorne haberdasher of London have taken up by exchange of Thomas Fuller merchaunt of the staple of Calais the sum of lx^{li} sterling, the which sum of three skore pounds sterling to be payd to the said Thomas Fuller *or to the brynger of thys byll* in manner and forme foloynge . . . to the whiche payments well and trewly to be payd to the said Thomas Fuller *or to the brynger hereof* . . . I the said Thomas Thorne bynd me myne ayres executors and assignes and all my goods." The bill is signed and sealed by the maker. In 1536 we have a similar bill drawn in a set of three, and promising to pay to the creditor or his assigns. It runs as follows:[2] "Be yt knowne unto all men by this my second byll not beyng payd my fyrst nor thyrd I William Browne merchaunt of Tynbe . . . knowlage that I owe unto you Thomas Gale haberdasher of London x^{li} x^{s} sterling the which tene pounds and tene shillings starling I promys and me bynd to pay unto the sayd Thomas Galle *or to his assignes.*" In 1538[3] we have a combination of these clauses. In a document under seal, John Stubbarde, citizen and fishmonger of London, and Peter Kyrseeman, merchant of Bruges, bind themselves to pay £13 to John Harryson de Roos, mariner of Sluys, for a certain ship which they had bought of him; and this sum is to be paid to "the said John or to his certain attorney his heirs executors or assigns or to the presenter or bearer of this present writing." There are several other similar documents appearing in the same records,[4] all of which, it is fairly clear, correspond to the instruments payable to a creditor or his nominee or to a creditor or bearer which were in use on the Continent. The question therefore arises—What effect was given to them by mercantile practice and by English law?

On both these points Malynes' treatise gives us some information; and that information probably presents both the practice and the law of the greater part of the sixteenth and of the earlier part of the seventeenth centuries.

Malynes tells us[5] that the "most usual buying and selling of commodities beyond the seas, in the course of traffick, is by Bills of Debt or obligations called Bills Obligatory, which one merchant giveth unto another for commodities bought or sold, which is altogether used by the Merchants Adventurers at Amsterdam, Middleborough, Hamborough, and other places." He gives us the following specimens of the usual form of these bills:[6] "I, A.B.

[1] Select Pleas of the Admiralty (S.S.) i 41.
[2] Ibid 55. [3] Ibid 62, 196.
[4] Ibid 72 (1538-1539); ii 68 (1538)—called a bill of exchange; 70 (1549); ibid 70, 71 (1554)—called a bill of exchange; 71 (1553); 72 (1557); 73 (1557).
[5] Lex Mercatoria, 71. [6] Op. cit. 74.

merchant of Amsterdam do acknowledge by these presents to be truely indebted to the honest C.D. English merchant dwelling at Middleborough, in the sum of five hundred pounds currant money for merchanize, which is for commodities received of him to my contentment, which summ of five hundred pounds as aforesaid I do promise to pay unto the said C.D. (*or the bringer hereof*) within six months next after the date of these presents: In witness whereof I have subscribed the same at Amsterdam the 10 of July, 1622, *Stilo novo*, A.B.'

It is reasonably clear that this is one of the old instruments to bearer, adapted to modern commercial conditions, which had long been known on the Continent. We have seen that, before the date when Malynes wrote, they had lost those negotiable qualities which they had possessed in earlier law.[1] But on the Continent the merchants had invented a cumbersome device by means of which they could be made assignable. The creditor and payee of such a bill stipulated with his debtor, the maker, that he (the debtor) would make the bill payable to any person nominated by himself. The maker thereupon drew the bill, leaving the name of the payee blank. The original creditor then handed this bill to a creditor of his own to present to the maker thereof. But this assignee might, by a similar method, make use of it to pay a creditor of his; and so the bill might pass through half a dozen different hands before it was finally presented to the maker by the man who wished to have his name inserted as payee.[2] Or, Malynes tells us, the bill might be made payable to the original payee or bearer; "and so all the parties are bearers thereof, unto whom the same is set over by a tradition of it only."[3] It should be observed, however, that all depended on the solvency of the maker. The names of the several transferees did not appear on the bill, and therefore they had no recourse against each other.[4] It was not till the clause to order and the practice of indorsement had been applied to these bills that this security was gained.[5] But it would seem that, when Malynes wrote, this device had not yet been applied to these bills. The only bills with which he was acquainted were bills to bearer. In spite, however, of this defect, it is clear that these bills of debt were, among the merchants, regarded as a species of mercantile currency. The parties by themselves or their brokers had (like

[1] Above 124-125.

[2] Lex Mercatoria, 71.

[3] Ibid. "This," he says, "is called a rescounter in payment, used among merchants beyond the seas, and seemeth strange unto all men that are ignorant of this custom."

[4] Ibid 73—a case cited to show that the practice of getting the name of the creditor's nominee inserted in the bill "is not without some danger" to the nominee, in case the debtor turn out to be insolvent.

[5] Below 155-156.

our modern bill brokers)[1] means of finding out the commercial reputation of the maker of any bill, which an intending purchaser proposed to give in payment; and the holder of such bills could sell these bills and get ready money for them. These bills are, as he says, "as money paid by assignation."[2]

The advantages of this mercantile custom are eloquently set forth by Malynes[3]—"very great matters are compassed in the trade of Merchandize, the commodities are sooner vented in all places, the custom and impositions of Princes do increase, the poor and mechanical people are set on work, men are better assured in their payments, the counterfeiting of bills and differences are prevented; the more commodities there are sold, the less ready money is transported, and life is infused into traffick and trade for the general good." But he is forced to admit that this mercantile custom was wholly unknown to and legally impossible in the common law. Being choses in action they could not be assigned.[4] If they were drawn up, as they usually were, in the form of a contract under seal, they could not be made payable to bearer, or altered into another man's name; and letters of attorney given by the payee to an assignee to sue in his (the payee's) name were always revocable.[5] Many lawyers and merchants, he tells us, had advocated the establishment of this custom in England by Act of Parliament;[6] and he makes the further suggestion that transfers should be indorsed on the bill, and that there should be (as at Lisbon and Rouen) a register kept of all these bills.[7] But these

[1] Bagehot, Lombard Street, 285, 286.

[2] "This custom is much practised by the Merchants Adventurers beyond the seas at Middleborough, Amsterdam, Antwerp, Hamborough and other places where they do trade, in manner following as we have noted:—A merchant having many of these bills, which he hath received for his clothes . . . will resort unto . . . another merchant, commonly accompanied with a mediator or broker, to buy a good round quantity of silk wares . . . and having agreed upon the price of the said commodity . . . he maketh the seller acquainted with what payment . . . he will give him in bills . . . Hereupon all such bills as are of known persons, are soon accepted of, and of the unknown persons, either himself that is the seller or the broker, will enquire of them sufficiently, and then likewise accept their bills in payment"; enquiry was then usually made of the debtor whether he will meet the bills (which were usually made payable to bearer) and the debtor assents. The receiver may either wait till the bills fall due and get the money, or "buy other commodities therewith"; "nay more, if he will have ready money for these bills, he may sell them to other merchants that are moneyed men . . . which is commodious for young merchants having small stocks, as also for all men upon all occasions; for it is properly as money paid by assignation," Lex Mercatoria, 72-73.

[3] Ibid 73. [4] Ibid 71. [5] Ibid 73. [6] Ibid 71.

[7] "If there were a register kept of the passing and transferring of these bills from man to man, and by an endorsement thereof also upon the bill, it might be done with ease, and the bearer of it should be acknowledged thereby to be a lawful Attorney in law; and by these means the undecent plea of *Non est factum* would be cut off. And to prevent fraudulent dealing, if any bills should be lost, notice might be given instantly to the Register (which at Lixborn and Roan is called a Prothonotary) . . . and the bills for the most part do remain in the office at the disposition of the last assign or assigns," ibid 73, 74; the keeping of a register of bills of exchange in order to prevent the secret export of money was advocated in 1621 and 1638, S.P. Dom. 1619-1623, 255, cxxi 20; 1638-1639, 257, ccccviii 45.

suggestions bore no fruit. "Hitherto things are not rightly understood, as it is to be wished it were, whereby other nations have still an advantage."[1]

In England, as abroad, it was not till the modern idea of negotiability had come into the common law in the train of the bill of exchange, that these bills obligatory developed into negotiable instruments, and became the promissory notes of our modern law. To the advent of the bill of exchange in this country we must now turn.

(2) *The bill of exchange.*

The bill of exchange, and the law and practice relating thereto, were known to English merchants long before they were fully received into the common law.[2] When, in the early part of the seventeenth century, the common law courts began to recognize the validity of these instruments, they were already a developed institution.[3] It was inevitable therefore that the common law should receive, along with them, the law which had grown up around them on the Continent. This reception took place under cover of the recognition of mercantile custom; but it was no wholesale or slavish reception. No doubt, both our system of case law, and the insularity of the common lawyers, helped to prevent a reception of this kind. Foreign writers are very rarely cited in the reports;[4] and foreign doctrine was both modified, when modifications were necessary to suit the different technical conceptions of English law, and added to, when new cases produced new problems for solution. This process was in full operation during the latter part of the seventeenth century. It was naturally far less rapid than it would have been if foreign doctrine had been received in a more wholesale manner; and therefore at the end of this century English law was less detailed, and perhaps less advanced, than the law of many continental countries. But the process had fairly started, and good progress had been made.

The history of the bill of exchange therefore falls under two well defined heads: (i) the bill of exchange in mercantile practice;

[1] Lex Mercatoria, 74; it may however be noted that a bill to make bills of debt transferable by indorsement was before the House of Lords in 1669, but it dropped with the close of the session, ibid MSS. Com. 8th Rep. App. 137; and that in February 1672-1673 an Act for assigning bills and bonds was ordered to be prepared by the House of Lords, which got as far as its first reading in January 1673-1674, Journals of the House of Lords xii 538, 623; Hist MSS. Comm. 9th Rep. App. Pt. ii 40 no. 151; a similar proposal had been made in 1653, vol. vi 418.

[2] Above 130-131.

[3] Above 136-145.

[4] In Carter v. Downish (1687) 1 Shower at p. 128, there is a reference in argument to "all the book cases on foreign bills of exchange"; and another general reference to the civil law in the argument in Claxton v. Swift (1685) 2 Shower at p. 501; even general references such as these are very rare.

and (ii) the recognition and development of the bill of exchange in English law.

(i) *The bill of exchange in mercantile practice.*

Though, as we have seen,[1] documents which were in substance bills of exchange had made their appearance in the Mayor's Court of London at the very beginning of the thirteenth century, they do not make their appearance in the central courts till much later. There is a possible reference to a document, which is something like a bill of exchange, in a case heard by the court of Chancery between 1486 and 1500.[2] But the earliest specimens of bills of exchange are to be found in the records of the court of Admiralty. It is clear from their form that they are exactly similar to the bills of exchange known on the Continent. The earliest is a Latin document of the year 1540 translated from the Italian,[3] and there are others of 1553,[4] 1554,[5] 1562,[6] and 1563[7] in English. If we compare the specimens of 1540, 1562, and 1563 with the specimen given by Malynes, we shall see that in England they were drawn in the same stereotyped form as in other parts of Europe.[8]

The following is the form which Malynes[9] gives of a bill of exchange from London to Amsterdam :—

[1] Above 130-131.

[2] Proceedings in Chancery (R.C.) i cxx-cxxii; the plaintiff, Sebastian Giglis, merchant of Venice, alleges that at the request of the defendant, Robert Welby, priest, he wrote to one Reale, a merchant, a letter asking Reale to pay to Welby £20. Reale did so, taking a document with sureties signed by Welby for repayment. He was unable to get payment at common law because the document was not sealed, and Welby waged his law. Therefore Reale sued Giglis who was obliged to pay. On these grounds the Chancellor ordered Welby to pay the money to Giglis; this letter, if not actually a bill of exchange, is certainly reminiscent of the mercantile practice which gave rise to them.

[3] It runs as follows: "Jhesus 1540, 26 die Julii in London," cxviii li. xviii s. monete Flandrie currentis.

"Ad tempus solitum Anglice at usans solvetis pro hac prima presenti billa cambii D. Barnardo Calvalcanti libras centum et octodecim et solidos octodecim grossorum in moneta currenti pro valore recepto a Guidone Cavalcanti et ponetis in computo V . . . orum hic Subscripcio literarum cambii Meliadux Spinola.

"Superscripcio literarum huiusmodi D. Adriano de Brancho iuniori in Antuerpia.

"(*In the margin*) Tenor literarum cambii ex Italico idiomate in Latinum translatarum," Select Pleas of the Admiralty (S.S.) ii 69.

[4] Ibid 70. [5] Ibid 71. [6] Ibid 73. [7] Ibid.

[8] The following is the bill of 1562: "Laus deo. Andwarpe le 4 of September 1562 £50 0. 0.

"At Usans and halfe paye by this my fyrste byll of exchainge my second not beinge paid to Myhell Cruche or the bringer hereof the some ffyeftey poundes sterlinge corant mony for marchandyse and ys for the valewe receyved here of John Turner at the daye make good payment and put yt to your accompte by me Richard Stainffeld.

"Eccepted by me William Lewtie.

"(*Endorsed*) To Mr. Lewteye servant to Richard Stainffyld dd in London pa."

[9] Lex Mercatoria, 269, 270.

"Laus Deo. Adi 24 August 1622 in London—500 lb. at 34s. 6d.

"At usance[1] pay by this my first bill of exchange to A.B. the sum of five hundred pounds sterling at thirty-four shillings and six pence Flemish for every pound sterling currant money in merchandize for the value hereof received by me of C.D. and put it to account as per advice, A. Dio. etc. G.M."

Then, "on the backside is indorsed, To my loving friend, Master W. C. merchant in Amsterdam, Pa."[2]

Malynes says[3] that the bill must always be in this form—"You may not say in the bill it may please you to pay or I pray you to pay, although it were to your master; for the bill of his high nature doth carry with it a command . . . neither is there any witness unto it nor any seal, but a small piece of paper of some two fingers broad: and the letter of advice doth declare for whose account, or to what intent or purpose the said money is taken up."[4]

It is clear from this specimen that we have the same four parties to the bill as on the Continent.[5] (i) There is C. D. who has paid over money to G. M.; (ii) there is the drawer G. M.; (iii) there is the drawee W. C.; and (iv) there is the payee A. B. It is also clear that the bill has not yet become a negotiable instrument. In the specimen Malynes gives we do not find the expressions "order" or "bearer." As we have seen, it was not till after Malynes wrote that the development of the negotiable character of the bill of exchange took place in continental states.[6] But the need for an instrument which admitted of some form of transfer was obvious; and the merchants met it by a device not unlike that which they employed in the case of bills obligatory. "Peter delivereth five hundred pounds to John, who is to give the bill of exchange for it; Peter taketh up five hundred pounds of William, and may give him the said bill of John for it; William taketh up five hundred pounds of Nicolas, and may deliver John and Peter's bill for it; Nicolas taketh up five hundred pounds of Francis, and doth give him the bill of John, making mention of Peter and William. Here are four takers-up of money, and but

[1] The term usance means the time at which the bill was payable, if not payable at sight. This time varied according to the custom of different places. Double or treble usance means double or treble the customary time, and half usance half the customary time, Malynes, op. cit. 268, 269; Marius, Practical Advice, 18.

[2] I.e. The Italian Pagate. [3] Op. cit. 270; cp. Marius, op. cit. 1.

[4] "If he which doth underwrite the bill [i.e. the acceptor] is to make himself Debitour, then he [the drawer] writeth in the bill, *And put it to my Account*; but if he which ought to pay it, and to whom it is directed, is Debitour unto the drawer, then he writes, *And put it to your Account*: Also sometimes it is expressed in the bill thus, *And put it to the Account of* such an one," ibid 7.

[5] Above 137. [6] Above 140-145.

effectually one deliverer of money, which is Francis: for albeit that Peter was the first deliverer of the five hundred pounds, he became a taker again of the said money, receiving the same of William; so that *gradatim* John is the first taker-up of the said five hundred pounds, Peter is the second taker-up, William is the third taker-up, and Nicolas is the fourth taker-up of the said five hundred pounds of Francis. To this Francis is the bill of exchange given, payable to his friend, factor or servant in the place for which the money was taken up. But the said bill is made by John, the first taker-up of the said money, declaring, that the value of it was received of Peter, for William and for Nicolas, upon the account of Francis, which is the last deliverer of the money; which bill being paid, all the parties in this exchange are satisfied and paid: which is done with great facility."[1]

This method of assigning a bill of exchange had one very great advantage over that used in the case of bills obligatory. All the parties' names appeared on the bill, and they could therefore all be made liable on it. "As for example, Francis, the party who took this bill, as being deliverer of it (the money) at last, must go a retrograde course herein, if John who made the bill, and was the first taker-up, do not pay the same: Francis then seeketh Nicolas, Nicolas seeketh William, William seeketh Peter, and Peter seeketh John, the first taker-up of the money of him. Suppose that John is broken, then he goeth to Peter; if Peter is broken, then to William; if William is broken, then to Nicolas; if Nicolas is broken, then all is lost. So that all of them are answerable to this bill as above said."[2]

But this was a cumbersome process. The merchants, in their efforts to find more convenient methods, were accustomed either to send letters of credit,[3] or bills with the names left blank to be filled up by their foreign agent,[4] or to make the bill payable to the payee "or the bringer thereof." As to the effect of these words, when Malynes wrote, I must say a few words.

Malynes expressly cautions merchants not to insert these

[1] Malynes, op. cit. 271. [2] Ibid 274.

[3] "A merchant doth send his friend or servant . . . to buy some commodities or take up money for some purpose, and doth deliver unto him an open letter, directed to another merchant, requiring him that if his friend . . . the bearer of that letter have occasion to buy commodities or take up moneys . . . that he will . . . procure him the same . . . and he will provide him the money, or pay him by exchange," ibid 76.

[4] "There is also a custom that a master to his servant or one friend to another will send bills of exchange with the names in blank from one country unto another, as from Hamburgh to Embden, or from Antwerp to Amsterdam, and from thence to Dansic; and at Amsterdam the names are put in to whom to be paid, and of whom received," ibid 272; a similar plan was pursued in the case of the bill obligatory, ibid 77.

words.[1] But that they were generally inserted is clear from some of the specimens of bills in the Admiralty records,[2] and from the early seventeenth-century precedents of pleading.[3] We have seen that abroad their insertion did not at this period give the bearer a right to sue;[4] and we shall see that, when bills of exchange became common in the English courts, the same rule was adopted. But it would appear that, if the bill contained these words, a payment by the acceptor to the bearer discharged the acceptor.[5]

Malynes' book was published in 1622.[6] In 1651 Marius, a notary public, published a small tract giving practical advice upon bills of exchange.[7] An enlarged edition, published in 1670, was said by the author to embody twenty-four years' experience in his profession. But it would appear from the preface that the new edition did not embody any very striking changes in the law, but rather consisted of a number of additions to the information given.[8] If this be so, it is clear that between 1622 and 1651 very great advances had been made towards making the bill of exchange a negotiable instrument. And, having regard to the state of the law on the Continent, this is not surprising. It was during this period that the practice of making bills payable to order, and of transferring them by indorsement, was becoming common; and it is clear from the French legislation that it was becoming more and more common to make both bills and other instruments payable to bearer.[9] All the specimens of bills which Marius gives are made payable to A or assigns or to A or order, and the assignment or

[1] "Neither may you make a bill of exchange payable to the bearer or the bringer thereof (as you make your bills obligatory beyond the seas)," Malynes, op. cit. 270.

[2] The bills of 1562 and 1563, Select Pleas of the Admiralty (S.S.) ii 73, above 152, have this clause.

[3] Brownlow, Declarations (ed. 1659) 266, 267—the date in the pleading is 1605; Vidian, Exact Pleader (ed. 1684) 66, 67—the date in the pleading is 1620; in 1622 West, Symboleography § 660, gives a bill payable to R.P. or the bringer thereof; on the other hand the pleadings in Rastell f. 10a, and the pleading in Herne's Pleader 136-137, which are all from the last half of the sixteenth century, do not contain this clause; similarly the clause to A or assigns, though not mentioned by Malynes, was used at this time; below 156 n. 1.

[4] Above 124-125.

[5] This was clearly so when Marius wrote, and probably so when Malynes wrote, though he nowhere expressly states this; Marius, Practical Advice 13, says, "A bill which shall be payable to Robert W. or the bearer hereof may chance to miscarry or come to a wrong man's hands, and he may go and receive the money upon such a bill . . . And he that paid it will produce the bill itself for his warrant to pay it to whomsoever shall bring it"; cp. Hodges v. Steward (1691) 1 Salk. 125, where a similar rule is laid down.

[6] For Malynes and his book see vol. v 131-134.

[7] My citations are from the ed. of 1684 which is contained in the folio ed. of Malynes' Lex Mercatoria.

[8] "I have now . . . not only comprised what was formerly handled, and something enlarged upon the same for the better understanding thereof . . . I have in a manner gone through the whole body of Exchange."

[9] Above 125-126, 142.

order is indorsed on the back.[1] Moreover, it is clear that the assignee or indorsee might himself assign or indorse over.[2] If the bill was indorsed in blank the holder might either insert his own name as indorsee, or, on getting payment, write a receipt for the money.[3] That bills were sometimes also made payable to bearer is clear from Marius's warning of the dangers of the practice.[4] On the other hand, a bill might be payable to A simply. In that case it admitted of no assignment.[5]

On many other points Marius follows closely the rules of law observed on the Continent. Thus the rules as to acceptance for honour;[6] the irrevocability of acceptance;[7] protest in case of non-acceptance, undue acceptance, or non-payment;[8] days of grace;[9] the efficacy of a verbal acceptance;[10] liability on a lost bill;[11] the liability of an indorser to his own and, perhaps, to subsequent indorsees[12]—all follow closely continental rules of law. On the question whether a bill should be presented for acceptance as soon as received, or whether the holder should wait till it falls due, he strongly advocates the English custom that it should be presented as soon as possible, in order that the other parties to the bill might not be prejudiced.[13] No doubt on this[14] and upon other points (e.g.

[1] It may, however, be noted that, though the clause to order or to assigns does not appear in the specimens of bills which Malynes gives, we get the clause to assigns in a bill of 1554, Select pleas of the Admiralty (S.S.) ii 71, and also in a pleading dated 1627, Vidian, Exact Pleader, 68.

[2] Marius, op. cit. 9—for the forms of indorsement; at p. 11 he tells us that on outland bills (for these see below 158) three or four assignments are often written.

[3] Marius, op. cit. 30; cp. Lambert v. Pack (1700) 1 Salk. at p. 128, for a similar ruling by Holt, C.J., at nisi prius; the real name of the case is Lambert v. Oakes, see note to 1 Salk. 126 pl. 6, which case is reported 1 Ld. Raym. 443.

[4] Above 155 n. 5.

[5] "If the bill be made payable positively to such a man, and not to such a man or his assigns or order, then an assignment on the bill will not serve the turn, but the money in the strictness of the letter must be immediately paid to such a man in person, and he must be known to be the same man mentioned in the bill of exchange. . . . And if the bill is made payable positively to such a man as hath been said, such a man's name written on the backside of the bill in blank, is no sufficient warrant for another man to come (as in his name) to receive the money, but the man himself to whom the bill is payable must appear in person," Marius, op. cit. 34; this was the common-law rule, see Hill v. Lewis, 1 Salk. at p. 133, *per* Holt, C.J.; but after the statute of Anne (3, 4 Anne c. 9) a note payable to A simply was decided to be a promissory note within the statute, see Burchell v. Slocock (1728) 2 Ld. Raym. 1545; *quære* did this make such notes negotiable? It would seem that it did, below 173 n. 5; in England the Bills of Exchange Act, 45, 46 Victoria c. 61 §§ 3.1, 8.4, 89.1, has made the rule as to notes applicable to bills; in the U.S.A. the opposite course has been pursued, Street, Foundations of Legal Liability ii 387.

[6] Marius, op. cit. 21, 31. [7] Ibid 20.

[8] Ibid 13, 17, 21, 24, 28, 29. [9] Ibid 15, 23, 24. [10] Ibid 16.

[11] Ibid 19, 20; cp. below 157 n. 3.

[12] "Where there are any assignments on bills negotiated, always the party that receives the value is directly bound to him of whom he hath received it, and the acceptor to the last assigned," ibid 27.

[13] Ibid 12.

[14] Whitehead v. Walker (1842) 9 M. and W. 506 at p. 515 *per* Parke, B.; for the present law see 45, 46 Victoria c. 61 § 30.

as to the possibility of a verbal acceptance,[1] as to the validity of a gratuitous promise to accept,[2] and as to the rights of the parties on a lost bill)[3] English law was ultimately settled to be the contrary of the rules which he laid down. But when he wrote, English law on this topic was, as we shall see, but scanty. Probably he had an accurate knowledge of such points of law as had been actually decided.[4] At any rate, it is certain that the large majority of his rules upon points of form, practice, and procedure, have been adopted, and are at the present day part of English law.[5]

It is clear therefore that, when Marius wrote, a bill of exchange made payable to order had, in mercantile practice, acquired one of the most important elements of negotiability—a capacity to be transferred indefinitely by indorsement and delivery. On the other hand, a bill of exchange made payable to bearer was probably still in the same position as it was in when Malynes wrote. But Marius leaves us uncertain as to how far these bills possessed the other two elements of negotiability—the capacity of a bona fide holder for value to get a better title than his transferor, and the presumption of consideration. Thus he says nothing at all on the question whether a holder of a bill in good faith, who has acquired it from one who had no title or a defective title, can sue upon it. But it would appear from Malynes that mercantile opinion was in favour of the view that an acceptor was always prima facie liable to pay; and that the facts (i) that the drawer had become insolvent since the acceptance; and (ii) that the drawer had not received value from the payee—were no valid defences to an action by the holder.[6] On the other hand, Marius would seem to be of opinion that if the payee had not given value, and the drawer had satisfied

[1] Marius 16; for the subsequent development of the law see Hindhaugh v. Blakey (1878) 3 C.P.D. at pp. 139-141; that case decided that the bare signature was not enough; but this was overruled by 41, 42 Victoria c. 13; repealed and re-enacted by the Bills of Exchange Act, 45, 46 Victoria c. 61 § 17 (2) (a).

[2] Marius 16; Johnson v. Collings (1800) 1 East 98; Street, op. cit. 399-401.

[3] Marius 19, 20; Hansard v. Robinson (1827) 7 B. and C. 90; Street, op. cit. 375-376.

[4] Thus, as Street points out, op. cit. ii 376, he knows that the proper form of action against the acceptor is not assumpsit, but an action on the case based upon the custom.

[5] See e.g. Tassell v. Lee, 1 Ld. Raym. 743—approval by Holt, C.J., of the mercantile customs of protest and days of grace.

[6] Lex Mercatoria 274—the case was as follows:—A merchant at Antwerp drew on a merchant in London for £800 to pay a creditor of his in Antwerp. The London merchant accepted these bills; and then the drawer became insolvent. The acceptor then stated that he would not pay the bills because the insolvent drawer had not received value of the payee—though in fact the bills had acknowledged the receipt of value. The answer given to this was that the acceptor must pay because "for other matters they had nothing to do therewith." The acceptor then died and no decision was reached; but, says Malynes, "the opinion of other merchants and my own is, that the acceptor of the bill was to pay them, and his heirs and executors are liable thereto, unless there were found an apparent combination and practice in it between the two merchants of Antwerp, as was by many suspected."

the person who had given value, neither the payee nor subsequent indorsees could sue the drawer; for the payee's right to sue was based, as it was abroad, on the fact that he was either the deliverer of the money to the drawer, or the principal or agent of such deliverer, or a creditor of the drawer by reason of some precedent debt.[1] But it would appear that the acceptor remained liable to the drawer, and perhaps to subsequent indorsees.[2] It is clear that much was still uncertain. Of the three main features of negotiability the bill of exchange was only just beginning to acquire one —the feature of ready transferability. But though its negotiable character was as yet in germ, it had began to develop in two other directions.

In the first place, it had ceased to be used only in connection with foreign trade. It could be used equally well in connection with internal trade. If used in connection with foreign trade, it was called an outland bill; if used in connection with internal trade it was called an inland bill.[3] In the second place, though four parties were still normally requisite to the making of a bill,[4] a bill could be made as between three and sometimes as between only two parties.[5]

[1] Marius, op. cit. 35—"If a bill of exchange be made payable to one man, for the value received of another man, and the party on whom the bill is drawn hath accepted the bill, but . . . faileth in the payment, and hereupon protest is made, and by vertue of that protest the party which delivered the value doth recover satisfaction of the drawer; I say, in this case the drawer is freely discharged against the party or parties to whom the said bill was made payable, either immediately in the bill, or mediately by assignment or assignments were they never so many on the bill."

[2] "Neither can he to whom the bill is first made payable (if but an assign of the deliverer) prosecute the acceptor (after the drawer hath given satisfaction to the party which delivered the value)" . . . but, "the acceptor is not totally discharged. . . . In reference to the party that delivered the value first, and the party to whom the bill was payable (supposing himself to be but an assign of the deliverer) the acceptor doth but confirm what the drawer hath done, and the drawer having made satisfaction to the deliverer, the acceptor is likewise discharged against the deliverer, and against the party to whom the bill was first payable (if he be but an assign); but the acceptor, by vertue of his acceptance, makes himself debitor, and is still liable to the drawer, or to the account for which he accepted the bill, until satisfaction be given," ibid.

[3] Ibid 2—but Marius thinks it necessary to state that these inland bills are "as effectual and binding" as outland bills; he cites a book of John Trenchant on arithmetic, printed at Lyons in 1608, for the older view that properly Exchange should only be recognized as between towns "in subjection unto divers lords," who do not allow the transport of money, or because of the risk of loss in transport; in some of the earlier pleadings only outland bills seem to be contemplated as valid by the custom, see e.g. Liber Placitandi (1674) 41—a precedent dated 1636; the bill of exchange mentioned in Acts of the Privy Council (1613-1614) 578 is an outland bill.

[4] Marius, op. cit. 2; above 153.

[5] "First the drawer, and secondly the party on whom it is drawn; the drawer he makes a bill of exchange payable to himself or order for the value in himself, and subscribes the bill, and directs it to the party that oweth him money, and is to pay it by exchange, by which bill (when the party on whom it is drawn hath accepted it) he becometh debtour to the drawer, and he before the bill falls due, doth negotiate the parcel with another man, and so draws in the money at the place where he liveth," ibid; cp. Buller v. Crips (1702) 6 Mod. at p. 30 *per* Holt, C.J.

These two developments show us that in England, as abroad, the process is begun which will make the bill of exchange a form of paper currency.[1] But as yet it is only begun; and we shall see that some of these developments tended to make English lawyers, whose acquaintance with these mercantile instruments was as yet slight, confuse the bill of exchange with those bills obligatory or bills of debt, to which the merchants were endeavouring to give somewhat the same transferability as the bill of exchange had acquired. Of this, however, I cannot speak till I have examined the process by which the bill of exchange was received into English law, and its negotiable characteristics developed by the courts of common law.

(ii) *The recognition and development of the bill of exchange in English law.*

It was the development of the action of assumpsit which gave to English lawyers a form of action well fitted to enforce many various kinds of mercantile contracts.[2] In the latter part of the sixteenth century it occurred to some lawyers that it might be used to enforce the rights of the parties to a bill of exchange. The first edition of Rastell's Entries, which was published in 1564, contains a pleading in which this attempt was made;[3] and the second edition, published in 1670, contains two more precedents of the years 1595 and 1596.[4] In Herne's book on pleading there is another precedent, taken from a court roll of the year 1586, in which a similar attempt was crowned with success;[5] and in *Martin v. Boure*[6] (1602)—the earliest reported case on a bill of exchange—assumpsit was again adapted to enforce the rights of some of the parties, and again with success.

But these authorities show us that the statement, in the terms of assumpsit, of the rights of the parties to a bill of exchange, was as difficult for the common lawyers as the statement of these rights, in the terms of the Roman law of obligatio, was for the civilians.[7] The precedent in Rastell's first edition sets out that one A had delivered money to B (the drawer); that in return for this money B had promised that one John of G. (the drawee) would pay a certain sum to Reginald S. (the payee), who was the factor of A; and if John of G. did not pay, that then B would do so; it then avers that the drawee had not paid the money to the payee,

[1] Above 145.

[2] Vol. iii 428 seqq.

[3] At f. 10a, cited Street, Foundations of Legal Liability ii 341 n. 1, and Cranch, Promissory Notes, Essays, A.A.L.H. iii 76-77; for this book see vol. v 384, vol. vi 683.

[4] Rastell, Entries ff. 338a-339a.

[5] Herne's Pleader (ed. 1657) 136-137, the reference given is Trin. 13 Eliza. Rot. mmxxi; for this book see vol. v 385.

[6] Cro. Jac. 6.

[7] Above 137-140.

and that, if he had done so, the money would have come to the profit of A; and that B (the drawer) has refused to fulfil his contract by paying it. It is fairly clear that this is an action against a drawer by a deliverer of the money, who was in substance the principal of the payee.[1] As we have seen, the payee's right of action was explained in a similar way by continental jurists.[2] The pleadings in Rastell's later edition, and in Herne, are adapted to actions by a payee against an acceptor and a drawer respectively. All these later precedents are more explicit than Rastell's earliest precedent, in that the instrument is termed a "bill of exchange," and reference is made to the custom of the merchants. But they all state the cause of action in a somewhat similar manner. Thus the precedent in Herne's book alleges that W (the deliverer of the money and the payee) paid money in England to H (the drawer); that H in consideration thereof promised to pay to W at Hamburg a certain sum in two months time; that in fulfilment of this contract H gave to W "his bill of exchange made according to the use of merchants," whereby he directed his factor R (the drawee) to pay the money; that R promised to pay the money (i.e. he accepted the bill); and that in breach of his promise he had neglected to do so. The facts in the case of *Martin v. Boure* are rather more complicated, and the pleadings as summarized in the report are somewhat obscure. But it would seem that the action was brought by the drawer against the acceptor for a failure on the part of the acceptor to pay, in consequence of which failure he (the drawer) had been obliged to pay to the payee.[3]

It was shortly after the decision in this case that the pleaders adopted another and a much more satisfactory device for stating the rights of the parties. We have seen that, at the beginning of the seventeenth century, it was coming to be generally admitted that a general mercantile custom was a part of the common law.[4] It followed that in these actions it would be sufficient to state the facts, and allege that the rights and duties of the various parties to the bill arose merely by virtue of this custom. This course was followed in *Oaste v. Taylor*[5] in 1612, and in all subsequent cases. In many of them the custom relied upon is stated at considerable length.[6] At the end of the century a step further was taken in the direction of simplifying the pleadings. It was said that these

[1] Above 137.
[2] Above 139-140.
[3] See Street, op. cit. ii 347.
[4] Vol. v 145.
[5] Cro. Jac. 306; as Street says, op. cit. ii 348-349, "upon reference to pleadings in that case the reader will see what lengthy recitals could be pared off upon acceptance of the idea of duty arising from a custom of merchants."
[6] See the recitals in Brownlow, Declarations (ed. 1659) 266-267; Vidian, the Exact Pleader 66, 67, 70; Cramlington v. Evans (1691) 2 Vent. 298, 300; cp. Barnaby v. Risalt (1633) Cro. Car. 301-302.

mercantile customs being part of the common law it was unnecessary to plead them specially.[1]

These changes in methods of pleading effected, as Mr. Street has said,[2] a great simplification in the statement of cases turning on these bills. They also had, as changes of pleading very often have, a considerable effect upon the development of the law. Under cover of these convenient phrases about the custom of the merchants, it was easy to introduce into the common law both the legal principles familiar to continental lawyers, and the commercial practices familiar both to English and to foreign merchants. The common law entered into the fruit of the labours of many generations of continental lawyers and merchants, when it thus took over the bill of exchange at the stage of development which it had reached in the middle of the seventeenth century.

The manner in which the judges incorporated the law as to bills of exchange with the common law can be read in the reports of the seventeenth century—more especially in the reports of the last years of that century, during Holt's tenure of the office of chief justice of the King's Bench. From these reports we can gather that the common law was beginning to possess a body of doctrine upon the rights of the parties to bills of exchange; that the negotiable character of these bills was beginning to emerge with some clearness; and that the administration of the law relating to them by the common law courts, was beginning to differentiate the English law as to bills of exchange from that of the Continent.

(*i*) The rights of the parties.

Let us recall the rights of the four normal parties to the bill of exchange, and see how they were envisaged by the common law.[3] (*a*) *The relations of the person who has paid over the money, which he wishes to remit, to the drawer who has received it.* It would seem from the books of precedents of the latter part of the sixteenth and of the seventeenth century, that his rights in England were based upon substantially the same ground as that upon which they were based abroad. The drawer, who has received money from the remitter, must fulfil his contract by paying it over to the person on whose behalf he has received it.[4] (*b*) *The relations*

[1] Williams v. Williams (1694) Carth. 269, 270: "'tis needless to set forth the custom specially in the declaration, for 'tis sufficient to say that such a person *secundum usum et consuetudinem mercatorum* drew the bill; therefore all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it"; Bromwich v. Lloyd (1698) 2 Lut. 1585; cp. vol. v 145-146.

[2] Op. cit. ii 348, 349.

[3] See above 137-140 for the continental law.

[4] Rastell, Entries 338b; Vidian, op. cit. 66-67; Woodward v. Rowe (1666) 2 Keb. 106—"By the common law a man may resort to him that received the money if he to whom the bill was directed refuse"; Mogadara v. Holt (1692) Holt 114—"The drawer is chargeable by the value received," *per* Holt, C.J.

of drawer and drawee. The books would seem to show that their relations were based, either upon the fact that the drawee was the agent of the drawer,[1] or that he is the debtor of the drawer.[2] (*c*) *The relations of acceptor and payee.* The cases make it quite clear that the courts adopted the principle that an acceptance was equivalent to a promise to pay, upon which, by the custom of the merchants, an action lay.[3] But it was clear, in some cases at least, that the consideration for this promise did not move from the payee. Thus if A gives money to B to transmit to C, and B draws a bill on X in favour of C which X accepts, there is no consideration moving from C to X. It follows that there is no privity of contract between them. It was therefore held that the payee could not sue in debt or indebitatus assumpsit, but must make use of an action on the case based on the custom.[4] In other words, the common law recognized the liability, recognized that it was not contractual, and therefore, without further analysis, allowed an action on the case to enforce a custom of which it approved. (*d*) *The relations of the payee and drawer.* Here again the courts followed mercantile custom and continental law, by basing the payee's right of recourse against the drawer, in the event of non-acceptance or of non-payment by the acceptor, upon the existence of some sort of agency between the payee and the person who had given value to the drawer. This relation of agency was often set out in the earlier pleadings.[5] In 1666 the Court stated that it would always be presumed.[6] But a relationship which will always be presumed is generally becoming fictitious. By the end of this period the drawer's liability is coming to be based upon a different ground. It is said that the act of drawing a bill implies a warranty to the payee that it will be paid.[7] The use of a term, which is reminis-

[1] Rastell, Entries 338a; Herne, Pleader 136; but the cause of action is sometimes stated more generally. Thus in a precedent, which is dated 1636, it is stated that according to mercantile custom (which as usual is set out at some length) if one merchant (A) draws on another (B), and B refuses to pay, A becomes liable; and A on this ground claims to hold B liable, Liber Placitandi (1674) 41-42.

[2] See the facts as found by inquisition in Cramlington v. Evans (1691) 2 Vent. at p. 309.

[3] (1613) Oaste v. Taylor, Cro. Jac. 306; Barnaby v. Rigalt (1635) Cro. Car. 301-302.

[4] Brown v. London (1670) 1 Vent. 152; 1 Mod. 285, and note to the report in Modern; Rainsford, C.J., said, "This is the very same with *Milton's Case* . . . where it was adjudged that an *indebitatus assumpsit* would not lie . . . we all agreed that a bill of exchange accepted, &c., was indeed a good ground for a special action upon the case; but that it did not make a debt"; cp. Hodges v. Steward (1692) 1 Salk. 125.

[5] Rastell, Entries ff. 10a, 339a; cp. Street, op. cit. ii 352.

[6] Woodward v. Rowe (1666) 2 Keb. 133—An action against the drawer, and, "Judgment pro plaintiff (the payee) *per totam curiam*, and they will intend that he of whom the value is said to be received by the defendant was the plaintiff's servant."

[7] Starke v. Cheeseman (1700) 1 Ld. Raym. 538—Holt, C.J., said, "He who draws a bill warrants the payment of it, and if he does not, it is a deceit, and one may have an action upon it"; the report goes on to state that the plaintiff afterwards got judgment because "the drawing of a bill was an actual promise"; cp. Claxton v. Swift

cent of the sale of goods, is perhaps a sign that it is coming to be recognized that the bill operates as a conveyance as well as conferring contractual rights.[1] But as yet this idea is new, and the courts have not grasped it firmly. Here, as in other cases, the courts were generally satisfied with stating that, by the custom of the merchants, the drawer is liable to the payee in the event of non-acceptance or of non-payment by the acceptor, and with giving effect to the custom. We must wait till the following period for the more extensive use of the idea of warranty to explain the liabilities inter se of the various parties to a bill.[2]

I have not yet described all the possible parties to a bill of exchange. There are also the rights of indorsers and indorsees, and of the bearer of a bill made payable to X or bearer. But their position I can best deal with under the next head.

(*ii*) The negotiable character of the bill of exchange.

We have seen that the quality of negotiability includes three main peculiarities—(*a*) the mode of transfer; (*b*) the fact that the title of the holder is unaffected by defects in or the absence of title on the part of his transferor; and (*c*) the presumption of consideration.[3] The reports show us that, by the end of the century, all these peculiarities were beginning to be recognized.

(*a*) It was recognized that if a bill was payable to X or order, or to X or his assigns, the bill could be transferred by indorsement and delivery;[4] and further, that the indorsee could in like manner transfer his rights.[5] On the other hand, a bill which was payable to X simply could not be so transferred.[6] The rights of the indorsees depended upon the principle that each indorsement amounted in substance to the drawing of a new bill.[7] The

(1687) Comb. 32-33, the indorser's liability is explained by reference to the law as to warranty—"no case in law resembles this, but that of a warranty"; cp. Anon. (1694) Holt 115.

[1] Above 142-143, 145; we see the same idea in an anonymous nisi prius case of 1699 reported 1 Salk. 126; it was ruled that trover would lie against the finder of a lost bank bill, but not against his assignee, "by reason of the course of trade which creates a property in the assignee or bearer."

[2] See Street, op. cit. ii 411-415; cp. 45, 46 Victoria c. 61 §§ 54-56.

[3] Above 113-114.

[4] "When the bill is payable to J.S. or order there an express power is given to the party to assign, and the indorsee may maintain an action," Hodges v. Steward (1692) 1 Salk. 125.

[5] "As to the appointment, this will not make an order at common law, because there are two indorsements; and if I give my servant an authority to receive, he cannot authorize another; otherwise if but one; then payment to the first indorsee would be a payment to the person, therefore you here depend upon the law of merchants, which at present I think we ought to take notice of," *per* Ventris, J., Carter v. Downish (1686) at p. 130; cp. above 141-143 for the growth of this principle on the Continent.

[6] Above 156.

[7] Williams v. Field (1694) 3 Salk. 68—"Every indorsement is a new bill and implies a warranty by the indorser that the money shall be paid"; Harry v. Perrit (1711) 1 Salk. 133.

indorsee's right against his indorser therefore depended upon the same principle as the right of the payee against the drawer.[1] The indorser by indorsing warrants that the indorsee shall be paid. From this principle two consequences flowed. In the first place, the last indorsee could sue any of the indorsers, as well as the drawer;[2] and, after some hesitation, it was held that each indorser could be made primarily liable on the bill, and not merely liable only in the event of the drawer failing to pay.[3] In the second place, although a bill made payable to A simply did not admit of transfer, yet if A indorsed it to B, and B to C, C could sue B or A upon their indorsements.[4]

It was only if a bill was payable to A or order or to A or assigns that it was transferable. It was held, after a little hesitation, that a bill payable to A or bearer was not so transferable.[5] It was treated as a bill payable to A simply. It is true that if the bill were made payable to bearer, a payment to the bearer would discharge the acceptor;[6] but the bearer could not sue on such a bill in his own name. He could only sue in the name of the person to whom the bill was payable.[7] It is probable that the judges, when they laid down this rule, were influenced by the prevailing continental practice. We have seen that it was not till 1721 that the bearer was given a right of action in France;[8] and it was not till 1764 that it was clearly and finally laid down by the English courts, in the case of *Grant v. Vaughan*,[9] that the bearer of a bill of exchange, made payable to A or bearer, had an independent right of action. This development was assisted by the fact that, long before that date, the Legislature had allowed the bearer of a promissory note, made payable to bearer, to sue in his own name.[10] The older cases do not, as we shall see, distinguish very clearly between notes and bills.[11] It was thus possible to apply the law

[1] Above 162-163. [2] Williams v. Field (1694) 3 Salk. 68.

[3] Holt, C.J., ruled in Lambert v. Pack (1700) 1 Salk. 127, that a demand on the drawer must be proved before the indorser could be sued; this was dissented from in Harry v. Perrit (1711) 1 Salk. 133, and overruled in Bomley v. Frazier (1722) 1 Str. 441, on the ground that the delay so caused would impede the circulation of these bills; cp. Haylyn v. Adamson (1758) 2 Burr. at pp. 675, 676.

[4] Hill v. Lewis (1709) 1 Salk at p. 133—"The indorsement of a bill which has not the words, *or to his order*, is good, or of the same effect betwixt the indorser and the indorsee, to make the indorser chargeable to the indorsee."

[5] Hinton's case (1682) 2 Shower 236, the bearer of a bill of exchange made payable to J.S. or bearer sued, and Pemberton, C.J., ruled "that he must entitle himself to it on a valuable consideration . . . for if he come to be bearer by casualty or knavery he shall not have the benefit of it"; it was held in Hodges v. Steward (1692) 1 Salk. 125 that a bill so drawn was not assignable; the reason given in Nicholson v. Sedgwick (1698) 1 Ld. Raym. at p. 181 was that "if the bearer be allowed to bring the action in his own name, it may be very inconvenient; for then anyone, who finds the note by accident, may bring the action."

[6] Hodges v. Steward (1692) 1 Salk. 125.

[7] Nicholson v. Sedgwick (1698) 1 Ld. Raym. at p. 181.

[8] Above 125-126. [9] 3 Burr. 1516.

[10] Below 173. [11] Below 171.

as to notes to bills; and give to bills to bearer the same advantages that bills to order had previously enjoyed. It followed that, in the case of a bill to order indorsed in blank, the holder could sue as the bearer.[1] He was no longer obliged (as he was in this period) either to fill up the blank and sue in his own name, or leave the blank not filled up and sue in the name of the indorser.[2]

(*b*) It was during this period that the right of the bona fide holder for value to recover on a bill, notwithstanding a defect in or even an absence of title on the part of his transferor, was gradually gaining recognition. This feature of negotiability—the most important and the most characteristic of all its features—was not yet clearly defined. It was not yet clearly defined mainly because the rights of the bearer as such were not yet clearly recognized. We have seen that it rests ultimately upon the view that the acceptor, or other party liable upon the bill, has contracted to pay any one who is the bearer in the case of an instrument payable to bearer, or any bearer in whose favour an order has been indorsed on the bill in the case of an instrument payable to order.[3] It is in the case of a bearer instrument that this most clearly appears, because the bearer cannot, as Mr. Street puts it,[4] be treated "as an attorney or representative, or as taking by mere assignment an estate that had been vested in another." He must be treated "as taking his title directly from the grantor"; and the grantor must be treated as contracting directly with him. This view is clearly expressed in one of the cases of the late seventeenth century, in which the courts had adopted the view (maintained by the court of Chancery[5] but afterwards dissented from by the courts of common law[6]) that the bearer of a note payable to bearer could sue:—"Traditio facit chartam loqui: and by the delivery he expounds the person before meant; as when a merchant promises to pay to "the bearer" of the note, any one that brings the note shall be paid."[7] It was not till the independent rights of the bearer were recognized by the cases decided in the latter half of the eighteenth century, that the rights

[1] Peacock v. Rhodes (1781) 2 Dougl. at p. 636: "I see no difference between a note indorsed blank, and one payable to bearer," *per* Lord Mansfield.

[2] Clark v. Pigot (1699) 1 Salk. 126—the plaintiff having a bill payable to himself or order indorsed it in blank and sent it to J.S. The money not having been paid, he sued the acceptor. Holt, C.J., said, "J.S. had it in his power to act either as servant or assignee: if he had filled up the blank space making the bill payable to him, that would have witnessed his election to have received it as indorsee; but that being omitted, his intention is presumed to act only as servant to Clark."

[3] Above 144. [4] Foundations of Legal Liability ii 370-371.

[5] Crawley v. Crowther (1702) Freeman, Cases in Chy. 258.

[6] Above 164 n. 5.

[7] Shelden v. Hentley (1681) 2 Show. at p. 161; cp. Crawley v. Crowther (1702) Freeman, Cases in Chy. 258 where it is said that, "If a bill be payable to A or bearer, it is like so much money paid to whomsoever the note is given, that let what accounts or conditions soever be between the party who gives the note and A to whom it is given, yet it shall never affect the bearer, but he shall have his whole money."

of the bona fide holder of a bill of exchange were so clearly recognized and explained.[1]

But even at this period, when it was only a bill payable to A or order or to A or assigns that was fully transferable, this element of negotiability was beginning to emerge. It was being reached by two different routes. In the first place, it was said that if A accepts a bill payable to B or order, it is a contract by A to pay either B or any assignee in whose favour B makes his order.[2] That being so, the mere fact that A might have had some defence to an action on the bill if B had sued him, will not allow A to set up that defence if he is being sued by B's assignee. Thus in *Hussey v. Jacob*[3] it was said by Holt, C.J., that a bill of exchange, given to X or order for a gaming debt, and void under the statute of 16 Charles II. c. 7, could be sued on by X's assignee, at any rate if it had been accepted after the assignment.[4] In the second place, this view of the superior rights of the assignee was assisted by the theory that each indorser of a bill of exchange in effect draws a new bill.[5] It follows that he is liable to his indorsee irrespective of any weakness in his own position. Thus it was laid down in *Hill v. Lewis*,[6] that, if a bill was drawn without words of negotiability, the drawer was not liable to an indorsee of the holder, but that the indorser was liable to the indorsee. Moreover, even if the bill had been forged, the indorser was liable.[7] In both cases the indorser was liable on the new bill which he had drawn.

These cases go the length of deciding that the holder of a bill is not liable to be met by the defences which would be valid against his transferor. In other words, the bill is assignable free from equities. But suppose that the bill has been stolen, and that the holder has acquired through the thief—could not the acceptor refuse to pay, on the ground that the holder was not an assign at all? On the principles recognized at this period it would seem that he ought to have been able to refuse. Yet it was ruled by Holt in an anonymous nisi prius case that, if a bank bill payable to A or bearer (i.e. a non-negotiable bill) was lost, and was found by X, who indorsed it to C, A could sue X in trover, but not C, "by reason of the course of trade which creates a property in the assignee or

[1] As for instance in Peacock v. Rhodes (1781) 2 Dougl. at p. 636.

[2] "When a bill is payable to J.S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action," Hodges v. Steward (1692) 1 Salk. 125.

[3] (1697) 1 Comyns 4.

[4] "If such a note was given to the winner or order, and the winner indorsed it to a stranger for a just debt, and the person upon whom the bill was drawn accepts it in the hands of the stranger, the acceptor would be liable," ibid at p. 6, *per* Holt, C.J.

[5] Above 163.

[6] (1709) 1 Salk. 132.

[7] Lambert v. Pack (1700) 1 Salk. 127.

bearer."[1] In other words, Holt again falls back on the custom of the merchants, without giving any explanation of the rule laid down. In fact, as I have said, no really satisfactory explanation could be given till the negotiability of bearer bills was recognized.

(*c*) In a bill of exchange drawn in the usual form the drawer always states that he has received value. Malynes tells us that the receipt of value was necessary to the validity of bills obligatory;[2] and the forms of bills of exchange show that this is also true of bills of exchange. But, from an early date, the statement on the face of the bill that value had been received, seems to have been regarded as creating a presumption in favour of the existence of a consideration;[3] and it was held in 1714 that this presumption would arise whether or no the words "value received" were present.[4] Such consideration, whether proved or presumed to exist, will give the holder the right to sue the acceptor or any of the other parties liable on the bill. But it is now settled that if it can be shown that no consideration was ever given as between any of the parties, no action can be brought on the bill. It is not true therefore to say that no consideration is necessary for the validity of a bill of exchange; but it is true to say that there are two points in which the doctrine of consideration is applied to bills of exchange in a manner different from that in which it is applied to other contracts. In the first place, the burden of disproving the presumption that consideration has been given is on the defendant; and, in the second place, if consideration has once been given for the drawing of the bill or in the course of its negotiation, the presumption that consideration has been given is irrebuttable.[5] It follows that there is no need for consideration to move from the holder who is suing; and this exception from the ordinary rule was, as we have seen, technically justified by giving the holder, not an action of assumpsit, to succeed in which he would be obliged to prove a consideration moving from himself, but an action on the case.[6]

These results were not ascertained till after this period. As we have seen, the courts were inclined to explain the rights of

[1] (1699) 1 Salk. 126; above pp. 164, 165-166.

[2] Lex Mercatoria, 74, "the civil law and the law merchant do require that the bill shall declare for what the debt groweth, either for merchandize or for money, or any other lawful consideration"; the form of words "current money for merchandize," which were sometimes found, were inserted to get the benefit of the higher rate of interest which was allowed for money "in the course of traffic," ibid 74-75.

[3] "If the drawer mention it '*for value received*,' then he is chargeable at common law," Cramlington v. Evans (1685) 1 Shower 5 *per* Holt, C.J.

[4] Josceline v. Lassere (1714) Fortescue 281; cp. Hatch v. Trayes (1840) 11 Ad. & El. 702; Street, op. cit. ii 382, 383, 391, 392.

[5] Ibid 389.

[6] Brown v. London, above 162 n. 4; Hodges v. Steward (1692) 1 Salk. 125, and note

the parties by reference to the custom of the merchants, and very rarely attempted to explain the principles upon which that custom was based.[1] It was clear that the doctrine of consideration could not be applied to these bills in the same manner as it was applied to ordinary simple contracts. For instance, an acceptor was liable to an original payee or an indorsee, though no consideration had moved from such payee or indorsee to the acceptor. Holt, therefore, and many of the other judges, came to the conclusion that the bill of exchange was in the nature of a contract under seal. Just as the seal made the agreement valid though no consideration was present, so the custom of the merchants made the acceptor, drawer, or indorser liable.[2] All through this period this was the prevailing theory. But it was contrary to the continental view of the law;[3] contrary to the view taken by the merchants;[4] and inconsistent with the ordinary forms of bills of exchange.[5] The modern view was first laid down in connection with promissory notes. We shall see that the negotiability of these notes was recognized by a statute of 1704.[6] In 1721 two of the judges applied to these notes the doctrine that the bill was in the nature of a contract under seal; but the other two judges and the lord Chancellor held that the note was only a simple contract; "and notwithstanding the statute says that the money shall be due and payable by virtue of the note, that only makes the note itself evidence of a consideration . . . though the note itself be evidence of a consideration, yet it is not conclusive evidence, but turns the proof on the defendant to show that there was no consideration given."[7] This view was accepted by the courts of common law in relation to notes;[8] and, though Lord Mansfield decided in favour of the opposite view in *Pillans v. Van Mierop*,[9] the decision of the House of Lords in *Rann v. Hughes*[10] made it clear that a bill of exchange could not, merely because it was a written contract, be in the same position as a contract under seal.[11] It followed that the principle applicable to notes was applicable to it.

[1] Thus in Cramlington v. Evans (1685) 1 Shower 5, Holt, C.J., said that if there is no mention of "value received," "then you must come upon the custom of the merchants only"; cp. Woolvil v. Young (1698) 5 Mod. 367.

[2] Thus in Clerke v. Martin (1702) 2 Ld. Raym. at p. 758, Holt, C.J., said that to allow the negotiability of promissory notes "amounted to the setting up of a new sort of specialty"; and he took the same view in Cutting v. Williams (1702) 7 Mod. at p. 155; cp. Street, op. cit. ii 383.

[3] Above 143.

[4] Above 157; Marius, Advice 1.

[5] Above 152-153.

[6] Below 173.

[7] Brown v. Marsh (1721) Gilb. Eq. Cases 154.

[8] Jefferies v. Austin (1725) 1 Stra. 674.

[9] (1765) 3 Burr. 1663 at p. 1669.

[10] (1797) 7 T.R. 350 note; above 30.

[11] See Street, op. cit. ii 388-389.

(*iii*) Some peculiarities in the English law as to bills of exchange.

By the end of the seventeenth century the law as to bills of exchange was administered by the common law courts, and had become part of the common law. It was not administered in special mercantile tribunals, as was generally the case on the Continent.[1] This had two important and permanent effects on the law. In the first place, the rule that the bill of exchange was only valid as between merchants was obsolete by the end of the seventeenth century. In the case of *Bromwich v. Lloyd*[2] Treby, C.J., summed up the result of the cases as follows: "Bills of exchange at first were extended only to merchant strangers trading with English merchants, and afterwards to inland bills between merchants trading with one another here in England, and then to all traders and business men, and lastly to all persons whether traders or not." The first stage is represented in the work of Malynes, the second in the Tract of Marius, and the third is the result of the cases decided in the last quarter of the seventeenth century. In the second place, as the bill of exchange ceased to be used exclusively by traders, it came to perform a function other than that of enabling a person to pay a debt in a distant place. The rule still prevailing in France that "the place where a bill is drawn must be so far distant from the place where it is payable that there may be a possible rate of exchange between the two,"[3] was disappearing as early as 1697.[4] The result has been that "in England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out."[5] We have seen that even in France it is recognized as performing some of the functions of a paper currency;[6] but in England this function has been much more completely worked out, largely because these bills have not been confined to their original purpose of providing a method of avoiding the dangers of a physical transport of money.[7] This difference was not fully apparent at the end of this period. Although a bill was coming to be regarded as a species of currency, it was quite clearly

[1] Vol. v 148-154.
[2] (1697) 2 Lut. 1585.
[3] Chalmers, Bills of Exchange (7th ed.), Introd. lxii.
[4] The facts of Hussy v. Jacob, 1 Comyns 4, make this clear.
[5] Chalmers, op. cit. lxi-lxii.
[6] Above 145; cp. Chalmers, op. cit. lxi. note.
[7] As early as 1720 this aspect of the bill of exchange was recognized in the case of Bomley v. Frazier, 1 Stra. 441; the court there said, "the design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie."

settled that it was not an absolute payment, unless the creditor chose to take it as such. It operated as a payment only if it was met at maturity;[1] and this is still the law.[2] But the root of the difference between the English and the continental developments was present; and if we look back at the law from the point of view of the present day we can clearly see its beginnings.

Similarly the principles which underlie the various elements which go to make up the idea of negotiability had not been as yet clearly worked out. These various elements were in many cases justified by a reference to the custom of the merchants without being explained. But the underlying principles were often very near to the mind of the judges, and only awaited a clear statement. We shall now see that the task of making this statement in the following century, was materially helped by the somewhat peculiar history of the recognition of the negotiable character of the promissory note.

(3) *The promissory note.*[3]

In England, as abroad, the development of the negotiable character of the bill of exchange reacted upon the legal position of the note, or bill obligatory, payable to bearer.[4] We have seen that the common law, in the sixteenth and early part of the seventeenth centuries, did not recognize the assignability which these instruments possessed according to the customs prevailing amongst the merchants.[5] But in the latter part of the seventeenth century many of these mercantile customs had become part of the common law.[6] The assignability of bills of exchange payable to order was fully recognized;[7] and many of the other rules relating to them were so contrary to the ordinary principles of the common law, that they could only be justified by a reference to mercantile custom. Could not mercantile custom do for these notes what it had done for the bill of exchange?

Cases decided in the latter part of the seventeenth century show that the lawyers were inclined to answer this question in the

[1] Ward v. Evans (1702) 2 Ld. Raym. 928, this was ruled as to notes; Holt, C.J. said, "I am of opinion and always was (notwithstanding the noise and cry that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street) that the acceptance of such a note is not actual payment . . . when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time"; in Hill v. Lewis (1709) Holt, C.J., seems to lay down the same rule as to bills of exchange, though the case concerned notes.

[2] Street, op. cit. ii 389-391; of course it is otherwise if the instrument is accepted in full discharge, Vernon v. Boverie (1683) 2 Shower 296.

[3] On this topic see generally Cranch, Promissory Notes before and after Lord Holt, Essays A.A.L.H. iii 72-94; Street, op. cit. ii 363-372, 383-392.

[4] Above 125-126.

[5] Above 150-151.

[6] Above 160-161.

[7] Above 162-164.

affirmative.[1] Indeed it is clear, as Lord Mansfield once complained,[2] that they did not distinguish between the inland bill and the promissory note. Both are often called bills of exchange in the pleadings[3] and in the reports;[4] and the bill introduced into the House of Lords to make bills of debt transferable, appears to have taken the view that inland bills of exchange were governed by the same rules as bills of debt, since it proposed to make them transferable like foreign bills of exchange.[5] In one important respect, indeed, they closely resembled one another, and differed from the outland bill. Upon neither was a protest necessary as a condition of recovery against the drawer, till an Act passed in 1698 required a protest in the event of the non-payment of an inland bill of exchange.[6] In fact, it was not till Holt's campaign against promissory notes, and the passing of the statute of 1704, that the distinction was clearly drawn.[7] This being so, we are not surprised to find that the development of the law relating to promissory notes is very closely connected with the development of the law relating to bills of exchange. Thus a note payable to X or order was treated as assignable by indorsement and delivery, while a note payable to X or bearer was, after some hesitation,[8] treated like a bill to bearer, as not assignable.[9]

[1] Shelden v. Hentley (1680) 2 Shower, 161—a bearer allowed to sue on a note under seal promising to pay the bearer who delivered the note; Williams v. Williams (1692) Carth. 269; S.C. 3 Salk. 68 sub nomine William v. Field; Hawkins v. Cardy (1699) Carth. 466, 1 Ld. Raym. 360; in the latter report the document is erroneously called a bill of exchange; for an account of all these cases see Cranch, op. cit. 83-87.

[2] Grant v. Vaughan (1764) 3 Burr. at p. 1525—"Upon looking into the reports of the cases on this head, in the times of King William the Third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill and when upon a note: for the reporters do not express themselves with sufficient precision, but use the words 'note' and 'bill' promiscuously."

[3] See e.g. Brownlow, Declarations (3rd ed.) 266-267—"Whereas also there is, and from the time of the contrary whereof the memory of man is not extant there hath been such a custome within the kingdome of the Lord the king now of England betweene English merchants or forrainers and their factors or servants, used and approved, that if any merchant or merchants aforesaid, or their factors or servants, being in parts beyond sea, without the aforesaid kingdom of England, should deliver to any person, in the same parts beyond sea being, any sum of moneyes to be paid by any person in the same kingdome of England being by *bill or note of exchange* thereof made, [and such person] should so accept and subscribe, from the whole time aforesaid, [he] was chargeable and hath been accustomed to be chargeable to pay the said sum of money to such person as by the same *bill or note of Exchange* should be limited and expressed to be paid."

[4] Hawkins v. Cardy (1699) 1 Ld. Raym. 360; Cranch, op. cit. 87; Street, op. cit. ii 369.

[5] Above 151 n. 1; Hist. MSS. Com. 8th Rep. 137.

[6] Brough v. Parkins (1704) 2 Ld. Raym. 992; 9, 10 William III. c. 17; the statute was defective in that it did not provide for a protest in case of non-acceptance; this was remedied by 3, 4 Anne, c. 9, § 4.

[7] Below 172-173.

[8] Shelden v. Hentley (1681) 2 Shower, 161.

[9] Horton v. Coggs (1692) 3 Lev. 299—"After a verdict for the plaintiff it was moved in arrest of judgment, that this custom to pay to the bearer was too general; for perhaps the goldsmith before notice by the bearer had paid it to Barlow himself

During the later years of the seventeenth century cases turning upon these notes came with increasing frequency before the courts. This was no doubt due to the growth of depositing money with the goldsmiths, who at this period were beginning to do the business of bankers.[1] They issued these notes promising to pay the sum deposited, sometimes to a payee or bearer, sometimes to a payee or order. In 1704 Holt, C.J. said that the merchants agreed that they had been in use for some thirty years; and that he remembered when actions upon them first began to be brought.[2] But we have seen that in mercantile practice similar notes were much older.[3] However, there is a sense in which Holt's statement is true; their use by the goldsmiths, and their appearance in courts of common law, were not much older.[4]

Down to the year 1700 the history of these notes had been uneventful. They were very generally confused with inland bills of exchange; and it seemed as if they would silently assume the same negotiable character as these bills.[5] But in that year, in the case of *Clerke v. Martin*,[6] Holt, C.J. decided that a note payable to X or order was not a bill of exchange, and was therefore not negotiable. He said, "that this note could not be a bill of exchange, that the maintaining of these actions upon such notes were innovations upon rules of the common law; and that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants

(which at the Bar was said to be the truth of the case). And of that opinion after divers motions were Pollexfen, Powell, and Rokesby . . . though upon the trial of the cause before Pollexfen at the Guildhall he then held the action well lay, this matter having been objected at the said trial"; Nicholson v. Sedgwick (1698) 1 Ld. Raym. 180; but, according to the report of Nicholson v. Sedgwick, in 3 Salk. 67, it was admitted that a note payable to order was negotiable; and the same decision was come to in Carter v. Palmer (1701) 12 Mod. 380, Holt doubting; but it would seem from Crawley v. Crowther (1702) 2 Freeman, Cases in Chy., at p. 258, that the common law view as to a bearer instrument was not followed in the court of Chancery; see above 164 n. 5, 165.

[1] Below 185-186.

[2] Buller v. Crips, 6 Mod. 29, 30—"At another day, Holt, C.J. declared that . . . two of the most famous merchants in London . . . had told him, it was very frequent with them to make such *notes*, and that they looked upon them as *bills of exchange*, and that they had been used for a matter of thirty years, and that not only *notes* but *bonds* for money were transferred frequently, and indorsed as *bills of exchange*."

[3] Above 147-150.

[4] Dudley North was away from England between 1661 and 1680; his brother tells us, Lives of the Norths, ii 174, that, "He found divers usages in London very different from what had been practised in his time there . . . as first touching their running cash, which, by almost all sorts of merchants, was slid into goldsmiths' hands; and they themselves paid and received only by bills; as if all their dealings were *in banco*. He counted this a foolish lazy method, and obnoxious to great accidents; and he never could bring himself wholly to comply with it."

[5] See the cases cited above 171 nn. 1 and 4.

[6] 2 Ld. Raym. 757.

proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general indebitatus assumpsit for money lent." This case, as Holt himself admitted, caused a considerable outcry in the mercantile world.[1] But the decision was upheld in three subsequent cases;[2] and the merchants were obliged to get an Act passed to reverse them.[3]

The Act in substance provides that all notes in writing, made and signed by any person, whereby he promises to pay to any other person or his order or to any person or bearer, shall be assignable and indorsable over in the same manner and with the same legal effect as if they were inland bills of exchange.[4] This was interpreted to mean that all such notes, whether payable to A simply, or to A or order, to A or bearer, were made negotiable.[5]

Holt's treatment of these promissory notes, and the reversal of his views by statute, raise two interesting questions. Firstly, was there any justification for his views? and secondly, what has been the effect of the statute upon the law as to negotiable instruments?

(1) Distinguished lawyers of the eighteenth and nineteenth centuries,[6] and legal historians of our own days,[7] have generally maintained that Holt's views were merely wrong-headed; that they were historically false, and wholly opposed to the current of authority in his own time. There is much to be said for this view. Firstly, from an early period notes payable to bearer were recognized abroad, and possibly in England, as assignable by mercantile custom. They were certainly known to the English merchants from the sixteenth century onwards.[8] Secondly, there are one or two decisions which recognized the existing mercantile custom, and treated these notes as being on precisely the same

[1] Buller v. Crips (1704) 6 Mod. at p. 30.

[2] Potter v. Pearson, 2 Ld. Raym. 759; Buller v. Crips, 6 Mod. 29; Cutting v. Williams, 7 Mod. 155; though it was not followed in the Chancery, above 171 n. 9.

[3] 3, 4 Anne c. 9; the bill was presented 27 Jan., 1703, Commons' Journals xiv. 312; it was committed Feb. 12, ibid 335, and reached its third reading Feb. 2, 1704, ibid 508; in the Lords it was appointed to be read a second time Feb. 8, 1704, and Holt, C.J., was ordered to attend, Lords' Journals xvi. 653; probably he was responsible for the additions made by the Lords, which in substance correspond to §§ 5, 7, and 9 of the Act; these amendments were agreed to by the Lords on Feb. 15, ibid 664; the Commons accepted them and made further amendments on Feb. 22, Commons' Journals xiv 546, 674, which the Lords agreed to on the 26th, ibid 676.

[4] § 1.

[5] Burchell v. Slocock (1728) 2 Ld. Raym. 1545; but see Wain v. Bailey (1839) 10 Ad. and E. 616 where it was held that a plaintiff could recover on a lost note payable to himself simply; it has been assumed that this means that such notes were not negotiable see Thairlwall v. G.N.R. [1910] 2 K.B. at p. 519; but this seems contrary to the Act of Anne and the decision of Burchell v. Slocock; but the point now has only an academic interest owing to the provisions of the Bills of Exchange Act, 1882, above 156 n. 5.

[6] Grant v. Vaughan (1764) 1 W. Black at p. 487, *per* Ld. Mansfield, C.J.; Goodwin v. Robarts (1875) L.R. 10 Ex. at p. 349, *per* Cockburn, C.J.

[7] Cranch, op. cit. 89-93; Street, op. cit. ii. 386.

[8] Above 116, 147-150.

footing as inland bills of exchange.[1] Thirdly, there is certainly one case in which Holt himself recognized the negotiability of bank bills.[2] At the same time it is generally admitted that it is chiefly to Holt's decisions that we must look for the beginnings of the modern law as to negotiable instruments.[3] Why then should a man who was quite alive to the importance of commercial law, who by his decisions did much to settle the principles of many branches of that law, have gone out of his way to give decisions which were both bad in law, and injurious to the interests of the merchants?

It seems to me that Holt's decisions rested upon two chief grounds. In the first place, he had perceived, what most of his brother lawyers had not perceived, that there was a difference between an inland bill of exchange and a promissory note.[4] It may be that the statute of 1698, which required a protest in case of the non-payment by the acceptor of an inland bill of exchange, had made the difference clearer.[5] But, whether this be so or not, it is clear that Holt considered that assignability was the peculiar property of the bill of exchange annexed to it by law; that these notes were not bills of exchange; and that this was a mere attempt on the part of the "goldsmiths in Lombard Street . . . to make a law to bind all those that did deal with them."[6] He pointed out that the same object could be substantially effected by a bill of exchange drawn between two persons. In *Buller v. Crips* he said:[7] "Indeed I agree a *bill of exchange* may be made between two persons without a third; and if there be such a necessity of dealing that way, why do not dealers use that way which is legal? . . . as, if A has money to lodge in B's hands, and would have a negotiable *note* for it, it is only saying thus: 'Mr. B. pay me, or

[1] Above 171.

[2] (1698) Anon. 1 Salk. 126; S.C. 1 Ld. Raym. 738; I think it probable that the bank notes or bills in this case were either notes drawn payable to order in the form of bills of exchange, which Holt admitted to be negotiable; or possibly they were bank of England bills; 5, 6 William and Mary, c. 20, § 28, had provided for the issue of Bills by the Bank which could be assigned indefinitely by indorsement and delivery, and Holt would no doubt have regarded these bills as being in the same position as bills of exchange; it was the ordinary notes or bills of the goldsmiths, which merely acknowledged the receipt of money and promised to pay it, which were hit by his decisions; see Buller v. Crips (1704) 6 Mod. 29.

[3] "Though radically reactionary in dealing with promissory notes, in other respects he displayed much learning and judgment in deciding rights arising out of commercial transactions, and the law of bills is greatly indebted to him," Street, op. cit. ii 378; cp. Smith's Mercantile Law (11th ed.), Introd. lxxxii, n.; and see vol. vi 519-522.

[4] Compare his views as to the restricted competency of Indebitatus Assumpsit, which arose from his perception of the difference between contract and quasi-contract, above 90-91.

[5] Above 171; that Holt was a good deal interested in this branch of the law can be seen from the amendments made by the House of Lords to the Act of 3, 4, Anne, c. 9, which were probably suggested by him; above 173 n. 3.

[6] Buller v. Crips (1704) 6 Mod. 29. [7] 6 Mod. at p. 30.

order, so much money value to yourself'; and signing this, and B accepting it: or he may take the common note and say thus: 'for value received pay me (or indorsee) so much'; and good." The outcry of the merchants he considered to be mere "opinionativeness" seeing that they could do what they wanted by a slight variation in the form of their instruments.[1] In the second place, Holt considered that a bill of exchange was a specialty;[2] that no set of men could give to what was a simple contract the characteristics of a specialty; and that the attempt to do so, if acquiesced in, would mean that "Lombard Street would give the laws to Westminster Hall."[3] The merchants had, as we have seen, told him that not only notes but "bonds for money" were treated by them as bills of exchange;[4] and there is some evidence that they considered that a policy of insurance, when indorsed and transferred, "thereby became as good as a bill of exchange is."[5] His view, therefore, was that ignorant laymen, without any real justification, were attempting to upset the true legal principle, which he had discovered, that the promissory note was a contract of a very different nature from the bill of exchange. They were persisting in their view, although they could have effected all their purposes by means of a bill of exchange. Such opposition aroused both his personal and his professional pride, and fully accounts for the temper which he displayed on this occasion.

We have seen that Holt's view that the bill of exchange was a specialty (though held by many common lawyers) was eventually adjudged to be erroneous.[6] But it seems to me that there was a good deal to be said in favour of the other ground upon which he rested his decision. There is no doubt that a promissory note is an instrument of a different nature from a bill of exchange. These promissory notes were of comparatively recent introduction into the common law. It is true that they had been long familiar to the merchants. But it would seem that they had only come into extensive use within the last thirty years;[7] and they had assumed their negotiable characteristics in the common law courts under cover of a false analogy to the inland bill of exchange. It followed that, when the falsity of that analogy had been demonstrated, their supposed negotiable character disappeared.

There was technical force in this argument—especially in the seventeenth century. Its fallacy lay in the assumption that even the most correct technical reasoning could stop the development

[1] Clerke v. Martin (1702) 1 Ld. Raym. at p. 758. [2] Above 168.
[3] Clerke v. Martin (1702) 1 Ld. Raym. at p. 758. [4] Above 172 n. 2.
[5] See Davenant v. Midy (1695-1696) House of Lords, MSS. (N.S.) ii 196 no. 1009.
[6] Above 168. [7] Above 172.

of the new machinery rendered necessary by the new needs of an expanding trade. On the contrary, it was clear from the history of the bill of exchange that the law must adapt its technical rules to that machinery. But, once that adaptation had been made, Holt considered that the law had gone far enough. One form of negotiable instrument should suffice. Even in the nineteenth century substantially similar views have been held by distinguished judges.[1] At the beginning of the eighteenth century the Legislature was obliged to intervene to correct this error: in the nineteenth and twentieth centuries the courts themselves have recognized its fallacy, and corrected it.[2]

(2) I have already indicated the broad result of the statute—Holt's judgments were reversed, and promissory notes were made negotiable. This episode taught the courts that they could not wholly ignore approved mercantile custom; that they must adapt their rules to such customs; that in fact there were cases in which "Lombard Street must be allowed to give laws to Westminster Hall." And the eighteenth century was to show that the courts had learned that lesson. It was a salutary and a necessary lesson; and, if it had not been learned, it is difficult to see how a non-mercantile set of tribunals could have made commercial law for the greatest commercial nation of modern times. Further, it had a beneficial result on the development of the law of negotiable instruments. Notes to bearer were declared to be negotiable by the statute; and the case of *Grant v. Vaughan*[3] shows that the courts were assisted in coming to the conclusion that a bill to bearer was negotiable, by a chain of reasoning (historically somewhat fallacious) based upon this statute. We have seen that it was not till the independent rights of the bearer were recognized, that the most essential of all the elements of negotiability—the absolute title of the bona fide holder for value—could clearly emerge.[4]

It is not till the following period that this and other principles underlying the law as to negotiable instruments were clearly ascertained. In this period a good start had been made; but it was only a start. The united efforts of several generations both of merchants and lawyers were needed before the common law attained an adequate body of doctrine upon this, and upon many other branches of commercial law.

[1] Crouch v. Crédit Foncier (1873) L.R. 8 Q.B. at p. 386, *per* Blackburn, J.

[2] Goodwin v. Robarts (1875) L.R. 10 Ex. 337; Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q.B. 658; Edelstein v. Schuler [1902] 2 K.B. 144.

[3] (1764) 3 Burr. 1516; see especially the judgment of Wilmot, J., at pp. 1527-1528.

[4] Above 165-166.

We must now turn to the history of the closely allied topic of Banking.

§ 3. Banking

It was at one time thought that the earliest bank known to modern history was the bank of Venice, and that it was founded about the year 1170 to finance a state debt. But this opinion has been definitely disproved by the researches of Lattes and Ferrara.[1] They show that it was the *campsores*, or money-changers, who were the earliest bankers; and that the same set of economic causes which gave rise to the bill of exchange, gave rise also to the institution of banking.[2]

We have seen that money was entrusted to these *campsores* for purposes of transmission, and that, by means of the machinery of the bill of exchange, both the risks of transport[3] and the risk of receiving in payment defective or counterfeit coins were avoided.[4] It was not long before their business extended itself in different directions. On the one hand, a merchant who had begun by entrusting a particular sum to a money-changer for purposes of transmission in a particular transaction, found it convenient to keep with him a sum on which he could draw whenever he needed to transmit money; and others, besides merchants, found it convenient to deposit money with such a person for safe custody. On the other hand, the money-changer was only too glad to get this money into his hands, and was willing to pay something to get it. He could lend it at remunerative rates to needy princes or to merchants. Thus the Italian money-changers gradually replaced the Jews as the financiers of Europe.[5] The Caorsini, for instance, were the Pope's collectors; and they made large profits by lending the sums in their hands to needy borrowers.[6] The English kings were large borrowers from various Italian houses;[7] and Edward III., by his refusal to repay the money

[1] For an account of their work see C. F. Dunbar, Economic Essays 143 seqq.

[2] Above 128-130. [3] Ibid.

[4] "The notion of its being a prime business of a bank to give good coin has passed out of men's memories; but wherever it is felt there is no want of business more keen and urgent," Bagehot, Lombard Street, 81. The establishment of some state banks, e.g. Venice and Amsterdam, was caused primarily by the fact that this business was not satisfactorily done by the private bankers, below 180-181.

[5] The Italian bankers in England and their loans to Edward I. and Edward II., Historical Essays (edited by T. F. Tout and J. Tait), 137-167; see ibid pp. 143-153 for instances of loans to Edward I. on the security of the customs.

[6] Mat. Par., Chron. Mai. (R.S.) iii. 331-332, s.a. 1235 "Eodemque anno, episcopus Londoniensis Rogerus . . . cum intellexisset hos Caursinos usuras sine erubescentia palam frequentare vitamque spurcissimam deducere, viros religiosos variis iniuriis fatigare, pecuniamque argumentose coacervare, et multos iuga eorum coactos subire, commotus est et iratus"; he excommunicated them, but they had no difficulty in getting protection from their employer the Pope.

[7] Above n. 5.

which he had thus borrowed, ruined the Peruzzi and the Bardi of Florence.[1]

This development had taken place in Venice, and probably also in the other commercial cities in Italy, by the first half of the fourteenth century. "It is tolerably clear," says Dunbar,[2] "that private banking in Venice began as an adjunct of the business of the *campsores* or dealers in foreign moneys. In a city having a great and varied trade with many countries, these dealers necessarily held an important place. . . . As early as 1270 it was deemed necessary to require them to give security to the government as the condition of carrying on their business, but it is not shown that they were then receiving deposits. In an Act of September 24, 1318, however, entitled 'Bancherii scriptæ dent plegiarias consulibus,' the receipt of deposits by the *campsores* is recognized as an existing practice, and provision is made for better security for the benefit of the depositors. Whether the title of this Act is contemporary or not, its text shows that somewhere between 1270 and 1318 the money-changers of Venice were becoming bankers, by a method similar to that by which the same class of men at Amsterdam a couple of centuries later, and later still the London goldsmiths, became bankers. More than once in the next half century, provision was made for some public oversight of the *campsores*, and in the Acts the term *bancherius* and *bancus*[3] became frequent in what seems to be a technical sense."

Early in the fourteenth century, therefore, banks were being used to exchange, to remit, and to deposit money; and the bankers were driving a thriving trade by investing the money which thus came into their hands. It is clear that their operations tended to encourage and develop trade. Not only did they obviate the risks of transport, or payment in bad coin, and of the custody of a large amount of precious metals: they also helped mercantile operations in two other very important ways. (1) In the conduct of trade they immensely facilitated the adjustment of accounts.

[1] A History of Banking in all Nations iii 217.

[2] Economic Essays, 145-146.

[3] As to the derivation of the word see Oxford Eng. Dict., *sub voc.* Bank. It is there pointed out that it comes from *banco* or *banca* = a bench; this term was applied to a tradesman's counter or money-changer's table; hence it came to mean a money shop or bank, and in this sense passed from Italy to other countries. In Italy the word *Monte* was sometimes used in the sense of bank; and some have thought that "bank" is a German rendering of *Monte;* but that is a mistake, as the German bank always = bench, and not a mound or heap; the fact is that "in the development of banking the *banco* of the money-changer and *monte* or joint stock capital were combined, and the term 'bank' applied in England to both"; we find "bank" used in its modern sense in England at the end of the fifteenth and the beginning of the sixteenth century.

As the Venetian senator Contarini said in 1584,[1] "Buyer and seller are satisfied in a moment while the pen moves over the page: whereas a day would not be enough to complete the contract for a great mass of merchandize by counting a great number of coins." We have seen that at the great fairs the bankers adjusted the accounts of the chief trading centres of Europe.[2] In the sixteenth century it was at the fairs of Lyons, the Spanish fairs, and the fairs of Genoa, that this system was gradually perfected; and it was this adjustment of accounts which was the most important function of these fairs.[3] (2) By lending the funds at their disposal, the bankers could finance profitable undertakings.[4] And in time they found that they could use for this purpose not only the money actually deposited with them, but also their credit. A promise by a banker of good repute to pay on demand was as good as money and was taken as money. Thus in 1584 Contarini said that a banker could accommodate his friends, without payment of money, merely by writing a brief entry of credit; and that he could "satisfy his own desires for fine furniture or jewels by merely writing two lines in his books."[5] Thus, to use modern terms, the Italian banks had become not only banks of deposit, but also banks of issue.

A direct result of this function was the growth of the political importance of the bank. The state soon found that its business was one of the undertakings which a bank would finance in return for privileges which it could give.[6] A loan to the state and a state bank, in many different places and at many different times, have been related as cause and effect. The bank, established and guaranteed by the state, could perform a function somewhat analogous to that attributed to the Jew in mediæval England—it could, like a sponge, suck up the money of the subject, and be induced to squeeze it into the Exchequer by the payment of interest and other privileges. It was soon seen that this application of the institution of banking to political uses was capable of extension to religious or charitable uses. The idea of forming a fund to finance the state gave rise to the idea of forming a similar

[1] Cited by Dunbar, Economic Essays 148.

[2] Above 129-130.

[3] Huvelin, Le Droit des Marchés et des Foires, 562-574; Professor Huvelin tells us that after about the year 1570 this business was chiefly done at the fairs of Genoa —"Davanzati nous apprend que dans ces foires il ne s'effectuait pas de transactions sur des marchandises. Il y venait seulement cinquante ou soixante banquiers, chacun avec un petit carnet, pour régulariser les affaires de change de presque toute l'Europe."

[4] Dunbar, Economic Essays 149, says: "Trade with the Levant, the western trade, corn, exchange, the accommodation of friends, the purchase of land and houses —these were the typical classes of a banker's investments in that age."

[5] Ibid 149-150.

[6] Thus Ferrara calculated that at Venice between 1457 and 1507 the banks had lent sums amounting to 5,000,000 lire to the state, ibid 148-149.

fund—a *mons pietatis*—to finance the poor, and to deliver them from the clutches of the usurer.

It is clear, therefore, that in Italy in the sixteenth century banks had come to play a very important part in the economic life of the state. Their utility to the state itself and to all classes of persons in the state was obvious. But both their importance and their utility made some measure of state control necessary, both in the interests of its subjects and of the state itself. The history of banking at Venice shows that it was very necessary to legislate in the interests of the bank's customers. Thus it was found necessary to prohibit the bankers from making certain kinds of investment,[1] to appoint inspectors of banks,[2] to prescribe the times at which bankers must attend to make payments to their customers,[3] to make it an offence to refuse to pay cash on demand.[4] But these measures were not very successful. In 1584 it was said that of the 103 banks which had started business in Venice, 96 had come to a bad end.[5] The remedy was found in creating a State Bank of Venice in 1587 to receive cash deposits.[6] With these deposits there was to be no trading. They were retained in specie by the bank; and the expenses of the bank were met by a duty on imports. All merchants were practically compelled to keep an account at the bank, by the provision of a law, passed in 1593, that all bills of exchange drawn at or upon Venice must be paid by a transfer in bank.[7] The accounts of the bank were kept in bank money, which was 20 per cent. more valuable than the current coin.[8] This bank money, as Adam Smith explained in reference to the similar bank of Amsterdam, was always more highly prized, because it "represented money exactly according to the standard of the mint," because it was secure from fire, robbery, and other accidents, and because it was easily transferable.[9] Thus the bank of Venice provided for the transmission of

[1] Dunbar, Economic Essays 148. [2] Ibid 152. [3] Ibid 147.

[4] Ibid 150, 151; for regulations at Genoa in the fifteenth century see Leges Genvenses, Mon. Hist. Pat. xviii, Cols. 544, 545, 656-658.

[5] Dunbar, Economic Essays 146.

[6] A public bank was set up in 1584, the immediate cause being the failure of the house of Pisani and Tiepolo for 500,000 ducats; but the Act was repealed, and the bank was not revived till 1587, ibid 152, 153.

[7] Ibid 153-155; thus, as Dunbar says, ibid 145, the bank was founded to take over, under the guarantee of public authority, some of the functions which for over 270 years had been performed by the private bankers.

[8] Ibid 161-162.

[9] The classical account of the working of banks of this kind is to be found in Adam Smith's account of the bank of Amsterdam, Wealth of Nations, Bk. iv, chap. iii. He says: "The bank received both foreign coin, and the light and worn coin of the country, at its real intrinsic value in the good standard money of the country, deducting only so much as was necessary for defraying the expense of the coinage, and the other necessary expense of management. For the value which remained after this small deduction was made, it gave a credit in its books. This credit was

money, for the maintenance of a supply of good money, and for its safe custody. But it did nothing else. It took over certain functions only of the older private banks. The bank of Amsterdam was a bank of a similar character, and it was called into existence by similar causes—the difficulty of regulating the private bankers,[1] and of maintaining a standard medium of exchange.[2] Similar banks were established for similar reasons at Middleburg, Rotterdam,[3] Frankfort, and Hamburg.[4]

In the interests of its subjects, therefore, the state had found itself obliged to take over the control of the bank. But the state itself was sometimes even more directly interested in its proper management. It might be itself a debtor to the bank, which had for a consideration lent it money, or taken over an existing debt.[5] Thus the bank of St. George at Genoa took over the state debt, and the state as security ceded its governmental powers over some of its territory.[6] The bank thus developed from a mere commercial association into a political power, in a manner which reminds us of the development of our own East India Company. Similarly, a second bank was established at Venice in 1619, which took over the state's liabilities to its creditors, and was in return authorized to do banking business of a kind similar to that of the earlier bank of Venice, with which it amalgamated in 1637.[7]

Thus, at the end of the sixteenth century, the most important banks in Europe were state or public banks. The maladministration of the private banks, and the greater security offered by these public banks, had, so Marquardus tells us, almost driven the private banks out of the field.[8] The private bankers, whose

called bank money, which, as it represented money exactly according to the standard of the mint, was always of the same real value and intrinsically worth more than current money."

[1] A History of Banking in all Nations iv 193-195, 196-198.

[2] There was no national currency; a decree of the Earl of Leicester, 1586, mentions 130 different kinds of silver coins and 370 kinds of gold in circulation; a manual for changers issued on the basis of that decree fixed the prices for more than 500 kinds of gold and 370 kinds of silver coins, ibid 192; for the fidelity with which the bank of Amsterdam kept its deposits intact, see below 188 n. 7.

[3] A History of Banking in all Nations iv 201.

[4] Marquardus, De Iure Mercatorum et Commerciorum ii 12-14.

[5] Above 179; see a History of Banking in all Nations iii 214 for some account of the loans of the Florentine bankers to the state.

[6] Ibid 154-155.

[7] Dunbar, Economic Essays 156-158.

[8] Marquardus, op. cit. ii 12, 18-20; he says the private banks "Paulatim deficere coeperunt. Cui malo administratores eorum subvenire laborantes permiserunt aliis, maxime fideiussoribus, quibus quodammodo obstricti erant, exsolvere in banco pecunias, quas in eo non deposuerant. Inde factum, ut ruinam invenirent, unde celebritatem sperabant; iis, scilicet, qui pecunias acceperant, decoquentibus, et nemine amplius apud eos deponere volente. Hinc frequentissimæ decoctiones bancheriorum Genuæ, Neapoli, Messanæ, Florentiæ, etc., acciderunt . . . Unde factum, ut usus privatorum bancorum fere in desuetudinem abiret . . . Viget tamen adhuc publica banca, magna cum negociatorum utilitate."

business was done at the great fairs, were almost the only ones who had survived.[1]

At this period a bank, and the deposit business of a bank, could be described in terms which a modern lawyer might use. "By banking," says Marquardus,[2] "is signified a certain kind of dealing in money, approved by the state, according to which money is deposited with bankers for the benefit of the depositor, so that the ownership of the money passes to them, and so that the creditors (i.e. depositors) get security, and the debtors (i.e. the bankers) get advantage. This condition is however implied, that the depositor may whenever he pleases demand the money deposited; and this condition must always be understood to apply to all such deposits." The mutual advantage of a bank to customer and banker is explained to consist in the fact that the depositor is relieved of the anxiety of seeing to the safe custody of the money, while the banker can make a profit out of the money so paid to him;[3] and the universal prevalence of the custom among merchants in Italy and Germany of effecting payments by means of entries in bankers' books is attested.[4]

Malynes described the public bank and its working as he knew it on the Continent;[5] and his account is probably the first literary statement in English of a phenomenon familiar enough in mercantile practice. He begins by defining a bank in much the same way as Marquardus—it is "a collection of all the ready money of some kingdom, commonwealth, or province, as also of a particular city or town, into the hands of some persons licensed and established thereunto by publick authority."[6] The bankers

[1] Marquardus, op. cit. ii 12, 19: "Exceptis iis quæ . . . in feriis ex necessitate retinentur"; "competit autem hodie in feriis nomen bancheriorum illis mercatoribus, qui non tantum suas pecunias in cambiorum negociationibus occupatas habent; sed qui etiam, finitis feriis bilanciam exhibent, secundum regulas et leges feriarum."

[2] Ibid 12, 13: "Et denotatur per bancum certum negociationis genus in pecuniis consistens, publica auctoritate approbatum, quo pecuniæ apud Bancherios . . . in securitatem Creditorum et utilitatem Debitorum numeranti deponuntur ita ut dominium ad hos transeat . . . Hac tamen tacita conditione, ut quilibet deponens ad libitum nummos depositos recipere possit. Quod absolute omni deposito inest."

[3] Ibid 12, 16, 17 the advantages are: "ut deponentes custodia et periculo subleventur; depositarii, vero, qui pecunias illas maximam partem non patiuntur esse vacuas, . . . ex usu earum quas vel in merces vel in cambia imponunt, lucrum sentiant."

[4] "Consuetudo tamen et stylus mercantilis in Italia et Germania viget, ut quælibet promissio, facta in Banco, cedat loco solutionis; quod eo magis procedit, quando in libris illius, qui erat creditor, facta est mentio de tali promissione Bancherii, referendo illum in numerum debitorum, et talem promissionem scribendo loco solutionis receptæ a Creditore et factæ a Debitore," ibid ii 14. 3.

[5] Lex Mercatoria Bk. i chap. xx.

[6] Cp. the definition of S. Lamb, Seasonable Observations humbly offered to his Highness the Lord Protector (1659), Somers' Tracts vi at p. 457—"A bank is a certain number of men of estates and credit joined together in a joint stock, being, as it were, the general cash keepers or treasurers of that place where they are settled, letting out imaginary money at interest at 2 and ½ or 3*l.* per cent. to tradesmen, or

have their factors in all the great trading centres of Europe, and keep account with every man whose money they have received. By means of entries in the bankers' books, large sums of money can easily be paid and received. They pay out money on demand, and remit it to foreign countries for their customers by means of bills of exchange. The money in their hands is employed in many ways—in "dealing with great princes and potentates that have need of money for the maintenance of their wars," in ingrossing commodities and in fixing rates of exchange for different places. These rates were sometimes excessive, "wherefore the city of Amsterdam (to countermine them) have in the year 1608 also erected a very great bank, for which the said city hath undertaken to answer, whereby they are always stored with money, as appeareth, that the same is plentifully to be had at interest, at six and seven in the hundred by the year, and some at five and under." We shall see that this possibility of getting cheap money through a bank guaranteed by the state was one of the reasons for the foundation of the Bank of England.[1]

It is not surprising to find that in England, from the latter part of the sixteenth century, the advantages of establishing a public bank, of the kind familiar on the Continent, was pressed upon the Government. A proposal to establish banks "for the relief of common necessity" was introduced into an abortive bill on the subject of usury in 1571.[2] In or about 1576 one Stephan Parrotte proposed to establish a public bank;[3] and in 1581 Christopher Hagenbuck and his partners, who were probably Italians, had put before the Queen and Council a project for the establishment of such a bank.[4] In 1622 Sir Robert Heath made a similar proposal;[5] and in 1627[6] we hear of a suggestion for the "formation of a national bank, or treasure permanent to be lent out at 5 per cent., to enable merchants to traffic, gentlemen yeomen and husbandmen to till their grounds, and artificers to work and trade"—the capital stock to be raised by taxation. In 1636 Philip Burlamachi proposed the establishment of a bank through which the payment of all large sums should be made;[7] and in 1641 Sir Balthasar Gerbier suggested the establishment of banks which should

others . . ., and making payment thereof by assignation, and passing each man's account from one to another with much facility and ease, and saving much trouble in receiving and paying of money, besides many suits in law, and other losses and inconveniences, which do much hinder trade."

[1] Below 189. [2] Tawney, Wilson on Usury 125, 159.

[3] Tawney and Power, Tudor Economic Documents iii 370-377.

[4] S.P. Dom. 1581-1590, 31, cl. 73; the petition is in Italian; Bacon, in 1612, mentions projects to establish a Bank of Exchange which should be able to lend money to traders, Letters and Life (Ed. Spedding) iv 325.

[5] S.P. Dom. 1619-1623, 386, cxxx 28-32.

[6] Ibid 1627-1628, 493-494, lxxxix 17.

[7] Ibid 1636-1637, 73, cccxxix 34.

combine pawnbroking with banking business.[1] In 1661 Sir Gerbier D'Ouvilly described the advantages of establishing a "Bank of Exchange,"[2] which was to have its own "bank money," and power to lend on real estate. In 1673-1674 one Thomas Newcome wrote a pamphlet advocating the establishment of banks of credit, at which all payments by and to the crown should be made. Those receiving money in this way were to be able to assign the amount credited to them by the bank; and for debts payable by the king, bills of credit should be issued, which the crown should receive in payment of debts due to it, and should "pass under the name of check or bank money."[3] The advantages of such an undertaking were very clearly pointed out in a paper written by S. Lamb, a merchant, in 1659, and entitled "Seasonable Observations."[4] In many economic matters the Dutch were pointed to as an example at this period; and Lamb begins by showing how much their trade had benefited by their public banks.[5] He then pointed out that such a bank in England would increase trade, as it would enable money to be borrowed by industrious merchants at reasonable rates; and that this would tend to keep good men from failing.[6] It would guard against the risks of the transport of money, and the risks of being paid in bad or depreciated money.[7] It would provide an easy method of paying debts by the simple process of entry in the bank's books.[8] He therefore proposed that such a bank should be established, and that a society of merchants, to be chosen from the various companies of merchants, should be appointed to manage it.[9] Any one who wished was to be at liberty to deposit his money there, and to have it again on demand.[10] The bank was to have the power of issuing paper money; and all bills of exchange were to be received and paid there.[11] The expenses of management were to be defrayed from the profits, and any surplus was to go in augmentation of the bank's capital. There was to be a branch to do a pawnbroking business on reasonable terms.[12] In 1676 a "Bank of Credit," which should lend money to merchants, was proposed, and actually founded; but it failed.[13]

[1] S.P. Dom. 1640-1641, 527, ccccl.xxviii 96.

[2] Ibid 1661-1662, 78, xl 131; J. R. Scott, Joint Stock Companies i 274; and for another project in 1665 see ibid i 281; cp. Petty, Political Arithmatick, Economic Writings (Ed. Hull) i 265.

[3] S.P. Dom. 1673-1675, 186. [4] Somers' Tracts vi 446-465.

[5] Ranke, History of England in the Seventeenth Century (Eng. Tr.) v 77, says that "the Dutch had been heard to say that, so long as England did not set up a bank . . . Dutch commerce would keep ahead of English."

[6] Somers' Tracts vi 456; see S.P. Dom. 1665-1666, 184, cxliii 114 for a pamphlet describing the advantages of creating an office of credit for the benefit of traders.

[7] Somers' Tracts vi 457. [8] Ibid.

[9] Ibid 459; the companies named are the East India, Turkey, Merchant Adventurers, East Country, Muscovy, Greenland, and Guinea.

[10] Ibid. [11] Ibid. [12] Ibid 460.

[13] J. R. Scott, Joint Stock Companies iii 202; and see S.P. Dom. 1676-1677, 72; in 1676 an office for the discount of bills had been started, Scott, op. cit. i 293; and

But, though no public bank was established, the exigencies of trade, and the convenience of a bank as a place for the safe custody of money, led to the growth of a system of private banking. This business was not a definitely organized and a separate business in Elizabeth's reign.[1] It was not then definitely connected with the goldsmiths,[2] but rather with the scriveners[3] and the clothing and woollen trades.[4] But it was eventually monopolized by the goldsmiths. The nature of their trade compelled them to deal in the precious metals; and early in the seventeenth century they seem to have begun the business of exchanging money.[5] An attempt was made to stop them from exercising the business of exchange in 1627,[6] but it was ineffectual. Without ceasing to exercise either of these two branches of their business,[7] they added to it, possibly before the middle of the seventeenth century,[8] the business of receiving money for safe custody, and receiving the rents of gentlemen's estates.[9] On this money they allowed interest,[10] and made large fortunes by lending it to the government or to private persons.[11]

in the same year Yaranton proposed a bank "in each important trading centre based on land security and dependent on a register of titles," Scott, op. cit. i. 293.

[1] Tawney, Wilson on Usury 88 says, "it is not possible in the England of Elizabeth . . . to point to half a dozen members of a single craft as *par excellence* the 'bankers'"—rather the business of money-lending was carried on by various traders as subsidiary to their proper businesses; as he points out, even in the eighteenth century county bankers combined banking with other kinds of business, ibid 91.

[2] "The country gentleman who fifty years later would have drawn on his goldsmith, when he wants a loan of £200 in the sixteenth century writes to his draper, and that though he is in touch with a goldsmith who has already made him advances," ibid 94-95, citing Hist. MSS. Com. MSS. of Lord Middleton 157.

[3] 21 James I. c. 19 § 2 subsect. 3 enumerates among persons who can be made bankrupt those that "use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody"; and this is borne out by the facts in Herbert v. Lowns (1627-1628) 1 Ch. Rep. 22; for a good account of this side of the scriveners' trade see Tawney, op. cit. 96-101.

[4] In Scotland, famous banks are connected with the linen and corn trade, Cunningham, History of Industry and Commerce ii 455.

[5] In The Mystery of the New Fashioned Goldsmiths these are treated as their legitimate occupations: "In my time their whole employment was to make and sell plate, to buy forreign Coynes and Gold and Silver imported to melt and cull them, and cause some to be coyned at the *Mint*, and with the rest to furnish the *Refiners*, *Platemakers*, and *Merchants*, as they found the price of gold and silver to vary, and as the Merchants had occasion for Forreign Coynes."

[6] Tudor and Stuart Proclamations i no 1512; for the history of the attempt of the Government to control exchange business see Tawney, op. cit. 137-154.

[7] Pepys, Diary (ed. Wheatley) vi 323 (exchanging money); v 193—"Thence home, in my way had the opportunity I longed for, of seeing and saluting Mrs. Stokes my little goldsmith's wife in Paternoster Row, and there bespoke some thing, a silver chafing dish for warming plates"; The Grasshopper in Lombard Street 124.

[8] The case of Mayor of London v. Bennet (1630-1631) 1 Ch. Rep. 44-45, in which the plaintiff got an injunction against actions to recover money from the City, which the City had lent to James I. and Charles I., points to the existence of persons who had money deposited with them which they were able to lend at interest; cp. J. R. Scott, Joint Stock Companies i 238-239.

[9] Mystery of the New Fashioned Goldsmiths; Pepys, Diary v 397—he withdrew £1000 from Stokes.

[10] Ibid 258 (March 31, 1666); The Grasshopper in Lombard Street 132.

[11] Evelyn reports (June 11, 1696) that "Duncomb, not long since a mean goldsmith, having made a purchase of the late Duke of Buckingham's estate at neere

This banking business became well established in the mercantile world soon after the Restoration; and the king, instead of dealing as before with the city of London or with individual merchants for a loan,[1] applied to these goldsmiths or bankers.[2] It gradually became the custom for private persons to deposit their cash with them; and no doubt the way in which the bankers met their liabilities, during the run upon them occasioned by the disastrous Dutch war of 1667, helped to make the practice still more usual.[3] Indeed, it possessed such obvious advantages that not even the closing of the Exchequer in 1672 seriously affected it. The only effect which it had was to impress, both upon the goldsmiths and their customers, the idea that the less they had to do with the government the better it was for them.[4] "The public did not trust their money with them unless they were certain that they had nothing to do with the government."[5]

The reason why no public bank was established till the last years of the seventeenth century were thus chiefly political. A public bank was suspected on political grounds by the government itself, by the merchants, and by the public. It was suspected by the government because it was thought with some reason that it might, by the control of finance, get too much power in the state. It was admitted, indeed, that banks answered well enough in a republican state, like Holland or Venice; but it was thought that they were wholly incompatible with a monarchical form of government.[6] It was suspected by the merchants and the public because

£90,000 and reputed to have neere as much in cash," cited Grasshopper in Lombard Street 121.

[1] For instances of this practice see S.P. Dom. 1639, 276, ccccxxiii no. 20; ibid 1640, 31-32, 41, 142, 155; Sharpe, London and the Kingdom ii 127, 147, 152, 165.

[2] Clarendon, Continuation of Life (ed. 1843), 1166, 1167; for the king's dependence in the early part of his reign on Alderman Backwell, see Pepys, Diary v 6-7.

[3] Ibid Sept. 27, 1667 (cited Grasshopper in Lombard Street 126): "Did mightily wonder at the growth of the credit of bankers. . . . Upon this we had much discourse, and I observed therein, to the honour of this Citty, that I have not heard of one citizen of London broke in all this war, this plague, or this fire, and this coming up of the enemy among us."

[4] Before this date the merchants were shy of government business; in 1661 Th. Clutterbuck, writing to the Navy Commissioners, says "he has tried to negotiate the exchange business desired with the English merchants there, but they wish not to have to do with public monies, where if punctuality is not observed, no constraint can be used," S.P. Dom. 1661-1662, 46, xxxix 102; ibid 58, xl 22.

[5] Ranke, History of England in the Seventeenth Century (Eng. Tr.) v 77; cp. Evelyn's Diary, Feb. 12, 1672.

[6] This argument was produced by the Tories in 1694, see Macaulay, Hist. of Eng. c. xx; and it was an old one, see Cunningham, op. cit. ii 411 n. 2; as Cunningham says, ibid 412, "The Bank of England proved itself to be compatible with monarchy, only because the monarchy was now greatly limited by the provisions of the constitution"; even in Charles II.'s reign, the power which a bank might gain was beginning to be seen; the Court was extravagant, and the amount of the revenue fell seriously short of the amounts expected, and so, as Shaw says, Beginnings of the National Debt, 401-402, "The city of London and a small coterie of London Bankers held the government of Charles in the hollow of their hands"; cp. J. R. Scott, Joint Stock Companies i 274-275.

it was clear that any security which the state might give to such a bank, was far less valuable under a monarchical form of government, because it was at the mercy of the monarch's caprice.[1] Charles I. in 1640 had seized the merchants' money which had been deposited in the Tower for safe custody;[2] and Charles II. in 1672 closed the Exchequer, and suspended payment of his debts to the bankers.[3] The position was stated very clearly by Pepys in a conversation which he reports with Sir Richard Ford.[4] "The unsafe condition of a bank under a Monarch, and the little safety to a Monarch to have any; or Corporation alone (as London in answer to Amsterdam) to have so great a wealth or credit, it is, that which makes it hard to have a Bank here. And as to the former, he did tell us how it sticks in the memory of most merchants how the late King [Charles I.] (when by the war between Holland and France and Spayne all the bullion of Spayne was brought hither, one third of it to be coyned; and indeed it was found advantageous to the merchant to coyne most of it), was persuaded in a strait by my lord Cottington to seize upon the money in the Tower, which, though in a few days the merchants concerned did prevail to get it released, yet the thing will never be forgot."

A public bank was also opposed on economic grounds. Some merchants, one of whom was Malynes, did not wish to see such a bank established, because they thought that it would engross too much of the money of the state, and that the bank would use it to further its own private interests.[5] This view was brought out very clearly in a tract of 1676 entitled "The Mystery of the New Fashioned Goldsmiths or Bankers."[6] In that tract the goldsmiths or bankers are accused of buying up and sending good money out of the kingdom, and of lending money at excessive

[1] Lamb, Seasonable Observations (Somers' Tracts vi 461-462), meets the objection that "in a monarchical government the supreme governor may seize or borrow the money in bank," by suggesting that a law be passed to make this impossible.

[2] See S.P. Dom. 1640, 543-544, ccccIxi 104.

[3] For an account of these events see Macleod, The Theory and Practice of Banking i 433-442; as to the meaning of Charles II.'s closing of the Exchequer see W.A. Shaw, The Beginnings of the National Debt 391; for petitions of various creditors of the goldsmiths, who had been injured by the suspension of payments, see Hist. MSS. Com. 9th Rep. App. pt. ii 121 no. 613; and for the measure of relief given see ibid no. 628; it would seem that in 1677 the interest promised by the king to the goldsmiths was in arrear, S.P. Dom. 1676-1677, 537.

[4] Diary v 404-405 (Aug. 17, 1666).

[5] Lex Mercatoria, Bk. iii c. ix: "Some men of judgment have found my writing to be invective . . . against bankers, wherein they are not mistaken; for the use of banks (unless they be countermined by other banks) are not to be suffered in any well ordered commonwealth, as time will manifest more and more. The French king *Lewis* the ninth, and *Phillip* the Faire did with great cause confiscate the bankers' goods . . . *Phillip de Valoys* did the like, and indicted them as cozeners of the commonwealth; for it is found that in a short time,-with 24 thousand sterling, they had accumulated and gotten above two millions four hundred thousand pounds."

[6] Printed in facsimile by J. B. Martin in The Grasshopper in Lombard Street 287-292.

rates of interest to necessitous persons and to the government. "These and a hundred other practices they have used and do still continue, in contempt of Law and Justice, whereof they are so conscious to themselves, that most of them do once a year (at least) sue out their general pardon, to avoid the penalty of those wholsom laws made to prevent such frauds, oppressions, contempt of government, and mischiefs to the publick as they are dayly guilty of."

It was not until after the Revolution that a public bank, similar to the public banks of the Continent, was established in this country. In 1694 the Bank of England was established.[1] It was originally, as Bagehot says, a "Whig finance company."[2] The Ways and Means Act of 1694[3] provided that the subscribers to a loan of £1,200,000 to the government should be incorporated under the title of the Governor and Company of the Bank of England.[4] The bank was to have the power of dealing in bullion and bills, of issuing assignable notes, and of lending on merchandise.[5] But it could not trade with its own securities, or buy or sell goods, wares, or merchandise.[6] The bank, therefore, did not follow the models of the banks of Venice or Amsterdam. Those banks, at least in the first centuries of their existence, actually kept in specie all the money deposited with them. Their notes represented actual money in their possession.[7] The Bank of England, on the other hand, followed the system of banking developed by the goldsmiths. "It purported to give in its bills the equivalent of what it had received, but it never pretended to take the deposit for any other purpose than that of trading with it. It never professed to make its issues square exactly with its coin and bullion, though of course it made its liabilities square with its assets, plus the capital of its shareholders, and in time, plus the reserve also, i.e. its accumulated and undivided profits.

[1] See generally Macaulay, History of England c. xx; Thorold Rogers, The First Nine Years of the Bank of England; J. R. Scott, Joint Stock Companies iii 199-242.

[2] Lombard Street, 94. [3] 5 William and Mary c. 20. [4] §§ 19 and 20.

[5] §§ 28, 29; as to these notes see above 174 n. 2; below 190-191.

[6] § 27; the capital of the bank was enlarged and further privileges were conferred on it by 8, 9 William III. c. 20.

[7] Adam Smith, Wealth of Nations, Bk. iv c. iii: "The bank of Amsterdam professes to lend out no part of what is deposited with it, but, for every guilder for which it gives credit in its books, to keep in its repositories the value of a guilder, either in money or bullion. . . . In 1672, when the French king was at Utrecht, the bank of Amsterdam paid so readily, as left no doubt of the fidelity with which it had observed its engagements. Some of the pieces which were then brought from its repositories appear to have been scorched with the fire which happened in the town house soon after the bank was established"; but, "when Holland was overrun by the French in the early years of the great continental war, the whole of the treasure was gone. It had been lent, in defiance of the fundamental law of the Bank's constitution, to the Dutch East India Company," Thorold Rogers, First Nine Years of the Bank of England.

At first these profits were derived from the dividends it received from Government, and from the gains it made out of the notes which it put into circulation, in exchange for, or in addition to, the cash which it took. It coined, in short, its own credit into paper money." [1]

The services which the bank did the government in the early days of its existence are matters of general history. It financed the Whig government handsomely;[2] and the time came when it had its reward. Its position as the bank of the government gave it a wholly unique status, not only in the nation, but also in the civilized world.[3] Its services to the commerce and industry of the nation were no less conspicuous. Dr. Cunningham[4] has pointed out that the bank has conferred on the nation exactly those benefits which Lamb had promised in 1659.[5] It developed deposit banking. It therefore led to the increase of available capital, and lowered the rate at which capital could be borrowed. "From this time onwards it became a usual thing for careful men to trade upon borrowed capital, since they found they could habitually obtain the loan of it on easy terms. During the latter part of the seventeenth century, England was hampered in every way, both as to internal development, and commerce, and colonization by lack of capital; and the banking system which was inaugurated in 1696 had an enormous influence in remedying these evils." [6]

During the latter part of the seventeenth century, the growth of banking begins to be reflected in the reports by one or two cases, which put a legal interpretation upon some parts of the machinery by which the bankers did their business. These few cases, and the statutes which established and regulated the Bank of England, are the beginning of the English law of banks and banking.

The reports show us that the business of banking will eventually add a new species to the two classes of negotiable instruments then known to mercantile law. To the bill of

[1] Thorold Rogers, op. cit. 9.

[2] Ranke, op. cit. v. 80 n. 1, cites a contemporary pamphlet which said truly that "the Bank of England not only acts as an ordinary bank, but it must be viewed as a great engine of State"; as he says, "It was noticed directly how much a very general and wider spread participation in the loans served to strengthen the order of things brought in by the Revolution"; Macaulay hardly exaggerates when he says that "the weight of the bank, which was constantly in the scale of the Whigs, almost counterbalanced the weight of the Church, which was as constantly in the scale of the Tories"; cp. J. R. Scott, Joint Stock Companies iii 203-204, 209-210.

[3] Bagehot, Lombard Street 97; Ranke, op. cit. v. 79, describes it as an institution "which was destined to become at length the very heart of the business of London, of England, perhaps of the world."

[4] Op. cit. ii 442-446.

[5] Above 184.

[6] Cunningham, op. cit. ii 446; the date 1696 is taken because it was not till after the crisis of the new coinage had been passed that the Bank of England was firmly established.

exchange will be added the instrument by which a person orders a banker to pay—the cheque of modern law. To the promissory note will be added the instrument in which the banker promises to pay—the bank bill or bank note. With regard to these instruments, three questions had already risen: (i) how far were they negotiable; (ii) how far would their acceptance operate to discharge a debt; and (iii) what was the obligation of the banker who had given such a note to a customer?

(i) There is no doubt that, from the first, the order given by a customer to the banker to pay was regarded as a bill of exchange, and therefore negotiable;[1] and at the present day the Bills of Exchange Act defines the cheque, by which this is now effected, as "a bill of exchange drawn on a banker payable on demand."[2] Cheques being treated as bills of exchange, non-payment by the banker gave a right of recourse against the drawer, unless he had accepted it in full discharge of the debt.[3] Side by side, therefore with the bill of exchange, we get a similar instrument which will eventually become the modern cheque. On the other hand, the bank bill or bank note, by means of which the depositor proved, his right to the sum deposited with the banker, was in substance a promissory note. This deposit note, bank bill, or bank note was originally given for the whole sum deposited, and if any of it was paid off, the amount so paid off was marked on the original note.[4] "By an improvement on the original system, the receipt for the gross deposit might be sub-divided; it was only one step further . . . to give, instead of a single promise to pay the entire sum, a series of promises to pay a number of smaller sums making up the total of his customer's deposit."[5] These notes given by a banker

[1] A reproduction of the oldest known cheque, taken from The Times of Jan. 5, 1915, will be found in the L.Q.R. xxxiv 25. For other early specimens see The Grasshopper in Lombard Street 129; the following is one:

"Bolton 4th March 1684.

"At sight hereof pay unto Charles Duncombe Esq. or order the sum of four hundred pounds, and place it to the accompt of

"Your assured friend,
"WINCHESTER.

"To Captain Francis Child, Near Temple Barre."

[2] 45, 46 Victoria c. 61 § 73. For the evolution of the word "cheque" see Oxford English Dictionary, *sub voc.* Cheque; it was originally applied to the counterfoil attached to bills or other similar instruments to check forgery or alteration; it was then applied to any bill which had such a counterfoil—they were called cheque bills or cheque notes; thus in 1717 the Court of the Bank of England ordered all who kept accounts at the bank by drawn notes to use cheques; it is not till the late eighteenth century that the word is used in its modern sense. For an early use of the word, which is possibly connected with this original meaning of the word cheque, see above 184 and n. 3.

[3] Above 162-163, 170; cp. Ward v. Evans (1709) 2 Ld. Raym. 928; S.C. 1 Eq. Cas. Ab. 376.

[4] The Grasshopper in Lombard Street 127; see Cooksey v. Boverie (1693) 2 Shower, K.B. 296-297 for an illustration of this practice; and compare the modern letter of credit.

[5] The Grasshopper in Lombard Street 127.

might represent not only an actual deposit, but a sum which the banker had agreed to lend to a borrower. Because they were in substance promissory notes, they were treated by Holt as not negotiable;[1] and only became negotiable by the Act of 1704.[2] It is true that there is one case in which apparently Holt treated them as negotiable;[3] and, as we have seen, we must explain that case, either by supposing that the notes in that case were drawn as bills, or that they were Bank of England notes, which were considered to have been made negotiable by the Act of 1694. However that may be, there is no doubt that their negotiable character was finally fixed in 1704.

(ii) Neither a cheque nor a note operated as payment until it was honoured,[4] unless it was accepted in full discharge of the debt. That it was so accepted was somewhat easily proved;[5] and it might be presumed if persons to whom it was delivered delayed to demand payment.[6] But such delivery was not in itself payment; and if a servant or agent were directed to obtain payment, he was not thereby authorized to take a note of this kind.[7] It is only as a result of legislation [8] that Bank of England notes are legal tender (except as against the bank), and therefore operate as absolute payment. It is true that, in the latter part of the seventeenth century, the merchants said that it was their custom to treat the receipt of these notes as absolute payment.[9] But Holt decided, and, except in so far as it has been modified by the Legislature, it is still the law that payment by cheque or bank note is not absolute payment,[10] unless it can be inferred that the parties have agreed to take it as such payment.[11]

[1] Above 172. [2] 3, 4 Anne c. 9; above 173.

[3] Above 174 n. 2.

[4] "When such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time," Ward v. Evans (1704) 2 Ld. Raym. at p. 930 *per* Holt, C.J.; later it was held that if bank notes were offered and no objection was made, these would be a good tender, i.e. the presumption was in favour of payment, Wright v. Reed (1790) 3 T.R. 554; the fact that they could be objected to shows that they were not regarded as cash.

[5] Vernon v. Boverie (1683), Cooksey v. Boverie (1693) 2 Shower K.B. 296-297.

[6] Ward v. Evans (1704) 2 Ld. Raym. at p. 930 *per* Holt, C.J.: "If the party who takes the note keep it by him for several days without demanding it, and the person who ought to pay it becomes insolvent," it would operate as payment.

[7] Ward v. Evans (1704) 2 Ld. Raym. at p. 330.

[8] 3 and 4 William IV. c. 98 § 6; Wright v. Reed (1790) 3 T.R. 554 *per* Buller, J.

[9] "The notes of goldsmiths (whether they be payable to order or to bearer) are always accounted among merchants as ready cash, and not as bills of exchange," Tassell and Lee v. Lewis (1696) 1 Ld. Raym. at p. 744.

[10] Ward v. Evans (1704) 2 Ld. Raym. at p. 330; cp. Hopkins v. Geary (1702) referred to in Tassell and Lee v. Lewis 1 Ld. Raym. at p. 744; as Mr. Street says, the usage to consider these notes as absolute payment "may have been at the point of maturing into a custom, but Ward v. Evans settled the law the other way," Principles of Legal Liability ii 391; Holt's decision would seem to have been in substantial accord with the continental practice as stated by Marquardus, above 182 n. 4; though possibly the presumption of payment was stronger on the Continent, and therefore more like the law contended for by the merchants in Tassell and Lee v. Lewis, see last note.

[11] Above 170 n. 2.

(iii) On the other hand, if a banker gave a note to his customer promising to pay, the mere fact that he had given it in return for a note upon another person which he could not collect, did not discharge him.[1] It would seem that in such a case he could not safely give such a note till he had actually collected the money.

In this period the institution of banking is very new, and the law is scanty. We must wait till the following period for the elucidation of the many difficult legal problems to which it gave rise. At this point we must turn to the history of those commercial societies, whose extensive transactions had rendered it necessary for English Law to become acquainted, both with the properties of negotiable instruments and with the institution of banking.

§ 4. Commercial Societies

The commercial societies known to our modern law are associations formed for the purpose of making profits and of sharing them among their members; and these associations are, with the exception of those which have a special statutory status, either corporate companies or unincorporate partnerships.[2] At the end of this period English law had in substance reached this position. The joint stock company with freely transferable shares, for which there was a market, was a familiar object. A special class of dealers in these shares had arisen;[3] and also a special class who made it their business to promote their formation. Both the arts of these promotors, and the modern phenomena of speculation, were known to the world of commerce, and had begun to attract the attention of the government.[4] Side by side with the joint stock company was the unincorporate partnership; and, though the distinction between a corporate and an unincorporate body was clear enough in legal theory, it was not as yet very clearly understood by the commercial world. Commercial men did not firmly grasp the distinction between a large partnership and a chartered company till after the passing of the Bubble Act in 1720.[5] Probably this haziness was due to the fact that English law had as yet very few clear rules as to the powers of these commercial societies, corporate or unincorporate, and as to the relations of their members inter se or to third persons. These bodies had made their appearance in the world of commerce; but the lawyers had, as yet, hardly begun to

[1] Trowel v. Evans (1710) 1 Eq. Cas. Ab. 375.
[2] Lindley, Company Law (5th ed.) 2 citing Macintyre v. Connell (1851) 1 Sim. N.S. at p. 233.
[3] Below 214, 224.
[4] Below 211-213.
[5] 6 George I. c. 18 §§ 18-29; below 210-221.

settle their position in the legal system or to evolve rules to regulate their activities.

In this section, therefore, I must discuss chiefly the origins of these commercial societies, corporate and unincorporate, and the form which they had assumed at the end of this period. I shall deal with this subject under the following three heads: firstly, early forms of commercial association; secondly, the application of the corporate idea to commercial societies; and, thirdly, the commercial companies and partnerships of the seventeenth century.

Early Forms of Commercial Association

The two early forms of commercial association which have left their traces upon the later law are (1) the gild, and (2) the mediæval contract of partnership.

(1) Gilds formed for many varied purposes—religious and social as well as commercial—had existed from Anglo-Saxon times.[1] It is in the Gild Merchant, which appears soon after the Norman Conquest,[2] that we get the earliest association for strictly commercial purposes; and, later, we see the rise of the various trade gilds.[3] There are many traces of the influence of these gilds upon the trading companies of the sixteenth and seventeenth centuries. Their governing bodies often consisted of a governor and associates; and it is this form of organization that the commercial companies of the seventeenth century adopted.[4] In order to attain the objects for which the gild was formed it was often necessary for them to pass bye-laws,[5] and to keep and audit accounts.[6] This power and duty is often specifically mentioned in the charters of the regulated[7] and early joint stock companies.[8] There was a very close fellowship amongst the members of these gilds. They might be required to share their purchases with their fellows; and, later, the gild would sometimes appoint persons to purchase goods, which were then divided among the members.[9] Dr. Scott has pointed out[10] that "some of the early [joint stock] companies, instead of paying what would now be called a dividend,

[1] Stubbs, C.H. i 469-472. [2] Ibid 472, 473; vol. i 540.

[3] Stubbs, C.H. iii 611, 612; vol. i 568.

[4] Scott, Joint Stock Companies i 7; the Charter to the Merchants of Andalusia (1505), Select Charters of Trading Companies (S.S.) 2, 3, provided for a counsellor or counsellors and twelve assistants; the Charter of the Levant Company (1601), ibid 32, for a governor and twelve assistants.

[5] Scott, op. cit. i 7, 8. [6] Ibid.

[7] Levant Charter (1601), Select Charters of Trading Companies (S.S.) 34; Charter of Merchants Trading to France (1612), ibid 72; Charter of the African Company (1619), ibid 102, 103; for the difference between a regulated and a joint stock company see below 206.

[8] Charter of the Mines Royal (1568), ibid 9, 10; the New River Charter (1620), ibid 113.

[9] Scott, op. cit. i 6. [10] Ibid.

made a division of commodities to the members. This was proposed in the case of the Society of the Mines Royal (1571); it was a common practice of the East India Company in the first half of the sixteenth century; and it was the rule of the Ayr and Newmills cloth manufactories from 1670 to 1713. If it be supposed that the officials of the gild collected the funds from the members before the goods were delivered to them, the transaction resolves itself in its essentials into a joint stock followed by a commodity division." The very closeness of this fellowship left its mark both upon the conditions of the membership and the ceremonial of these gilds. Membership came generally by birth or apprenticeship; the members must take an oath of fidelity; they were penalized if they did not attend meetings; on fixed occasions there were feasts.[1] We can see some of these characteristic features in the early trading companies; for instance, the conditions upon which membership in the East India Company could be obtained were defined in 1615, and favour was shown to relations or dependents of members;[2] the purchaser of a share in that company was for a long time obliged to take an oath on admission;[3] and there were penalties for absence from meetings and disorderly conduct.[4]

It is, of course, in the earlier history of the commercial companies that the influence of the gild tradition is most clearly marked; it is more apparent in the regulated than the joint stock companies, because their objects were less strictly commercial; and it affects their organization, and their forms and ceremonies, rather than the manner in which they conducted their trade. More exclusively commercial influences come from the mediæval contract of partnership.

(2) Right down to the seventeenth century, the relations of partners inter se maintained something of the old gild tradition, in the idea that there was about them a connotation of brotherhood.

[1] Scott, op. cit. i 3, 4.

[2] Carr, Select Charters of Trading Companies (S.S.) xlix; see the African Charter (1619), ibid 105; the Charter of the King's Merchants of the New Trade (1616), ibid 81, after enumerating the members, provides "that they and every one of them their and every of their sons and apprentices . . . shall be . . . one body corporate."

[3] Evelyn's Diary, Sept. 27, 1657: "I tooke the oath at the East India House subscribing £500"; and this was a common provision in the charters; see, e.g. the charter of the Mines Royal (1568), Select Charters of Trading Companies (S.S.) 10; London Gold Wiredrawers (1624), ibid 133. Later charters, e.g. the Mine Adventurers of England (1704), ibid 245-247, only provide for an oath to be taken by the officers of the company.

[4] Scott, op. cit. i 4; ii 96; speaking of the organization of the East India Company, he says: "Its characteristics have frequently been noted, especially those that contain elements of old world picturesqueness, such as the march of the beadle carrying the subscription book or to summon the adventurers to a court, the 'feasts' of the freemen, the disciplinary rules by which they were fined for absence from a meeting, late appearance, or a neglect of the courtesies of debate."

The association is a "companhia."[1] The members are "companions," and have inter se the *beneficium competentiæ*.[2] Indeed, some primitive forms of non-commercial partnership in early French law,[3] and perhaps in early Roman law,[4] are hardly distinguished from gilds. But such forms of partnership died out. In a primitive age they were apt to facilitate disorder; and, when the state was beginning to make its supremacy felt, it frowned upon them.[5] It is the commercial partnership that survived and developed with expanding trade; and, in the Middle Ages, it took two chief forms, both of which have left their marks upon the commercial societies of our modern law. The first of these forms was the *commenda*, the second the *societas*.

(i) *The Commenda.*—Of the general features of this contract, and of the manner in which it was used to effect the loan of money at interest without incurring the guilt of usury, I have already spoken.[6] We have seen that the contract was in substance an arrangement by which a merchant who stayed at home—the commendator—lent capital to a partner—the *commendatarius*—to employ in trade. The *commendatarius* was entitled to his expenses and, generally, to one-fourth the profit.[7] If the capital was lost by no fault of the *commendatarius* the commendator bore the loss.[8] The contract was very common all over Europe in the Middle Ages,[9] and it was known in England.[10] The example cited in the note, which is dated April, 1211, will make the position of the parties to it clear.[11] This example is an illustration of the

[1] See Blancard, Documents inédits sur le commerce de Marseille au moyen age. In this collection of thirteenth century documents this word is usually used in conjunction with the word *societas* to distinguish it from a *commenda*, see e.g. i 364, 405, 406; ii 231, 232, 269. The following is an example from 1248: "Ego Petrus Anglicus, pellerius, confiteor et recognosco tibi Petro Pellerio civi Massiliæ, me habuisse et recepisse in societate et ex causa societatis a te xv l. regalium coronatorum, renuncians, etc., *quam companhiam* debeo tenere salvam," etc., ibid 333.

[2] Marquardus, De Jure Mercatorum et Commerciorum ii. xi 14, points out that a *socius totorum bonorum* always has this *beneficium*, "ratione societatis quæ jus fraternitatis continet," and, "etiam socius unius rei in id quod facere potest condemnatur, at non semper, sed tum demum si ratione illius rei in qua societas contracta est conveniatur."

[3] See Brissaud, Histoire du Droit Français ii 1454-1456, as to the "communautés taisibles de roturiers ou de serfs."

[4] Girard, Droit Romain (2nd ed.) 562 n. 3.

[5] Brissaud, op. cit. ii 1455, 1456.

[6] Above 104.

[7] For specimens, see Blancard, op. cit. *passim*; sometimes the *commendatarius* was given a half share of the profit; see e.g. ibid ii 180, 217, 218.

[8] The clause "ad fortunam Dei . . . et ad tuum resigum," see below, n. 11, which was usually inserted, had this effect.

[9] Mitchell, Early History of the Law Merchant 128.

[10] Select Cases on the Law Merchant (S.S.) i 77, 78—a case of the year 1300 in the Fair Court of St. Ives; Thomas, Calendar of early Mayor's Court Rolls 104-105—a case of the year 1300; ibid 132—a case of the year 1302.

[11] "In nomine Domini, amen. Manifestum sit omnibus hominibus hanc cartam audientibus quod ego Bernardus de Gardia confiteor et recognosco me habuisse et recepisse a te Stephano de Mandolio, in commenda, IIII. l. et xvii. S. regalium coronatorum, implicatas in xxv. bisancis milarensium, in quibus penitus ex certa scientia

earliest form of *commenda*, which contemplated a trading venture beyond the seas. But later it developed in different directions. It came to be used "for internal trade, and, finally, even for local industry."[1] At first the capital was always supplied by the commendator, but later we get cases in which both the commendator and the *commendatarius* contributed capital.[2] At first the contract contemplated one undertaking, but later we have contracts which contemplate a number of undertakings, or establish the relation for a definite or indefinite period.[3] Finally, in Italy, in the fifteenth century, we find cases in which there are a number of *commendatores* or *commendatarii*. The former are in substance capitalists who have invested money in the undertaking. They are not responsible for any debts beyond the amount of the capital invested, and they have no share in the management. The latter are in substance the directors of the undertaking; and they are personally liable to pay all debts contracted.[4] It is this latest development of the *commenda* which is the direct ancestor of the French *société en commandite*.[5]

This form of partnership did not take root in England, and has only been introduced by the Act of 1907.[6] This peculiarity of English law is due to several causes. Firstly, the conquest by the courts of common law and equity of the field of commercial jurisdiction[7] made English commercial law very insular. Secondly, in the trades controlled by the later regulated companies this form of commercial society was discouraged, because it afforded a means by which persons not free of the company might succeed in trading without being free of the company.[8] Thirdly, England's trade did not begin to develop rapidly till the latter part of the sixteenth century; and by that time the joint stock company was emerging.[9] through which the ideas, implicit in the later form of *commenda*— the opportunity for an investment of capital and a limited liability

renuntio exceptioni non tradite et non numerate peccunie; cum qua commanda ibo Deo duce, ad laborandum in hoc itinere de Oharano, et deinde ubique, causa negociandi ad fortunam Dei et ad usum maris et ad tuum resigum, ad quartam partem lucri; et promitto, auxiliante Deo, reducere totum dictum capitale et lucrum in hac terra in tuum posse vel tuorum, et verum inde tibi vel tuis dicam, et exinde recipio te in Dei fide et mei. Actum fuit trans Tabulas Ugonis Andree, anno dominice incarnationis MCCXI., IV. nonas Aprilis," Blancard, op. cit. i 8 no. 5.

[1] Ashley, Economic History i Pt. II. 415; see Blancard, op. cit. i 301-302, for an instance in 1248 of a *commenda* for internal trade.

[2] Ashley, op. cit. 414, 415; see the specimen cited by Mitchell, op. cit. 126.

[3] Ibid 127.

[4] Ibid 128: "Contracting in their own name the managers were responsible for the debts of the association, while the commendators were freed, in Florence, as early as 1408, from all liability beyond the amount of their quota. . . . This type of *commenda* was in the sixteenth century regulated in Italy by several city statutes, and in the following century in France."

[5] Ibid 129.

[6] 7 Edward VII. c. 24.

[7] Vol. i 553-558, 568-573; vol. v 139-148, 152-154.

[8] Scott, op. cit. i 11.

[9] Below 208-209.

—could be more readily carried out. Fourthly, at the beginning of the eighteenth century legislative opinion was hostile to the limitation of liability, which was the essential feature of the *commenda*.[1] But it was through the *commenda* that the idea of a society in which the capitalist could invest and limit his liability came into the commercial law of Europe; and, although it left no direct descendant in England, the influence of this idea indirectly affected the form of the commercial societies which in England and elsewhere emerged in the seventeenth century.

(ii) *The Societas.*—The *commenda* was originally a temporary association of two or more persons to carry out a particular commercial transaction; and the relations between the parties to it were purely commercial. The *societas*, on the other hand, was a more permanent association; and, as we have seen, the idea that partners were in some sense brothers lived long in the law.[2] Though the latter idea tended to evaporate, the former did not. It may, indeed, be sometimes difficult to distinguish some of the later forms of *commenda* from a *societas*; but they were always treated as quite distinct transactions;[3] and the distinction tended to grow more marked by reason of the consequences which the law deduced from the solidarity and permanence of this type of association. Thus the law gradually came to the conclusions, firstly, that each partner represented the others, and could bind the others by his contracts made on behalf of the firm;[4] and, secondly, that each partner was personally liable without any limitation to all the creditors of the firm.[5] The closeness of the tie which united the members of the *societas* is illustrated by the fact that it often traded

[1] Below 203-205. [2] Above 194-195.

[3] See Blancard, op. cit. ii 231, 232—a document in which the parties enter into a contract both of *societas* and *commenda*; the two bargains are kept quite distinct; ibid ii 103-104, in which a number of contracts of *commenda* are converted into a *societas*; cp. Mitchell, op. cit. 136.

[4] Ibid 132-134; Brissaud, op. cit. ii 1456, 1457; see Marquardus ii. xi 14: "Ut autem ex contractu vel facto unius sociorum teneatur socius alter non solum hoc est necessarium, (1) quod unus ab altero negociationi præpositus sit tacite vel expresse . . . sed etiam hæc requiritur, (2) quod ille socius, qui contractus fuerit, eum celebraverit nomine hujus societatis, cujus socios creditores vel contrahentes conveniri volunt. . . . Quod fit si negocia societatis a sociis simul et promiscue pertractantur; ita ut negociatores modo cum uno modo cum altero eorum contrahant . . . (3) hoc fit si plures mercatores socii administrationem negociationis committunt uni eorum. . . . (4) quando liber rationum sub unius socii nomine concipitur et describitur tunc ille caeteros obligat in solidum"; this passage shows that the presumption in favour of the power of the partner was, when he wrote, strong; but had not yet definitely become a rule of law; the stage at which a special authority was needed had clearly passed.

[5] Mitchell, op. cit. 135; Huvelin, Des Marchés et des Foires 484-486; the personal liability was not at first unlimited; but it always was unlimited in the fairs of Champagne; and, "il est plus que probable que cette responsabilité, qui donnait une garantie d'ordre exceptionel aux obligations contractées dans les foires de Champagne, n'a pas été sans exercer une influence notable sur le formation ultérieure du droit des soci[illegible]"

under a collective name.[1] "Bartolus proves that in his day the formula *Titius et socii* was already well established, and that its use entailed the joint and several liability of all the partners, even if they were not individually named."[2] Clearly we are on the high road to the view that the firm is a legal person distinct from its members.[3] Scaccia maintains this thesis;[4] and the law of Scotland, which has been more influenced by continental law than English law,[5] has adopted it.[6] That English law never came to this conclusion is due to somewhat the same causes as prevented it from recognizing the *société en commandite*.[7] The corporate company was more convenient than an unincorporate society of this kind. The lawyers, in spite of the fact that their own Inns of Court were unincorporated societies, found it difficult to recognize as a separate person any body which was not incorporated; and, as we shall see, the history of the commercial societies of the seventeenth century,[8] and the action of the Legislature at the beginning of the eighteenth century,[9] tended to stiffen and confirm this attitude of the common lawyers. But, for all that, the idea of a permanent commercial society, which is almost a distinct legal person, has influenced both the companies and the partnerships of our later law. The advantages of a solidarity, which draws a clear line between the firm and the individuals composing it, was a powerful influence which led merchants to wish for the corporate form. And, if they could not attain this form, and merely associated as an unincorporate firm, the ideas that each member of the firm is the other's agent, and that their liability is unlimited—ideas which were the conse-

[1] Huvelin, op. cit. 251.

[2] Brissaud, op. cit. ii 1457.

[3] "Si la société a un nom à elle, c'est qu'elle a une personalité distincte, indépendante de celle des associés; ou tout au moins, si l'on ne va pas jusque-là et que l'on conçoive qu'un nom puisse être donné à un faisceau d'intérêts, il est difficile de ne pas reconnaître que la tendance de la société à constituer une personne civile s'accuse dans ce fait. Fréquemment, surtout pour plaider les associés en nom collective, au lieu d'agir eux-mêmes, ont un mandataire investi du pouvoir d'user de la raison sociale," ibid.

[4] De Commerciis et Cambio § 1, quaest. i 450: "Aliud est corpus unius societatis, et aliud est quilibet socius ipsius societatis; unde si socii societatis cambii faciant bursam communem, et unum ex sociis constituant qui præsit illi bursæ communi, et hic præpositus petat ab uno ex sociis quod debet conferre in bursam communem, et iste socius respondeat præposito, tu debes mihi tantundem, compenso tecum; non est audiendus, quia quod debet societati non potest compensare cum eo quod debet habere ab uno ex sociis, cum societas non teneatur solvere debitum alienum"; cp. ibid § 6, gloss. 1, 95.

[5] Scott, op. cit. i 13 n. 6.

[6] Pollock, Partnership (11th ed.) 24.

[7] Above 196-197; "it might be supposed that, when there came a time at which English capital began to be used in enterprises of magnitude, the model of the *societas* would be adopted; but before that stage had been reached the influence of the Italian bankers in London had greatly declined. . . . When a considerable capital began to be needed to develop English industries about the middle of the fifteenth century . . . the corporate idea had developed in such a manner as, temporarily, to check the extension of partnership," Scott, op. cit. i 2.

[8] Below 214-219.

[9] Below 219-221.

quences deduced from the nature of the Mediæval *Societas*—have left their mark on our modern law of partnership.[1]

Towards the end of the sixteenth century it was clear that, for the attainment, either of the objects of the *société en commandite*, or of the objects of the larger specimens of the *societas*, the corporate form was desirable. With the effects of the application of this legal conception to commercial societies in England we must now deal.

The Application of the Corporate Idea to Commercial Societies

Before the beginning of the sixteenth century English law had acquired some knowledge of the ideas involved in corporate personality;[2] and during the sixteenth and seventeenth centuries considerable progress was made in the development of the law on this topic.[3] The value of the application of this legal conception to the older unincorporate bodies which regulated trade was soon apparent. It led to better government and a closer organization; and these advantages were especially needed in the foreign trades in which Englishmen were beginning to claim a share. From the last years of the fourteenth century onwards, kings made extensive grants of powers and privileges to companies of merchants trading abroad. "In 1391," says Mr. Carr,[4] "Richard II. empowered the English merchants in Prussia to meet and elect a governor, who was to rule over the traders, do speedy justice, settle disputes, and award compensation. Reasonable ordinances, pro meliori gubernatione, made in proper form with the common assent, were confirmed; and all and singular the said merchants were bidden to be helpful. Within the following twenty years Henry IV. gave similar privileges to the Havre Merchants, and to the merchants trading to the Netherlands and to Norway." And there are similar grants made at about the same period to the Merchant Adventurers and the Eastland Company.[5] The privileges granted to the companies trading

[1] The incidents of the modern contract of partnership were fashioned by equity during the eighteenth and nineteenth centuries; a few rules had begun to be developed during this period, below 217-218, 242-243; but its history belongs, like that of many other branches of equity, to the following period.

[2] Vol. iii 482-487. [3] Chap. vi § 2.

[4] Select Charters of Trading Companies (S.S.), xi, xii; they got a further charter in 1404, Scott, op. cit. i 8, 9.

[5] Carr, op. cit. xxi, xxii: "Time wrought little change in the charters of those companies which regulated trade. . . . The charters which Elizabeth gave or confirmed to the Merchant Adventurers . . . follow the usual pattern. Her patent of 1564 to the Merchant Adventurers of England (with which the grants to local bodies of merchants in Bristol, Chester, York, Newcastle, Hull, and Exeter may be compared) largely repeats and extends an older grant of 1505, which in turn was developed from one of 1407. . . . Similarly, in the case of the regulated Eastland Company, the Elizabethan patent is developed from an original of 1408, which provided for the government of the Baltic Merchants."

abroad in the sixteenth century follow these precedents. The grant to the Merchants of Andalusia in 1505 is similar to these earlier grants; and, as in the earlier grants, nothing is said about giving corporate form to their associations of merchants.[1] But that was in substance what was done; and in later grants to some of these old companies, and in the grants to the new companies, they are expressly incorporated, and the consequences of incorporation are set out.[2] But the actual privileges given, and the powers to organize the trade, do not materially differ from the older grants; and in some of the clauses of these charters, and in many of the observances of the companies, we see traces of an old gild to which more precisely defined powers and a corporate form have been given by royal charter.[3] And as it was with foreign trade so it was a little later with domestic trade. Some of the older gilds and companies, which exercised disciplinary powers over their particular trade, reappear, in substance, if not in name, as corporate bodies—to which the Crown or Parliament have given large powers of controlling their particular trade.[4]

If we look at the early charters to trading companies, we shall see that they are either made to the merchants trading to foreign countries, in order that the trade might be properly organized;[5] or they are made to merchants who wished to settle a new trade in parts where no English merchant had as yet traded;[6] or they

[1] Carr, op. cit. 1-3.

[2] See e.g. the Charter of the Levant Company (1601), Select Charters of Trading Companies (S.S.), 32: "that they [the merchants before named] and every of them forever henceforth be and shall be one body corporate and politic in deed and in name by the Governor and Company of Merchants of London trading into the Levant seas; and them by that name one body corporate and politic in deed and name really and fully for Us our heirs and successors We do erect make ordain constitute and declare by these presents." Then follow clauses allowing them capacity to hold and alienate lands, to plead and be impleaded in the corporate name, and to have a common seal.

[3] Above 193-194; cp. a clause in the charter of the King's Merchants of the New Trade (1616), which also appears in the Merchant Adventurers' Charter of 1564 (Select Charters (S.S.) 86), which gives power to the Governor and Assistants to admonish members of the company to come to the assemblies of the company, and if they do not appear, to fine and imprison them. The charter of the Mines Royal (1568) (ibid 12, 13) gives power to correct and punish by fine and imprisonment those who disobey the orders of the society; the same charter (ibid 12) gives jurisdiction over the "causes differences variances controversies and complaints" of the "ministers officers labourers and workmen of the said corporation."

[4] The privileges of some of these older associations were saved when a charter was granted to a new company. Thus, when the Royal Lutestring Company was given a charter in 1693, the privileges of the Weavers' Corporation were saved, Select Charters (S.S.) 233, 234; for those older associations and their powers see vol. ii 391, 466-467; vol. iv 321-322.

[5] The need for this organization was the great argument of those who desired a regulated as opposed to a free trade, see Select Charters (S.S.) xxv; and cp. the Charter of the Merchants Trading to France (1612), ibid 63, 73, 74; Charter of the King's Merchants of the New Trade (1616), ibid 93; S.P. Dom. (1673-1675) 291.

[6] In the first charter of the Russia Company, which dates from 1555, the company was styled "The Merchants Adventurers of England for the discovery of

are made to explorers who wished to colonize and settle and establish a trade in unappropriated lands beyond the sea.[1] All these companies want governmental powers and trading privileges which the crown alone can give them. In the first place, they want a power to associate, as without some definite permission, associations were looked upon with suspicion by the government.[2] In the second place, having got the right to associate, they want powers of self-government,[3] powers to impose taxes on their members,[4] powers to decide their own disputes,[5] powers to take adequate measures to defend themselves against pirates and other enemies.[6] They want the privilege of a monopoly of trade,[7] dispensation from particular laws as to export and import,[8] and other laws[9] which might hinder their trade, remissions of customs duties.[10] All these privileges the king, by virtue of his wide prerogatives to control foreign trade, could grant. And he was inclined to grant them, because the control which could be thus exercised by the company over its members, was of great assistance to the state in the international complications which often arose out of the various mercantile activities of its subjects.[11] Thus, in the first instance, corporate form was valued both by the king and by the merchants, not so much because it created an

lands territories and isles dominions and seignories unknown and not before that late adventure or enterprise by sea or navigation commonly frequented," Scott, op. cit. ii 37, 38; its privileges were confirmed by an Act of 1566 (which is not printed in the Record Com. Ed. of the Statutes), and its style was shortened, ibid 41, 42; Select Charters (S.S.) 28-30.

[1] Charter of the Newfoundland Company (1611), ibid 51.

[2] Ibid. xv n. 1; this right was specially granted in the Charter of the Merchants of Andalusia (1529), ibid 2; and the necessity for the grant of such a right is alluded to in the charter of the Merchants of the New Trade (1616), ibid 79; Jeffreys, C.J.'s, dictum in The East India Company v. Sandys (1684) 10 S.T. at p. 524, that "numbers of people could not meet to traffic or merchandize without being in danger of being punished as unlawful assemblies," had a good deal of authority to support it.

[3] These powers, of course, vary with the nature of the company. They are very large in the case of companies like the Newfoundland or African Company; they are comparatively small in the case of companies like the Mines Royal; and in the later charters to purely commercial companies they diminish still further.

[4] This is usual in all the early regulated companies.

[5] See e.g. the Charter of the King's Merchants of the New Trade (1616), Select Charters (S.S.) 85.

[6] Thus in 1613 the Newfoundland company got power to fit out and maintain at the cost of the fishing fleet a ship of war, Acts of the Privy Council (1613-1614) 146.

[7] Charters cited above, 200 n. 5; Levant Charter (1601), ibid 36.

[8] Charter of the Society of the New Art (1572), ibid 24; see ibid Introd. xv, xvi.

[9] E.g. the Charter of the Mineral and Battery Works (1568), ibid 19, exempts employés from jury service; in the Charter of the King's Merchants of the New Trade (1616), ibid 84, 12 Henry VII. c. 6 is dispensed with.

[10] E.g. the Newfoundland Charter (1611), ibid 57, 58; and see ibid Introd. xvi n. 2.

[11] Thus in 1613-1614 complaints of outrages committed on Frenchmen by a person "employed for Virginia," and by the captain of a ship belonging to the Muscovy Company were preferred for information to the Council of Virginia and to the Muscovy Company, Acts of the Privy Council (1613-1614) 316-317.

artificial person distinct from its members, as because it created a body endowed with these governmental powers and trading privileges. It was from the point of view of trade organization and the foreign policy of the state, rather than from the point of the interests of the persons composing the company—from the point of view of public rather than commercial law—that the corporate form was valued.

In the seventeenth century, in consequence of the rise of the joint stock company, formed to conduct jointly some specific trade,[1] the commercial advantages of incorporation began clearly to appear. In the first place, the corporate company, unless created for a definite period only,[2] was a perpetual body. When persons who had formerly worked together as partners were incorporated, the incorporation got rid of "divers and sundry great inconveniences which by the several death of the persons abovesaid or their assigns should else from time to time ensue."[3] Secondly, the fact that it was a corporate body made it easier to take legal proceedings against third persons,[4] and possible to take such proceedings against their own members.[5] Thirdly, the possession of a common seal made it easier to authenticate the acts of the corporate body, and to distinguish them from the acts of the individual corporators.[6] Moreover, it was possible to provide that, unlike partnership, the votes of a majority of the corporators should bind the rest.[7] Fourthly, continuity of management was more easily attained.[8] Fifthly, some undertakings, e.g. the New River Company, desired power to make rules affecting the general public, which they could not otherwise have acquired.[9] Sixthly, it was desirable to make it quite clear

[1] Below 208-209.

[2] E.g. the East India Company, and the Bank of England; as Mr. Carr says (Select Charters (S.S.) xix), "they were cases where exclusive powers were conceded of such an unusual or experimental nature as to require periodical revision."

[3] Charter of the Mines Royal (1568), ibid 5.

[4] This power was always inserted, and sometimes at great length; see e.g. the Mines Royal Charter (1568), ibid 6, 7; see ibid Introd. xix, xx.

[5] "An action between a partner and the firm, or between two firms having a common member, was impossible at common law," Pollock, Partnership (11th ed.) 24; it was partly for this reason that the Court of Chancery assumed jurisdiction in such cases, Spence, Equitable Jurisdiction i 641.

[6] See above 197, for the question how far the act of one partner could bind the rest.

[7] Select Charters of Trading Companies (S.S.) xvi and n. 5; in the charter of the Society of the New Art (1572), ibid 26, a unanimous decision is required, probably, as Mr. Carr says, under the influence of partnership; in other charters the principle that the majority decides is stated—see e.g. the Charter of the Mines Royal (1568), ibid 14, Charter of King's Merchants of the New Trade (1616), ibid 83, Charter of Mine Adventurers of England (1704), ibid 247, though this would seem to be unnecessary in view of 33 Henry VIII. c. 27.

[8] This was put forward as one of the reasons for incorporating those who undertook to drain the Bedford Level, Carr, Select Charters (S.S.) xviii and n. 2.

[9] Ibid 110—"The said work hath not hitherto yielded such profit as was hoped for . . . partly for want of power in them [the adventurers] to settle the carriage and government thereof in such order and form as is fit and convenient."

that shares in a company, though choses in action, were transferable.[1] Seventhly, it was desirable to draw a line between the corporate liability of a company, and the personal liability of the members of a company, for the corporate debts. Eighthly, it was desirable to settle the nature and extent of the personal liability of the members of the company to creditors of the company, and to the company itself. Of the nature of the settlement of the law upon these last two points, which, after some hesitation, was reached at the close of the seventeenth century, and of the way in which it was reached, some explanation must here be given.

As early as the fifteenth century it was clear that an individual corporator was not personally liable for the debts of the corporation;[2] and, after some hesitation,[3] this conclusion was ultimately accepted in the latter part of the seventeenth century.[4] Indeed, one of the advantages which petitioners for incorporation frequently set out, was the clear separation which necessarily followed between the liability of the corporation and that of its members;[5] and it is clear from the statutes which established the Bank of England, that, if the individual corporators were to be made liable for the debts of the corporation, this liability could only be imposed by express legislative enactment.[6] On the other hand,

[1] Select Charters (S.S.) xlix; the existence of such shares is assumed in the Charter of the Mines Royal (1568), ibid 10, 11. Dr. Scott points out (op. cit. i 443) that "as early as the sixteenth century shares were sold outside personal acquaintances and without limiting conditions"; and he points out (ibid ii 416 n. 2) that there is an instance of this in a sale by the earl of Leicester of part of his holding in the Mineral and Battery Works; and for sales in the early years of the seventeenth century, see ibid i 161; Select Charters (S.S.) xlvii n. 1; that the law on this point was still in an uncertain condition is clear from the fact that it was sometimes thought desirable to state expressly that shares should be transferable, see the Charters of the African Company (1660 and 1662), Select Charters (S.S.) 175, 180; of the Royal Fishery (1677), ibid 200; of the Mine Adventurers (1704), ibid 245, 246; and that, in corporations established by statute, it was still thought necessary to provide expressly that the shares should be transferable, see e.g. the statute establishing the Greenland Company, 4 William and Mary c. 17 §§ 19-21.

[2] Vol. iii 484.

[3] See the authorities cited by Carr, Select Charters (S.S.) xviii n. 1; he points out that "the indenture which settled the sums and rents due to the king from the Starchmakers Company (Patent Rolls, 20 Jac. I. Pt. x) provided that no such sums 'shall in any sort be demanded levied recovered or had but only of the body corporate'"; and that in 1655 the governor of the East India Company got an indemnity from the company "because his name is used in all suits and actions"; Hobbes (Leviathan 120) thought that "if a body politique of merchants contract a debt to a stranger by the act of their representative assembly, every member is lyable by himself for the whole."

[4] Edmunds v. Brown and Tillard (1668) 1 Lev. 237; Salmon v. The Hamborough Company (1671) 1 Ch. Cas. 204.

[5] Carr, Select Charters (S.S.) xvii, xviii, says that the following formula, taken from a petition for incorporation in 1692, is common: "The same [i.e. a joint stock] is not to be raised unless upon the establishment of a corporation, because if such an undertaking should be carried on only by articles of partnership, the stock will be liable to the particular and private debts of the several partners and subject to be torn to pieces upon the bankruptcy of any of them"; cp. S.P. Dom. (1691-1692) 523-524.

[6] 5 and 6 William and Mary c. 20 § 25—if the corporation borrows more than £1,200,000 the individual corporators are to be personally liable; 8 and 9 William III.

the corporators or shareholders were liable to pay to the corporation the sums assessed upon them by the corporation; and the power to make these "leviations" naturally took a prominent place in the charters of some of these companies.[1] But, that being so, it is clear that, if creditors could get an order from a court that the company should make "leviations" upon their members, the creditors could indirectly make the individual members of the company liable to the extent necessary to satisfy their debt. By a sort of subrogation the creditors could use the powers of the company against the individuals composing it, and so force these individuals to pay. We see this idea foreshadowed in a petition to the council in 1639;[2] in 1653 it was proposed to give it statutory force;[3] and in 1671 the principle was sanctioned by the House of Lords in the case of *Salmon v. The Hamborough Company*.[4] But it should be observed that, as the creditors' rights against the individuals depended upon the existence of the company's right to make "leviations" upon the individuals composing it, they lost these rights if in fact the company had no power to make leviations. This opened the door to the possibility of limiting the liability of members of the company by a contract between the members of the company and the company, which provided that the members should not be liable to be called upon

c. 20 § 49—if the capital is diminished by the payment of dividends so that it is not enough to pay the corporate debts the members are to be liable to the extent of the dividends received; see also 6 George IV. c. 9 § 2; 7 Will. IV. and 1 Vict. c. 73 § 4.

[1] Select Charters (S.S.) xviii n. 1; 1, 2, 91, 92, 164, 215; for instances in which these leviations were made, see Scott, op. cit. ii 47, 48, 59, 66, 80, 366, 367; for cases in which the authority of the council was invoked to force payment of these leviations, see Hist. MSS. Com. 4th Rep. App. 18, 20 (the Muscovy Company); S.P. Dom. (1634) 352, cclxxviii 39—Order of Council on petition of the Governor and Company of Silkmen of London; ibid (1637-1638) 260, ccclxxxii 20—Order of Council on petition of the governor of one of the Associations of Royal Fishings; cp. ibid (1639) 381, ccccxxv 43.

[2] S.P. Dom. (1639) 381, 382, ccccxxv 43.

[3] See the Draft Act "for the recovery of debts owing by corporations," Somers' Tracts vi 187; under that Act, if the leviations were not made, execution was to be had against the estate of the person who ought to have made it.

[4] (1671) 1 Ch. Cas. at pp. 206, 207, the Lords ordered that the governor and assistants of the company should "make such a leviation upon every member of the said company . . . as shall be sufficient to satisfy the said sum to be decreed to the plaintiff in that cause, and to collect and levy the same, and to pay it over to the plaintiff as the Court shall direct. . . . And if . . . the said money so to be assessed shall not be paid, then and from thenceforth every person of the said company, upon such a leviation, shall be made to be liable in his capacity to pay his quota or proportion assessed. And the Lord Chancellor . . . is to order . . . that such process shall issue against any such member so refusing or delaying to pay his quota or proportion as is usual against persons charged by the decree of the said Court, for any duty in their several capacities"; for further information about this case and the difficulties of the company see Hist. MSS. Com. 8th Rep. App. p. 147 no. 310; 9th Rep. App. Pt. ii p. 27 no. 109; ibid p. 47 no. 186; in 1672-1673 there is a petition to the House of Lords by certain creditors of the Grocers Company that the company should be ordered to assess their members to raise money to pay them, ibid p. 22 no. 87 (*f*).

to pay more than a fixed sum. Such bargains were made;[1] and that they were both common and efficacious may be gathered from the section of the statute of 1694, dealing with the liability of the shareholders in the Bank of England, which declared that, in certain events, they were to be personally liable for certain debts, notwithstanding any agreement which they might have made with the company.[2] Thus it would seem that, by the adoption of the corporate form, a clear line could be drawn between corporate liability and individual liability; and that, by bargains made between the company and its members, the individual liability of the members of the company could be limited in any way agreed on between the contracting parties.

Such, then, were the commercial advantages which a society might get by assuming a corporate form; and it followed that, if they were secured, the promoters were able to secure the supreme advantage of attracting capital more easily to finance their undertaking. In fact, a society possessing these privileges had all and more than all the advantages both of the *societas* and of the *commenda*. It was a permanent body quite distinct from its members. Privileges necessary for the particular trade which it proposed to carry on could be secured. It could get powers to coerce recalcitrant members, to settle disputes as to the working of the company, and to make necessary bye-laws. The corporate liability of the company and the individual liability of its members could be adjusted. The investor could be attracted by the advantages of transferable shares and a limited liability.

The older regulated companies, formed to organize foreign trade, naturally preserved many of the characteristics of the mediæval gilds, of which they were the lineal descendants. The new commercial companies of the joint stock type did not, as we have seen,[3] at once lose all trace of these characteristics. But they were more essentially commercial; and the privileges which they obtained were chiefly reminiscent of the ideas which the development of the *societas* and the *commenda* had introduced into continental law. We must now trace the history of the form which these ideas took in England during the seventeenth century.

[1] Scott, op. cit. i 228—an agreement in 1637-1638, that a shareholder in the Mosquito Islands Company, who had paid calls up to £1000, might elect not to go farther; ibid 344—the shareholders in the Million Bank were promised that they should only be liable to the extent of their stock. I do not agree with Dr. Scott (op. cit. i 270) that the Act of 14 Charles II. c. 24, which exempted certain shareholders from the bankruptcy laws, amounted to a limitation of liability; it only comes to this, that they were not to be accounted traders, and so could not be made bankrupt; if they were solvent their liability would be unlimited.

[2] 5 and 6 William and Mary c. 20 § 25.

[3] Above 194.

The Commercial Companies and Partnerships of the Seventeenth Century

I shall deal with this topic under the following heads :—firstly, the rise of the joint stock company; secondly, its commercial and legal consequences; thirdly, the Bubble Act and its effect on the development of company and partnership law.

(1) *The rise of the joint stock company.*

The main difference between a regulated and a joint stock company was that in a regulated company each member conducted his own trade with his own stock, subject to the rules and regulations of the company, while in a joint stock company the company traded as a single person with a stock contributed by its members.[1] The first form of association was the older, and it was well adapted to a company formed primarily to see that the trade with which it was concerned was conducted in accordance with the commercial policy of the state. The second form of association emerged in England somewhat later, and was more adapted to a company formed for the strictly commercial object of making money for its members. It was not, however, till the latter part of the seventeenth century that the two forms of company became clearly distinct. Thus in the East India Company there was at first a system of terminable stocks.[2] The investor subscribed only for a particular voyage, and the accounts of the different voyages were kept separately.[3] Each member was free to invest or not as he pleased in any given venture. What was permanent and constant was not the stock, but the governmental machinery of the company—in fact, it was not till 1657 that a permanent joint stock was formed.[4] Clearly this arrangement, though due partly to the exceptional position of this company, represents an intermediate stage between a regulated company formed primarily for the government of the trade with which it is concerned, and a joint stock company formed primarily to make a profit for its members.[5] Similarly, in some of the early English and Scotch joint stock companies there was a dividend paid, not in money, but in commodities.[6] The company, by trading with its joint stock, acquired these commodites, which it distributed to its members, and the members were free to dispose of them as they saw fit. This was the plan adopted by the Scotch New Mills Company, founded to manufacture cloth in 1681. Membership of the company was limited to trading merchants. When the cloth was produced, the price was fixed by reckoning the cost of production, together with a sum to represent interest

[1] Select Charters of Trading Companies (S.S.) xxi.
[2] Scott, op. cit. ii 96, 97.
[3] Ibid 123-128.
[4] Ibid 128 et seq.
[5] Ibid 96, 97.
[6] Ibid i 12, 301, 302.

on the company's capital. It was then distributed to members at this price, and they retailed it. Thus, as Dr. Scott says, "it was a body in which the members were a regulated company as retailers, and a joint stock one as manufacturers."[1]

It will thus be seen that the company with a permanent joint stock, which paid pecuniary dividends from its earnings to its members, only gradually differentiated itself from the regulated company. It is not surprising, therefore, to find that, "so far as the charters of incorporation are concerned, the change from the regulated to the joint stock type is hardly perceptible."[2] By the end of this period, however, the distinction between the two types of company was well established. The question thus arises, What was the origin of the joint stock form of commercial association, and what were the causes of its development?

There can be little doubt that the origin of the joint stock principle, like the origin of so many other principles of our modern commercial law, must be sought in mediæval Italy. Two elements went to its formation—firstly, ideas implicit in the *societas*;[3] and, secondly, the development of those ideas under the pressure of the use made of them by the state for its own purposes. It is probable that the partners in a *societas* generally traded with what was in effect a joint stock. From early times partnerships owned shares in a ship. The shares were transferable, and liability upon them was limited to the value of the ship.[4] It is clear that large mercantile and banking partnerships, such as the Peruzzi and the Bardi at Florence, must have carried on their trade with a capital jointly contributed by the partners.[5] We have seen that this feature of these partnerships tended to make the partnership almost a distinct legal person, and to make the lawyers regard it as an entity not very different from a corporation.[6] But it was the use made of these partnerships, under the pressure of state needs, which necessitated the development of some of them into corporations of the joint stock type. States as well as kings found it necessary to borrow in the Middle Ages; and just as some of our English kings borrowed from the Italian mercantile and banking societies,[7] so the Italian cities borrowed from their citizens. "The loans were divided into shares (*luoghi*), and the names of the owners were registered in special books. The shares not only passed to the heirs in case of the owner's death, but could be freely bought

[1] Op. cit. i 301, 302.
[2] Select Charters of Trading Companies (S.S.) xxi.
[3] Above 197-199.
[4] Thaller, Les Sociétés par actions dans l'ancienne France, 14, 15.
[5] For the names of some of these societies, see Huvelin, Marchés et Foires 251, 252.
[6] Above 198.
[7] Above 177-178.

and sold."[1] But to attract the borrower the state found itself obliged to give some form of security for the capital and interest. Thus, in 1346, Genoa raised a loan for the conquest of Chios and Phocea, and gave the shareholders the *dominium utile* of the lands conquered.[2] It is obvious that the shareholders were in effect a large partnership interested in the exploitation of these lands; and it was inevitable that they should assume a corporate form. Thus arose a joint stock company, consisting of creditors of the state, interested in exploiting a conquered colony. But when the institution of banking became general, it was also inevitable that it should play a great part in developing this institution. It was, as we have seen,[3] soon perceived that a banking company could finance both the state and many other undertakings. Thus, in mediæval Italy, as in England at the end of the seventeenth century, banks were formed which, in return for financial aid to the state, were given privileges which they exploited as a joint stock company. In 1407 the bank of Genoa took over the various state loans. "As security for the interest the city granted important privileges to the holders of the new consolidated stock, which was divided into shares of 100 lires. The stockholders were granted the right (1408) to carry on banking business, and especially after 1453 the administration and exploitation of important Genoan colonies passed into their hands. The creditors of the Genoan state had become the shareholders of a great colonial company which ultimately governed and administered Corsica, Kaffa, and the greater part of the foreign dominions of Genoa."[4]

In England, in the sixteenth and seventeenth centuries, we find that the same two elements—the ideas implicit in the *societas*, and the development of those ideas under the pressure of the use made of them by the state for its own purposes—contributed to the reception of the idea of the joint stock company. The sequence of events, and the historical incidents which led to their recognition and development, are, of course, different. But we can see that substantially the same causes were at work in England at this period as those which had been at work in Italy in the Middle Ages.

In the first place, bodies which started as a large partnership found it expedient to get corporate form, and to carry on their business as a joint stock company. Thus, the Society of the Mines Royal, which was founded in 1561,[5] was incorporated in 1568;[6] and the Society of the Mineral and Battery Works, which was founded in 1565,[7] was also incorporated in 1568.[8] Similarly,

[1] Mitchell, The Law Merchant, 138. [2] Ibid. [3] Above 179-180.
[4] Mitchell, op. cit. 139. [5] Scott, op. cit. ii 384. [6] Ibid 386.
[7] Ibid 414. [8] Ibid 415.

the trade with Africa in the sixteenth century was carried on by various partnerships or syndicates, to which privileges of exclusive trade was granted.[1] It was not till 1588 that the various syndicates trading to Africa were incorporated.[2] In the second place, state needs helped to foster the growth of such companies. In England the earliest of these needs was not, as in Italy, the need to persuade its citizens to lend their money to the state, but the need to organize foreign trade and to found colonies. In 1553 the Russia Company was founded as a joint stock company.[3] It was followed in 1581 by the Levant Company;[4] in 1600 by the East India Company;[5] in 1670 by the Hudson's Bay Company;[6] and in 1672 by the Royal African Company.[7] All these companies were founded primarily to develop foreign trade. Of the companies founded primarily to colonize we get, among others the Virginia Company, founded in 1609;[8] the Somers Islands or the Bermuda Company, founded in 1612;[9] and the New England Company, founded in 1620.[10] It was not until the end of the seventeenth century that the joint stock principle was applied to the financing of the government. We have seen that the Stuart kings had privately borrowed from the bankers; but that it was not until the foundation of the Bank of England that the plan of founding a bank as a joint stock company, and of giving it privileges in return for a loan to the government, was adopted in England.[11]

A large number of the joint stock companies, which were founded in the sixteenth and early seventeenth centuries, disappeared when changed conditions of trade and changed political conditions made the joint stock organization no longer suitable. During the latter part of the seventeenth century there was a movement in favour of greater freedom of trade. Monopolistic joint stock companies were successfully attacked. In 1605 the Levant Company had adopted the regulated form which allowed greater freedom of trade to individuals.[12] The Russia Company made a similar change in 1669;[13] and the fine for admission to the company was lowered to £5 by a statute of 1698.[14] Freedom of trade to Africa had been practically conceded by another statute of the previous year, which threw the trade open, subject to a payment by traders of a 10 per cent. duty to the company for the

[1] Scott, op. cit. ii 3-9
[2] Ibid 10 et seq.; Select Charters of Trading Companies (S.S.) xlii et seq.
[3] Scott, op. cit. ii 36 et. seq.
[4] Ibid 83 et seq.
[5] Ibid 92.
[6] Ibid 229.
[7] Ibid 20.
[8] Ibid 249, 250.
[9] Ibid 260.
[10] Ibid 302.
[11] Above 186-187, 188.
[12] Ibid 88.
[13] Ibid 67.
[14] 10 William III. c. 6 § 2; for previous negotiations with this company, see House of Lords MSS. (N.S.), iii, xiii, xiv nos. 1274, 1275.

maintenance of its fortifications.[1] In fact, the maintenance of fortifications, when this was necessary or possible, or the maintenance of consular agents, was the sole excuse for the continued existence of these companies;[2] and, when these duties were taken over by the state, these companies naturally disappeared, or survived only as social clubs.[3] Similarly, the companies formed to colonize gradually disappeared when the colonies which they founded had become in substance political societies.[4]

On the other hand, the privileges given to some of these companies, or the necessities or fortunes of their trade, secured to some of them a longer life. The South Sea Company dragged out a struggling existence till 1807;[5] and the faded splendours of its South Sea House survived long enough to secure immortality in the Essays of Elia. The Hudson's Bay Company served a useful political purpose in checking French influence in Canada;[6] and it obtained Parliamentary sanction by a Private Act in 1689.[7] Its usefulness in this direction continued till the victory of Wolfe in 1759. But even after that event some organization was necessary to conduct a trade with Indian tribes; and so, although it was a monopolistic joint stock company, it survived;[8] and, having abandoned its monopolistic rights in 1869,[9] it still survives as a joint stock company. Similarly, the greatest of all these joint stock companies—the East India Company—survived the bitter attacks made upon it at the end of the seventeenth century,[10] and

[1] 9 William III. c. 26; House of Lords MSS. (N.S.) iii no. 1292; see Cunningham, Industry and Commerce ii 276, 277, for its subsequent history; it was finally dissolved by 1 and 2 George IV. c. 28.

[2] Cunningham, op. cit. ii 252, 284; Select Charters of Trading Companies (S.S.) xli, xlii; cp. Acts of the Privy Council (1613-1614) 97-98 for a rebuke to the merchants trading to Spain and Portugal for their "uncurteous and froward dealing" to the consul appointed by the king; see ibid 397 for a dispute between the Turkey merchants and the consul whom the Turkey merchants paid.

[3] Dr. Scott (op. cit. ii 69) tells us that the Russia Company "continued to exist as a trading body till the end of the eighteenth century, and as late as 1865 furnished a return to Parliament of certain dues it collected." Till the Russian Revolution it possessed its own parish church in Moscow and its own charitable institutions, Quarterly Review, July 1925, 153.

[4] See e.g. Dr. Scott's remarks on the dissolution of the Somers Islands Company in 1683, ibid ii 297; and cp. ibid 314, 315, as to the arrangements made by the colonists with the Massachusetts Bay Company; we can see an analogous sequence of events in progress in America in the dissatisfaction felt at the conduct of the government of the proprietary colonies, see House of Lords MSS. ii 444, iv 314, 463. A modern instance of the workings of the same process will be found in the events which led to the case of In re Southern Rhodesia [1919] A.C. 211; Lord Sumner's extremely able and interesting judgment gives us a lucid account of the manner in which this development has taken place in S. Africa—an account which is as interesting to the student of political science as to the constitutional lawyer.

[5] Cambridge Modern History vi 181, 182.

[6] Cunningham, op. cit. ii 279.

[7] Statutes of the Realm (R.C.) vi 179.

[8] Cunningham, op. cit. ii 283, 284.

[9] Ibid 279 n. 4; Select Charters of Trading Companies (S.S.) xc.

[10] See Scott, op. cit. ii 135-174, for an account of the troubled history of the company from 1670-1708; for the inquiry in 1695 into the bribery which the company had used to get its charter, see House of Lords MSS. (N.S.) i nos. 920, 930.

continued to exist till the middle of the last century, mainly because it was a body whose governmental functions were becoming progressively more important than its commercial functions. We have seen that the minor governmental functions performed by some of these companies had led to their survival in a regulated form.[1] The increasing empire which the East India Company was acquiring made it necessary that the affairs of the society should continue to be administered on a joint stock basis.[2]

But though some of these earlier joint stock companies had disappeared or had changed their form by the end of this century, it was quite clear that the joint stock principle had come to stay. It had become quite clear that industrial enterprizes of many varied kinds could be initiated successfully on a joint stock basis; and an enormous extension was given to the joint stock principle when the state used it to borrow money. In 1694, in return for money lent to it by a group of persons, the state incorporated this group as a joint stock company under the name of the Governor and Company of the Bank of England, and empowered it to conduct banking business. Thus the capital subscribed, bearing the interest promised by the state, was converted into a joint stock for the conduct of a commercial venture. The underlying idea, as Dr. Scott has pointed out, was "the utilization of capital lent to the state as 'a fund of credit' on which loans could be raised by an incorporated body for its trading operations."[3] But this principle was capable of development.[4] If the credit of the state could be converted into a fund which could be

[1] Above 209-210.

[2] See House of Lords MSS. (N.S.) ii 29-56 for a discussion in 1695 as to the comparative merits of organizing the company on a regulated or a joint stock basis.

[3] Op. cit. i 389; as Dr. Scott says (ibid 396, 397), "in order to grasp the full import of the situation, it is necessary to remember that the extensive utilization of credit was new, and that contemporary observers noticed that, by this agency, business had been immensely extended, and the results achieved were viewed with amazement. . . . The idea of a fund of credit was described as 'a mine of gold,' or as 'realized alchemy.' . . . Everywhere when men considered how enterprizes had been started and had been carried on successfully by the using twice over of the same wealth, it came to be thought that the process was capable of infinite extension.

[4] "In Great Britain, since the Revolution, this ideal had been gathering importance. In addition to the land bank schemes of 1695, the finances of every important company had been determined by it. Not only was all the capital subscribed by the members of the Bank of England lent to the State, but, in addition, a further sum was taken from the deposits of customers. Thus none of the share capital was available for the business of banking, and the loan made by the Bank to the State became in fact a fund of credit, to support the operations of the institution . . . the engrafted stock of the Bank of England was formed by the valuing of Government obligations, which were selling at the time at a discount of about 35 per cent., at their nominal value. Apparently the operation was justified, for those who converted their tallies into engrafted stock secured a large profit by the transaction. Similarly the whole influence of Parliament, as affecting the East India trade, tended again and again to force this branch of foreign commerce to depend solely on capital lent to the State. . . . On three different occasions within the space of eleven years the East India trade was compelled by the state to rely on a fund of credit," Scott, op. cit. i 397-398.

thus profitably used, why should not a company be formed to take over the whole of the state debt? This company, if given trading privileges, might be expected to make large profits. The state creditors would accept its shares instead of their holdings in the state debt, and the company could afford to pay the state handsomely for its privileges. Thus in time the state debt might be redeemed. Some such ideas as these, coupled with schemes still more ambitious, inspired the grandiose schemes of John Law;[1] and it was these ideas which led to the foundation of the South Sea Company.[2]

In 1711, when the South Sea Company was originally founded, there was a floating debt of more than nine millions. It was determined to incorporate these creditors, and to give them the monopoly of the trade to South America. The government undertook to pay interest on this debt at 6 per cent., and it was to be redeemable after 1716.[3] The company had some success, and in 1719 a large extension of this principle was proposed. The company was to take over the whole of the National Debt, except those parts of it owed to the Bank of England and the East India Company. The amount to be thus taken over was some thirty-one millions. The creditors were to be bought out, or to exchange their holdings for the company's stock. The government was to gain, because the debt was thereby made redeemable, and the interest upon it was to be reduced from 5 to 4 per cent. after 1727.[4] The company considered that the capital lent to the state, the interest upon which afforded a large revenue to the company, was a basis upon which immense sums might be borrowed to extend indefinitely the trade of the company. "Not only were there alluring prospects from the South Sea trade, but the mere fact of so large a working capital, under prudent organization, would render the greatest enterprises possible. Further, the close relations of the company and the Government must not be lost sight of; so that, in any venture which required the assistance of the state, the most powerful support might be counted on."[5] Naturally, the possession of such privileges was considered to be worth paying for. The directors of the company, in the first instance, offered to pay the government £3,500,000. But the Bank of England made a higher offer. Eventually the company, unhappily for itself and happily for the Bank,[6] outbid the Bank

[1] Cambridge Modern History vi 169-176; cp. Scott, op. cit. i 398.

[2] "The crisis of 1719-1720 constitutes simply the attempt to realise an unconscious ideal of the indefinite expansibility of a fund of credit," ibid 397.

[3] Cambridge Modern History vi 177, 178.

[4] Ibid 178; cp. Scott, op. cit. i 408.

[5] Ibid iii 307.

[6] Ibid i 432.

by an offer of £7,500,000, and by bribes offered to and accepted by members of the government and the Legislature.[1]

By the end of the seventeenth century, therefore, it was recognized that the joint stock company was a valuable instrument for the promotion and working of new industries, and for the mobilization of national credit. On the other hand, it had, as we shall see, also become clear that it could be used to perpetrate gross frauds upon the public, and to encourage wild speculation and gambling in stock and shares. These new phenomena naturally had important results both commercial and legal. With these results I must now deal.

(2) *The commercial and legal consequences of the rise of the joint stock company.*

The joint stock company met obvious needs. It gave to capitalists an opportunity for investment; and it made available much capital which would not otherwise have been employed in trade.[2] Then, too, it interested all the wealthier classes in trading ventures, and so it tended to make the merchants a less exclusive class; and this mixture of the mercantile and non-mercantile element in the management of the joint stock company conduced, as Dr. Scott has pointed out,[3] to the success of many of the early joint stock ventures. "In foreign trade or colonising much more than the specialised information of the merchant was required. In addition, there was needed something of the imagination of the pioneer and of the diplomacy of the statesman . . . thus the admission of a strong non-mercantile element by the joint stock company, not only was advantageous in increasing the supply of capital, but also in strengthening its organisation. From this point of view their strength lay not so much perhaps in the mere introduction of capitalists who were not actually in trade, but in the union of these in one body with the mercantile classes. Either in isolation was imperfect. The short-sighted views of some of the regulated companies, and the lamentable ignorance displayed in the equipment of the Darien Company, are cases in point. Whereas the combination of the specific and detailed knowledge of the traders, with the broad outlook of the man of affairs, tended towards a greater efficiency." That this combination was so successfully made in England is partly due to the

[1] As to the evidence for this bribery, which came out in consequence of the Parliamentary inquiry, see Scott, op. cit. iii 331-346; the committee of secrecy reported that, while the scheme was pending, a small committee of directors was authorized to facilitate the passing of the measure, and that they disbursed secretly £1,259,325, ibid 315, citing Journals of the House of Commons xix 425-451; the East India Company had resorted to similar methods, above 210 n. 10.

[2] Scott, op. cit. i 442.

[3] Ibid 443, 444.

fact that the mercantile classes had never been so separate from other classes of the community as elsewhere; and this again was due in part to the fact that mercantile law was becoming part of the common law, but chiefly to the absence of class barriers which were insurmountable.[1]

In the last decade of the seventeenth century, dealings in shares of these companies were so numerous that John Houghton began, in 1692, to publish a paper in which the prices of stock and shares were recorded.[2] We are not, therefore, surprised to learn that "the mechanism of Stock Exchange dealings had been developed"; that "time bargains were well understood, and 'put and call' options were not unknown"; and that "the business of a stock broker was specialised, and a tariff of charges had been established."[3] The stock and share market was beginning to be familiar with its alternate booms and panics. Macaulay's account of the boom of 1692-1695 is classical.[4] Bagehot,[5] who was a banker and an authority on such matters, said of it, "You will not find the cause of panics so accurately explained in the dryest of political economists—in the Scotch M'Culloch."

It was naturally in the years of reaction which followed on a boom, that the shady side of joint stock enterprise forced itself on the attention of the public. A report of the Commissioners of Trade, published in 1696, accused the dealers in shares of rigging the market, and the promoters of companies of fraudulently raising the price of shares by making false statements as to the prospects of the company, and then selling their holdings at a high price.[6] The report was, perhaps, too sweeping in its condemnation,[7] though it is probable that there were individual cases in which these or similar frauds had been practised. The Legislature, by an act of 1696-1697,[8] attempted to regulate brokers, and to check gambling by means of time bargains; but nothing was done as

[1] See vol. iv 402-407; as Dr. Scott says, op. cit. i 444, "this happy result is to be attributed in no small degree to the relation of classes in England, where members of different social grades could work together with the minimum of friction, and both could bear adversity with fortitude."

[2] It is called A Collection for the Improvement of Husbandry and Trade; see ibid 329, for a description.

[3] Ibid 345.

[4] History of England chap. xix.

[5] Literary Studies ii 250.

[6] Journals of the House of Commons xi 595: "The pernicious art of stock jobbing hath of late so perverted the end and design of companies and corporations erected for the introducing or carrying on of manufactures to the private profit of the first projectors, that the privileges granted to them have commonly been made no other use of by the first procurers and subscribers but to sell them with advantage to ignorant men, drawn in by the reputation, falsely raised and artfully spread, concerning the thriving state of their stock. Thus, the first undertakers getting quit of the company by selling their shares for much more than they are really worth to men allured by the noise of great profit, the management of that trade and stock comes to fall into unskilful hands."

[7] Scott, op. cit. i 358-360.

[8] 8 and 9 William III. c. 32.

yet to fetter the activity of the promoter. Probably both the Legislature and the lawyers were puzzled. The phenomenon of speculation in the shares of joint stock companies was, as a commercial problem, new to the Legislature, and, as a legal problem, it was equally new to the lawyers. This fact we shall appreciate if we look at the extreme poverty of the ascertained rules of law applicable to commercial societies, whether corporate or unincorporate.

In the first place, the line between corporate and unincorporate societies was generally disregarded by the projectors of companies. Bodies of persons joined together to form a society, which differed from an incorporated joint stock company in no particular, except in the absence of a charter.[1] In the second place, the powers of an incorporated society acting under a charter were by no means clearly defined. Once having got a charter, a society considered itself free to undertake business projects wholly outside the business for which it was incorporated.[2] In 1691 the York Buildings Company was incorporated to supply water to London. But in 1719 it sold its interest in the waterworks, and began to deal in lands forfeited by the Jacobites in consequence of the rising of 1715.[3] This idea, that the activities of an incorporated society were not limited by the terms of its charter, led to a trade in charters. Societies which wished to get the privilege of incorporation at small expense, bought up the charter of a company which had ceased to trade, and used it to carry on their own businesses. Thus, first a company of merchants who proposed to lend money on land in Ireland, and then the banking partnership of Turner Casswall and Sawbridge got possession of the charter of a company formed in 1691 to manufacture hollow sword blades. This banking partnership traded under the name of the Sword Blade Company. They acted as the bankers of the South Sea Company, issued "sword blade notes" on "sword blade bonds," and were eventually proved, inter alia, to have falsified their books, and to have issued fictitious notes to cover presents of South Sea stock to high officials.[4] Similarly, an insurance company made use of the

[1] Scott, op. cit. i 337, 338, citing Houghton, Collections, No. 98, 15th June 1694; as Dr. Scott says, probably the preoccupation of the government in the war allowed these practices to escape notice; "as it was, no obstacle was placed in the way of those who wished to start any enterprise by means of a joint stock, and it was left to the founders of each venture to prescribe the constitution under which it was to work"; see the preamble to the Act of 1719, 6 George I. c. 18 § 18, below 220.

[2] For the legal theory at the back of this idea see chap. vi § 2.

[3] Select Charters of Trading Companies (S.S.) cxxvi, cxxvii; Scott, op. cit. iii 418-434.

[4] Select Charters of Trading Companies (S.S.) cxiii, cxiv; Scott, op. cit. iii 435-442; the best account of the doings of this banking partnership is contained in a note to the Preface of vol. lxxi of the Revised Reports at pp. viii-ix.

charters of the Mines Royal and the Mineral and Battery Works.[1] The South Sea Company, in 1720, instigated proceedings against some of these companies, with the result that their charters were forfeited;[2] and it was this very rash, and, in the circumstances, impudent action on the part of that company, which began the panic which ruined it.[3] These proceedings established the rule that the activities of a company were limited by the terms of its charter; and that it could only use the powers conferred by its charter in furtherance of the business for the carrying on of which it had been incorporated.[4] But it would be difficult to point to any previous authority in which this elementary principle had been precisely laid down; and, in fact, in the Parliamentary inquiries of this period, the directors of some of these companies cited in support of their proceedings the opinions of eminent counsel whom they had consulted.[5] In the third place, accounts were often kept in a very irregular manner;[6] and as "the idea of capital as something which should be kept intact was unknown,"[7] no very clear notions prevailed as to what parts of the gains of a company were properly divisible as profit. In fact, "the payment of dividends

[1] Scott, op. cit. iii 398.

[2] Ibid i 425-427; as Dr. Scott says (ibid iii 325), "while the South Sea Company was within its rights in raising this question, its action was most injudicious. . . . It might well have been argued that since the directors, who professed themselves aggrieved by companies acting under obsolete charters, employed as their banker an association that worked under a grant for the making of hollow sword blades, they had condoned the offence. Indeed, when one considers the many indirect practices of the directors, both in obtaining and applying their own Act of 1720, it was the height of effrontery to have raised the question."

[3] "It may have been some consolation to the companies attacked by the South Sea directors to know that the stroke directed against them had recoiled with crushing force upon the aggressors. Before the issue of the writ South Sea stock had stood at 850, a month later it was as low as 390," ibid i 427.

[4] This is made quite clear by some opinions of the Attorney-General given in 1719, which are cited in the Journals of the House of Commons xix at pp. 345 and 349. In the first of these opinions he said: "The transactions stated in the report to have been carried on for the insurance of ships and merchandise under colour or pretence of the charters aforesaid [the Mines Royal and the Mineral and Battery Works] and in the names of the supposed corporations are illegal and unwarrantable . . . those charters, being granted for the particular ends specified and limited therein, not giving sufficient authority to the corporations thereby erected, if they were existing, to carry on a business or employment of so publick a nature as that of insurance of ships and merchandise, and which is wholly foreign to the design of those incorporations." In the second of these opinions, dealing with the land speculations of the York Buildings Company, he said: "The corporation created by the Act of Parliament above recited was so instituted for the particular purposes therein specified; and though the power therein given to purchase lands is not, by express words, restrained to any particular annual value, yet by a reasonable construction, the exercise of that power ought to be governed and limited by the purposes for which the corporation was erected."

[5] Sir John Williams deposed "that they had consulted and had the opinion of several eminent counsel that they might insure ships by virtue of the charters for the Mines Royal [and] the Mineral and Battery Works; and that two of the said counsel are Sir Robert Raymond and Mr. Reeves," Journals of the House of Commons xix 344; see chap. vi § 2 for an explanation of this view.

[6] Scott, op. cit. i 158, 159.

[7] Ibid 69.

out of capital was quite usual."[1] In the fourth place, there was no clear law as to the manner in which claims against a company, which had been dissolved or had amalgamated with another company, should be settled. Persons who had claims against the dissolved or amalgamated company often found it difficult to realize them.[2]

Nor was the law as to unincorporated partnerships in a much better state. We shall see that the courts were beginning to arrive at some rules as to the order in which the joint and separate property of the partners could be made liable for the debts of the firm, and the debts of the individual partner, in a case where one of the partners was bankrupt.[3] It was well recognized that the maxim *jus accrescendi inter mercatores locum non habet* applied to partners;[4] so that, though a surviving partner could sue a partnership debtor or be sued by a partnership creditor without joining the executor of the deceased partner,[5] the executor was entitled to the deceased's share of the partnership assets,[6] and was liable to pay the deceased partner's share of the partnership debts.[7] It was also well recognized that the partners were agents for one another, and that, in matters falling within the scope of the partnership business, they could bind one another.[8] The convenience of the machinery of the court of Chancery for the taking of accounts, the common law rule that actions between the partners and the firm or between two firms having a common membership were impossible,[9] the possibility of getting discovery,[10] and injunctions against anticipated breaches

[1] Op. cit. Dr. Scott says that in the sixteenth century "there was no need of a term to describe the whole outlay. As yet the company stood in this respect too near the partnership for the want of a capital account to be felt. The idea of capital as something which should be kept intact was unknown, and very much later the payment of dividends out of capital was quite usual. In fact . . . the temporary joint stock made this method of procedure unavoidable. As the goods brought home were sold the adventurers received payments pro rata; and when the voyage had been a success they obtained more than they had paid in, if it was a failure they might get less."

[2] Acts of the Privy Council (1613-1614) 586-587—the Merchant Adventurers, having been requested to surrender their charter, said they were willing to do so, but "whereas by this resignacion of our charters, wee shalbe disenabled to recover any debtes due unto the bodie of our Company, and thereby want meanes to pay what wee owe to other men, wee therefore humbly pray your honours that such power and authority may be given us, whereby wee may not only collect such sommes as are and shalbe due to the body, but also make a cessement upon the now Bretheren of this Company for the better satisfaction of those debtes, which are owing unto others by the same"; S.P. Dom. (1676-1677) 34, 35—a petition to the Council by an agent of the Royal Adventurers Company, which had sold its assets to the Royal Africa Company, stating that, "though the members of the new company consist mostly of persons who were members of the old company," he cannot get his claims satisfied.

[3] Below 242-243.

[4] Jeffereys v. Small (1683) 1 Vern. 217.

[5] Martin v. Crompe (1698) 1 Ld. Raym. 340; a principle apparently applied also to co-factors, Holstcomb v. Rivers (1669) 1 Eq. Cas. Ab. 5.

[6] Ibid.

[7] Lane v. Williams (1693) 2 Vern. 292.

[8] Lane v. Williams (1693) 2 Vern. 277; Pinkney v. Hill (1697) 1 Ld. Raym. 175.

[9] Above 202 n. 5.

[10] Eastwick v. Conningsby (1682) 1 Vern. 118.

of the partnership agreement,[1] were all beginning to bring partnership cases under the jurisdiction of equity. But the court of Chancery had as yet only just begun to lay the foundations of the modern law.

Obviously this state of the law tended to increase the risk of fraud, because it left the promoters, directors, or members of commercial societies corporate or unincorporate, and the dealers in their shares, very free to act as they pleased. Obviously, also, these risks were very much increased, when the state gave an impetus to the joint company, by using it as a means to borrow money from its subjects.

We have seen that the state was prepared to incorporate its creditors, and to give to the company so incorporated certain privileges in return for a loan;[2] and that this was the basis upon which the Bank of England was founded.[3] But we have seen that later this idea was extended. The South Sea Company was prepared to take over the greater part of the National Debt in return for trading privileges, and to pay the state handsomely for the opportunity of doing so, in expectation that the capital and revenue thus acquired would be a "fund of credit," which would enable it to conduct an enormous trade, and earn correspondingly enormous profits.[4] Now, no doubt the growth of the system of lending money to the state had many and obvious advantages. It gave to the individual a safe form of investment. It increased the stability of the state, because it gave to a large number of its citizens a direct pecuniary interest in that stability—in fact, it had an effect upon the stability of the state precisely similar to the effect which the distribution of the spoils of the monasteries had in Henry VIII.'s reign upon the stability of the Reformation settlement.[5] On the other hand, the methods adopted to raise the money, the bribery which accompanied the negotiations with the South Sea Company, and the manipulation of the existing debt under the influence of exaggerated ideas of what could be accomplished by means of a "fund of credit," gave such an impetus to rash speculation that the boom of 1719-1720, and the ensuing panic, surpassed anything that had yet been known in the financial world. All classes followed the example of the Government,[6] and

[1] Spence, Equitable Jurisdiction i 666. [2] Above 188-189.
[3] Ibid. [4] Above 212-213. [5] Vol. iv 37.
[6] Dr. Scott (op. cit. iii 351, 352) points out that, in the case of the South Sea Company, the state had, through the connivance of responsible ministers, practically sanctioned this gamble. As he says: "Whatever may be one's judgment on the ethics of modern speculation, in the seventeenth and eighteenth centuries, the State not only encouraged but often represented such adventures of capital as a part of the duty of a patriot. In this connection it is only necessary to refer to the advertisement of the State lotteries of the period. There is abundant testimony that any who spoke or wrote against the company when the fever was at its height were held to be

tried to find a short-cut to riches by investing in companies which promised immediate wealth on easy terms; and the promoters and the directors of companies, unrestrained by any effective rules of law, were left practically free to gull the public as they pleased. In order to remedy these obvious evils, for which the Legislature itself was largely responsible, it passed a measure which influenced for more than a century the history of commercial societies in this country.

(3) *The Bubble Act and its effect on the development of company and partnership law.*

After considering a good deal of evidence as to the promotion and administration of many of the companies which had sprung up during this period of speculation, the House of Commons came to the following resolution:[1]—"That for some time past several large subscriptions having been made by great numbers of persons in the city of London to carry on public undertakings, upon which the subscribers have paid in small proportions of their respective subscriptions, though amounting on the whole to great sums of money; and that the subscribers having acted as corporate bodies without any legal authority for their so doing, and thereby drawn in several unwary persons with unwarrantable undertakings, the said practices manifestly tend to the prejudices of the public trade and commerce of the kingdom." In other words, the House of Commons neglected the deeper causes of the panic—the encouragement to speculation given by the Government's connection with the South Sea scheme,[2] the corruption of the Ministry and of members of the Legislature,[3] the extravagant notions entertained of the powers of a fund of credit,[4] the facilities for fraud and negligence given by the absence of any sort of legal control over the activities of promoters and directers;[5] and they concentrated their attention on one cause only—the extension of the joint stock system by the manner in which societies, which were not incorporated, usurped corporate form, and the consequent growth of the "pernicious art of stock-jobbing."[6] What was needed was an Act which made it easy for joint stock societies to adopt a corporate form, and, at the

disaffected. So that, so far from the speculator being blamed for his rashness at this time, it is to be remembered that all information that would enlighten him was discouraged, while he was overwhelmed, and too often carried away, by data designed to mislead."

[1] Journals of the House of Commons xix 351.

[2] Above 218 n. 6.

[3] Above 213.

[4] Above 211-212; as Dr. Scott says (op. cit. i 437): "Politicians sometimes find a remedy for their mistakes, but they rarely have the candour to make a public recantation of the principles which caused those mistakes to be made. Everyone at the end of 1720 blamed the mechanism which had shown the disorder of credit; no one seized upon the fallacy that had been the true cause of the distemper."

[5] Above 215-217.

[6] Scott, op. cit. i. 436, 437.

same time, safeguarded both the shareholders in such societies and the public against frauds and negligence in their promotion and management. What was passed was an Act which deliberately made it difficult for joint stock societies to assume a corporate form, and contained no rules at all for the conduct of such societies, if, and when, they assumed it.

The Act[1] began by repeating in substance the resolution to which the House of Commons had come. It set out the evils which had arisen from the starting of dangerous undertakings on a joint stock basis with a transferable stock, from the unlawful assumption of corporate form, and from the trade in charters which had recently been carried on.[2] It then condemned as illegal all such undertakings to the prejudice of trade, and subscriptions, assignments, transfers, and other things for furthering such undertakings; the acting or presuming to act as a corporate body; the raising of a transferable stock, or the assigning of such stock without authority either by Act of Parliament or by charter; acting under any charter formerly granted by the crown for purposes other than those expressed in the charter, or under an obsolete or forfeited charter.[3] It was provided that these acts should be deemed to be public nuisances,[4] that the persons guilty thereof should incur the penalties provided by the statute of Præmunire,[5] that merchants injured by them could sue for treble damages,[6] and that brokers dealing in the shares of such undertakings should be liable to a penality of £500.[7] The Act was not to extend to undertakings established before June 24, 1718—they were to be left to the common law.[8] Henceforth there was to be no confusion between a corporate and a non-corporate commercial society. Henceforth the privilege of possessing a transferable stock, which brokers or jobblers could manipulate, was to belong only to a corporate society.

Nor were these results wholly objectionable. It is not good for the state that large societies which are not corporations, and yet assume to act as corporations, should be allowed to exist. Such societies are much more difficult to regulate than a corporation. A corporation has received a privilege from the state, and, in return for that privilege, it can be submitted to such rules as may seem necessary to protect both its members and the public. Its existence is well known, and inquiries can easily be made into

[1] 6 George I. c. 18 §§ 18-22; for the leading decisions on the Act, see Lindley, Law of Companies (5th ed.) 130-132; see also R. v. Webb (1811) 14 East 406.

[2] § 18 preamble. [3] § 18. [4] § 19.

[5] Ibid. [6] § 20. [7] § 21.

[8] § 22. This, of course, would make corporations trading under obsolete charters, or trading in a manner not allowed by their charters, still liable to legal proceedings, above 215-216; whether at common law societies with a transferable stock were illegal is more doubtful, below 221.

its conduct. It is difficult to regulate an unincorporated society, because, if it is proposed to subject it to legal liability, it is apt to dissolve into its component parts, and leave the injured person to the impossible remedy of suing a large number of persons who, individually, are not worth suing; nor is it easy to ascertain the manner in which its affairs are conducted. What was objectionable in the Act was the hindrances which it threw in the way of the assumption of a corporate form. The Act, as Dr. Scott has pointed out, stopped the development of the joint stock system. "It became both difficult and costly to obtain the necessary legal authorisation for the starting of a new enterprise needing a large capital. In one that might have been established with a moderate outlay, which for any reason it was desirable to collect from a large number of persons, the trouble and cost proved prohibitive. Therefore, for upwards of a century, industry was deprived of the advantages of a certain amount of capital which would otherwise have been available."[1]

When the Act was repealed in 1825[2] interesting questions arose, analogous to those which arose after the repeal of the Combination Acts,[3] as to whether the offences created by the Act were also offences at common law, and in consequence unaffected by the repealing Act. On this point there was a considerable divergence of judicial opinion, because the common law had, as we have seen,[4] no very definite rules upon the subject. The cases of the earlier part of the nineteenth century decided that though, possibly, the assumption of the status of a corporation without authority,[5] and certainly the formation of a company which attempted to defraud the public, or otherwise of a dangerous or mischievous character, were illegal acts;[6] the mere formation of a joint stock company[7] with a transferable stock[8] was not illegal; and this view is probably historically correct.[9]

[1] Op. cit. i 438.
[2] 4 George IV. c. 94.
[3] Vol. ii 470-471.
[4] Above 215-217.
[5] Duvergier v. Fellows (1828) 5 Bing. at p. 267; and cp. Harrison v. Heathorn, (1845) 6 Man. and Gr. at pp. 137, 138; but (ibid at p. 107) Tindal C.J. seems to doubt whether this was an offence at common law; cp. Lindley, Law of Companies (5th ed.) 131 n. c.
[6] Blundell v. Winsor (1837) 8 Sim. 601, as explained by In re The Mexican and South American Co. (1859) 27 Beav. at pp. 481, 482; Lindley, op. cit. 133.
[7] Walburn v. Ingilby (1833) 1 My. and K. at p. 76.
[8] Garrard v. Hardey (1843) 5 Man. and Gr. 471; Harrison v. Heathorn (1843) 6 Man. and Gr. 81; but it appears that Lord Eldon thought otherwise; see Kinder v. Taylor, cited in the argument of Duvergier v. Fellows (1828) 5 Bing. at pp. 261, 262.
[9] As Tindal, C.J., said in Harrison v. Heathorn, at p. 140: "The raising of transferable shares of the stock of a company can hardly be said to be of itself an offence at common law; no instance of an indictment at common law for such an offence can be shown, the raising of stocks with transferable shares being, indeed, a modern proceeding; and the very great particularity with which it is described in the statute seems to show that it was an offence created by the statute only." It would

The history of commercial societies after the passing of the Bubble Act, the causes which led to its repeal, the rise of the limited company, and the enormous development of the joint stock principle which ensued, belong to the modern history of this branch of commercial law.

We must now turn to the law of agency, the development of which was a necessary consequence of the rise, both of the modern mechanism of negotiable instruments and banking, and of these commercial societies corporate and unincorporate.

§ 5. Agency

Primitive systems of law are ignorant of a law of agency. The parties to acts in the law must execute them in person.[1] But so soon as the law begins to develop, this primitive principle begins to yield at different points to practical necessities. The Salman was an agent for a particular purpose—the transference of property in accordance with the directions which he had received.[2] In later law the feoffee to uses was an agent for a somewhat analogous purpose.[3] The attorney was an agent for purposes of litigation;[4] and the clauses in commercial and other documents, which allowed the bearer or the creditor's nominee to sue, were designed to evade the strict rules of primitive law as to the employment of agents for this purpose.[5]

Gradually the common law came to recognize a law of agency both for the acquisition of chattels personal, and for the making of contracts.

The development of the actions of detinue and trespass on the case gave the beneficiary an adequate remedy, when chattels personal had been conveyed to another person to his use.[6] On the other hand, though a man could appoint an attorney or agent to convey or receive hereditaments or chattels real, he had no adequate remedy against a person who held such property on his account, until the rise of the use and the equitable trust.[7]

We begin to see the rise of agents for the purpose of contract at an early date. At first these agents were found chiefly in the

seem that a transferable share, being a chose in action, would have been as impossible at common law as a limitation of the liability of the shareholders, see Walburn v. Ingilby (1833) 1 My. and K. at p. 76; but that neither the attempt to make the share transferable nor the attempt to limit liability would make the association illegal; on the whole subject see Lindley, op. cit. 132-135.

[1] "Dans le très ancien droit, les actes juridiques doivent être accomplis par l'intéressé lui-meme; c'est là une conséquence de leur caractère formaliste; les solennités ou les paroles qu'ils supposent impliquent son intervention; elles n'auraient pas de sens si elles émanaient d'un tiers," Brissaud, op. cit. ii 1442.

[2] Vol. iii 563-565; vol. iv 410-412.

[3] Ibid 411.

[4] Vol. ii 315-317.

[5] Above 116-117.

[6] Vol. iii 425-426, 428, 443-444; above 88.

[7] Vol. iv 413-414.

higher ranks of society and in public law. "The king ever since John's day has been issuing letters of credit empowering his agents to borrow money, and to promise repayment in his name. A great prelate will sometimes do the like. . . . Among the clergy the idea of procuration was striking root; it was beginning to bear fruit in the domain of the public law; the elected knights and burgesses must bring with them to parliament 'full powers' for the representation of the shires and boroughs."[1] But in the early thirteenth century the appointment of agents for this purpose was not common; and it would seem that agents informally appointed or appointed by implication were hardly recognized.[2] However, it was not long before it gained recognition; and the fact that the practice spread somewhat readily in the course of the thirteenth century, is due to the two allied influences of mercantile necessity and the canon law. From an early date the records of the fair courts show that some sort of commercial agency must perforce be recognized;[3] and, during the fourteenth and fifteenth centuries, the development of trading companies, which must necessarily act through agents, helped its further development.[4] All through the Middle Ages the ideas of the canon law in this, as in other branches of commercial law,[5] made for its easier recognition. As Maitland has shown, "the legal deadness of the monk favoured the growth of a law of agency";[6] and the corporate bodies of monks, like the corporate bodies of merchants, needed agents. Thus the canon law acquired some rules upon this branch of the law; and the merchants could borrow and apply these rules to the agents whom they employed.[7]

Thus, in the course of the mediæval period, the ideas that it is possible to make a contract through an agent, and that it is possible for a man to ratify a contract made on his behalf through an agent, were fully recognized by the common law.[8] The common law also recognized that on such contracts the principal and not the agent was liable,[9] not only when the agent had express authority to do the particular act, but also when he

[1] P. and M. ii 225.

[2] Bracton's Note Book, case 873, cited P. and M. ii 225 n. 6.

[3] Vol. v 111-112.

[4] Above 193 seqq.

[5] Vol. v 80-83.

[6] P. and M. ii 226 n. 1.

[7] Brissaud, op. cit. ii 1444, "la situation des procureurs aux négoces (par opposition aux procureuers aux causes, procès) est réglementée par voie d'emprunt aux régles du droit romain et du droit canon (Sexte 5, 12, 68, 72 (3))."

[8] See vol. iii 528-530 for the application of these principles to the liability of the husband for the wife's debts; and see generally Street, Foundations of Legal Liability ii 446-448.

[9] Y.B. 11 Hy. IV. Mich. pl. 53 *per* Thirning; and this rule was followed by equity, see Graham v. Stamper (1692) as reported in 1 Eq. Cas. Ab. 308-309; cp. 2 Vern. 146, and the note.

acted within the scope of an authority to do acts of a particular kind.[1]

During the sixteenth and seventeenth centuries it was beginning to be seen that certain classes of agents were more closely connected with commercial law. In the books of mercantile law written by merchants or civilians, it is clear that two chief classes of mercantile agents are emerging—brokers and factors.

Brokers, Malynes tells us, were intermediaries, through whom two persons were brought into contractual relations. They had been long known in the city of London, where provisions had been made for their regulation.[2] He approves the practice of dealing through brokers—thereby "many differences are prevented, which might arise between man and man in their verbal contracts; for the testimony of a sworn broker and his book is sufficient to end the same. And moreover it is many times a cause that factors and servants deal more faithfully for their masters in buying and selling of all commodities, or in moneys by exchange, knowing their evidence is extant against them."[3] But he says that brokers were seldom used in England[4]—a statement which is probably an exaggeration, at any rate in London. At the end of the seventeenth century, however, they were well enough known; and it is clear that a distinct class of brokers, dealing in bills of exchange and in stocks and shares, were beginning to emerge.[5] Public opinion credited these brokers with making combinations and confederacies to raise or lower the price of stock;[6] and though perhaps more blame was placed upon their

[1] Y.B. 8 Ed. IV. Mich. pl. 9 (p. 11), "si jeo command mon servant d'achater certein biens, ou jeo face un home mon factor et mon atturney pur achater marchandise etc., en ce cas s'il achat marchandise d'un home, jeo sera charge per tiel contract, comment que les biens ne unques veigue en maines, et comment que jeo n'ay unques notice de ceo, et le cause est pur ce que jeo don tiel power a eux, et ce fuist mon foly de issint faire," *per* Pigot; cp. 27 Ass. p. 133 pl. 5; Doctor and Student Bk. II. c. 42 f. 137a.

[2] Vol. ii 387; there are many cases turning upon the misdeeds of those sworn brokers in the early Rolls of Mayor's Court which run from 1298-1307, see pp. 28, 32-33, and complaints of persons acting as brokers without being sworn, ibid 7-9, 37. Malynes, Lex Mercatoria Bk. I. c. xxxix, says, "no broker should be admitted unless he were sworn, and upon affidavit or certificate made by some principal merchants of his sufficiency and behaviour, and to put sureties for his true and good demeanour amongst Merchants, according to the custom of London"; see 2 James I. c. 21 preamble; further regulations of pawnbrokers were made by proclamation in 1630, Tudor and Stuart Proclamations i no. 1613; they were to be registered and enter into a bond of £100; for a proposed bill of 1678 to regulate pawnbrokers, which was passed by the House of Commons and dropped in the House of Lords, see Hist. MSS. Com. 9th Rep. App. Pt. ii 122 no. 616.

[3] Malynes, loc. cit.

[4] Ibid.

[5] 8, 9 William III. c. 32 Preamble.

[6] "Whereas diverse brokers and stock jobbers or pretended brokers have lately set up and carried on most unjust practices and designs in selling and discounting of talleys, bank stock, bank bills, shares and interests in joint stocks . . . and have . . . unlawfully combined and confederated themselves together to raise or fall from time to time the value of such talleys, bank stock, and bank bills as may

shoulders than was just,[1] they no doubt sometimes helped to manipulate the market in their own interest. At any rate the Legislature in 1696-1697 thought it necessary to regulate their business.

The Act[2] did not apply to brokers for the purchase and sale of cattle, corn or other provisions, and coal. It did apply to brokers for the purchase and sale of all other merchandise, for taking up money, for negotiating bills of exchange, and for the sale and discount of tallies, bank stock, bank bills, and shares in joint stock companies.[3] No person was to act as a broker in London, Westminster, or within the Bills of Mortality, without a licence from the Lord Mayor;[4] and no broker, even though so licensed, could deal in tallies or stock secured upon funds granted by Parliament, unless licensed by the Treasury.[5] A broker, on being admitted, must take an oath to do his duty, and give a bond for its performance;[6] and their names and addresses were to be published.[7] They must keep a broker's book, and enter in it all contracts made by them within three days of their date.[8] They must not take more than 10s. per cent. brokerage;[9] and penalties were imposed on a broker who took more, or who dealt for himself in the exchange of money, or who bought stock or shares to sell again.[10] In order to discourage dealings in speculative options, it was provided that every bargain to give a man liberty to accept or refuse shares should be void unless it was exercisable within three days.[11] The number of brokers was limited to one hundred.[12] It is clear from this Act that brokers were beginning to take an important place in the commercial world. But as yet their legal position is ill defined. There are few if any cases concerning them in the reports. Comyns, in his Digest, cites none.

The broker was an independent person: the factor was essentially an employé. The broker could not be mistaken for a

be most convenient for their own private interest and advantage, which is . . . extremely prejudicial to the public credit of this kingdom and to the trade and commerce thereof, and . . . may ruin the credit of the nation and endanger the government itself," ibid; cp. Luttrell's Diary iii 528, 529 for some manipulations of the price of guineas; and see generally Scott, Joint Stock Companies i 358.

[1] Mr. Scott says that, though the war tended to produce great instability of prices, "it is remarkable that quotations display so little of the see-saw movement due to market manipulation, but on the contrary follow well-defined lines of movement, the causes of which can generally be traced"; hence he thinks that "the blame laid on stock jobbing was to a large extent undeserved," ibid i 358-360.

[2] 8, 9 William III. c. 32 § 14. [3] 8, 9 William III. c. 32 Preamble.

[4] § 1. [5] § 15.

[6] § 2—in addition to the oaths of allegiance and supremacy.

[7] § 4; § 8 required them to carry a silver medal which must be shown to the parties at the conclusion of all contracts.

[8] § 6. [9] § 7. [10] § 9.

[11] § 10; above 214. [12] § 3.

servant of his principal: the factor at this period was, in the eye of the common law, very much in the position of a servant.[1] Nevertheless, according to the practice and usage of the merchants, the factor differed essentially from a servant. "The difference," says Malynes, "between a factor and a servant consisteth chiefly in this, that a factor is created by merchant's letters, and taketh salary or provision of factorage: but a servant or an apprentice is by his master entertained, some receiving wages yearly and some others without wages. A factor is bound to answer the loss which happeneth by overpassing or exceeding his commission; whereas a servant is not, but may incur his master's displeasure."[2] Malynes then gives certain rules as to the adjustment of accounts between merchant and factor, as to keeping within the limits of his commission, as to his liability to account for any gain made by the use of his master's credit, as to his liability for false entries at the custom house, as to his liability for the loss of or damage to goods entrusted to him, as to his duties in relation to letters of credit, bills of exchange, the freighting of ships, and the insuring of ships or cargoes.[3] Molloy's chapter on factors does not add anything very material to the information given by Malynes.[4]

The information given by Malynes and Molloy no doubt summarizes existing mercantile practice. But as yet this practice was very little known to the English courts of law and equity. The cases which turn upon the relations of merchant and factor are very few in number, and deal only with one or two isolated points on the fringe of the subject. Thus we get a few cases in the common law courts, which turn on the applicability of the actions of account or debt,[5] on the liability for non-payment of duties at the custom house,[6] and on the interpretation of the bonds which factors gave to perform their duties carefully and honestly.[7] In Chancery we get some cases turning upon liability for erroneous entries at the custom house,[8] and on the administration of the

[1] In Southcote's Case (1601) 4 Co. Rep. at f. 84a Coke explains that a factor, unlike a carrier, is not liable if, without his fault, the goods trusted to him are stolen, "for if a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandize the best that he can, and a servant is bound to perform the command of his master."

[2] Malynes, op. cit. Bk. I. c. xvi. [3] Ibid.

[4] De Jure Maritimo et Navali (4th ed.) Bk. III. cap. viii.

[5] See e.g. Core's Case (1537) Dyer 20a; The Earl of Lincoln v. Topcliff (1599) Cro. Eliza. 644.

[6] William Lewson v. Kirk (1611) Cro. Jac. 265.

[7] Sheppard v. Maidstone (1713) 10 Mod. 144; The African Company v. Mason (1715) 10 Mod. 227.

[8] Smith v. Oxenden (1663) 1 Cases in Chancery 25; Borr v. Vandall (1663) ibid 30; Knipe v. Jesson (1666) ibid 76—in which the extraordinary rule was laid down that, if the factor could succeed in defrauding the customs of a foreign country, he could keep the profit, as he had run the risk.

estate of a deceased factor which comprised assets belonging to the merchant or vice versa.[1] In this period we get little else.[2] In fact, during the greater part of it, this branch of the common law has been least of all affected by the customs and rules of the law merchant.

Perhaps the best proof of this fact is the refusal of the common law to draw any distinction between the law of principal and agent, and the law of master and servant. In common speech, no doubt, both in the seventeenth century and in our own day, the terms principal and agent connote commerce, and the terms master and servant domestic service;[3] but, except in so far as special statutes have put particular classes of agents upon a footing of their own, the common law still treats these two branches of law as fundamentally identical. If in England commercial law had ever come to be administered by special commercial courts, the law of commercial agency might have come to be a branch of the law quite distinct from the law of master and servant. The fact that commercial law came to be administered by the common law courts, has prevented any such distinction from growing up.[4] Coke, as we have seen,[5] regarded the factor as a servant; and Blackstone dealt with the law of agency in his chapter on Master and Servant.[6]

The result was that the development of the law of commercial agency was very slow. We shall see that the courts, during the greater part of this period, contented themselves with applying the strict rules of the mediæval common law.[7] Except in those cases in which, from motives of public policy, a more extended liability was allowed,[8] a master was only liable for the acts of his agent if he had actually ordered him to act, or if he had, by words or conduct, subsequently ratified his acts. And this conception was, as we shall see, applied, as in the mediæval period, both to the contracts made and to the torts committed by the agent. The cases of *Barton v. Sadock* and *Southern v. How* illustrate this point.

In the case of *Barton v. Sadock*,[9] the plaintiff, a merchant,

[1] Chapman v. Derby (1689) 2 Vern. 117—claim by a factor on the estate of a deceased merchant; Burdett v. Willett (1708) 2 Vern. 638—claim by a merchant on the estate of a deceased factor.

[2] We have seen, vol. i 505; vol. v 150 n. 2, that the Council occasionally interfered on equitable grounds to redress cases of hardship caused by a principal's or an agent's fraud—but these cases do not carry us very far.

[3] Thus, Locke, Two Treatises of Government Bk. II. chap. vii § 85 uses the terms in this sense.

[4] "There has never been a time when cases on master and servant were not cited as authority in the law of principal and agent, and *vice versa*," Street, Foundations of Legal Liability ii 454.

[5] Above 226 n. 1.

[6] Comm. i c. xiv.

[7] Vol. iii 382-385; below 251-252, 472-473.

[8] Vol. iii 385-387; below 476-477.

[9] (1610) 1 Bulstr. 103.

brought an action of account against the defendant, his factor, for certain jewels delivered by the plaintiff to the defendant to trade with beyond the sea. The defendant had sold the jewels to Mulleshake, the king of Barbary, for £45; but he had not yet received the money. It was held that he was liable to the plaintiff. Fleming, C.J., said,[1] "In cases of authorities given to one (as in this case here) to sell anything, as a factor, in the due execution of this authority, he ought presently upon the sale thereof to have and receive quid pro quo, otherwise he doth not well perform the authority, thus to him given, neither ought he upon the sale thereof, to give him any further time, or day of payment, but as he delivers the one, so he ought then presently, at the same time, to receive the money for the same for which it was sold."[2] In the case of *Southern v. How*[3] the defendant was the owner of certain counterfeit jewels. He sent them to his factor in Barbary to be sold. The factor, through the plaintiff, sold them to the king of Barbary for £800, telling him that they were good jewels; and the £800 was paid over in due course to the plaintiff. When the king discovered that they were counterfeit, he imprisoned the plaintiff till he repaid him the £800. On these facts the plaintiff brought his action on the case against the defendant. Judgment was given for the defendant, chiefly, the report tells us, on the ground that the master did not command the factor to conceal the fact that the jewels were counterfeit.[4] This case thus illustrates the fact that, at this period, as in the mediæval period, the principle applied to the liability of the master for the torts of his servant was the same as that applied to his liability for his servant's contracts. In both cases there must be a particular authority to do the act complained of. Such cases as these show that, if the factor was to be protected from personal liability, he must be able to show that authority had been given to him in very wide terms.[5] It was only very occasionally that the criminal equity administered by the Council[6] and the Star Chamber[7] relaxed these rules.

At the end of the seventeenth century it was becoming obvious that these rules were quite inadequate. In fact the exigencies of commerce compelled all the courts to reconsider the principles of

[1] At p. 104.
[2] This case was followed in 1676, Anon. 2 Mod. 100.
[3] (1618) Cro. Jac. 468.
[4] At p. 470.
[5] As Malynes says, op. cit. Bk. I. c. xvi, if you have a good factor, "all commissions given unto him may be ample, with addition of these words, *dispose, do, and deale therein as if it were your own.*"
[6] Dasent vii 204 (1564-1565)—a master is ordered to produce his servant guilty of an affray or to go to prison.
[7] Reportes del Cases 165—it was ruled, that, "where one commands his servant to enter on certain land, and to take distress peaceably, and he enters with many others riotously, the master is a rioter."

this branch of the law. The court of Chancery was beginning to apply the principles of equity to the solution of some of its problems. Thus in one case it applied the analogy of trustee and cestui que trust to the relations between a factor and his principal;[1] and in another it ruled that payment by a principal to his agent did not necessarily discharge his debt to the creditor.[2] Then, too, it was clear that the very limited delictual liability of the principal for his agent's torts urgently demanded revision; and in this part of the law we shall see that certain civil law rules, applied by the court of Admiralty to the relations of shipowners, masters, and merchants, were taken over by Holt, C.J., and the common law courts, and used by them as a technical justification for this extension.[3] Probably Holt's decisions upon this branch of the law of agency were largely instrumental in preserving it for the common law. If the common lawyers had refused to extend it to meet obvious needs it might very possibly have been developed mainly by the court of Chancery.

§ 6. Bankruptcy

In many early systems of law the obligation of the debtor is personal in a very literal sense—the body of the debtor can be taken by the creditor.[4] In all early systems of law each creditor is left to pursue his own remedy. There is no machinery by which the creditors as a body can collectively enforce their claims. But as soon as industry and commerce begin to develop, these primitive ideas must be modified. Whenever it is possible the creditor enforces his rights against the property and not against the person of the debtor; to prevent fraud, and to facilitate the equal treatment of all the creditors, a procedure by which creditors can collectively enforce their claims is developed; and generally some distinction is drawn between a debtor who is unable to pay by misfortune, and a debtor who is unable to pay by reason of his own recklessness or fraud.

These developments had taken place in the Italian commercial cities in the Middle Ages.[5] They had adapted to their own use the bankruptcy procedure of the Roman law (*Venditio Bonorum*), under which the whole property of the debtor was divided equally among his creditors.[6] At the same time they had adopted also

[1] Burdett v. Willett (1708) 2 Vern. 638.

[2] Speerman v. Degrave (1709) 2 Vern. 643. [3] Below 250-253, 473-475.

[4] "Dans le très ancien droit, c'est la personne du débiteur, son corps, qui répond avant tout du payement de sa dette; par extension, ses meubles en repondent aussi, car *mobilia ossibus inhærent*," Brissaud, op. cit. ii 1462.

[5] Ibid 1465; for Genoa see Leges Genvenses, Mon. Hist. Pat. xviii cols. 574, 657-659.

[6] For the Roman Law of Venditio Bonorum see Girard, Droit Romain [illegible]. Brissaud, op. cit. ii 1465 n. 3, notes that the law of the [illegible]

the modified procedure of the *Cessio Bonorum*, under which a debtor, who was unable to pay by misfortune, could escape arrest, and get discharged from his liabilities by giving up all his property.[1] From Italy these forms of procedure gradually spread to other countries during this period, and Malynes[2] gives us some account of them.

In England, as in other countries, a similar development took place during this period. But in order to understand the reasons why in England, as elsewhere, this development was necessary, I must make a short digression, and explain what remedies were open at common law to a judgment creditor against the chattels or person of his debtor.[3]

The two writs by which, at common law, a judgment creditor could realize his claim were, either the writ of *fieri facias*, under which the sheriff was directed to cause to be made from the goods and chattels of the debtor the sum adjudged to be due to the creditor; or the writ of *levari facias*, under which he was directed to levy it out of the goods and the profits of the land.[4] By neither of these writs could the body of the debtor be taken; and it is "not a little remarkable that the 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 *wite theow* may very often have been working out by his labours a debt that was due to his master."[5] Perhaps the reason is to be sought in the fact that the common law, under the influence of the ideas drawn from the mature Roman law, had shaken off the very primitive ideas as to the strictly personal character of liability for debt, which lead archaic systems of law to the conclusion that the seizure of the debtor's body is the only proper mode of enforcing his obligation to pay.

But, though the earliest systems of personal execution rest upon very primitive ideas, the law has at no time been able to dispense wholly with the power of restraining the debtor's person in the

the classical Roman law in the following particulars: (*a*) cessation of payment is a presumption of insolvency and an act of bankruptcy; (*b*) transactions entered into a short time previous to the bankruptcy are rendered void; (*c*) a majority of the creditors can give time to the debtor and allow him to resume control over his business.

[1] Girard, op. cit. 1013 n. 4; Brissaud, op. cit. ii 1471, tells us that in France it early made its appearance in the customs of the south, and also in the north in the second half of the thirteenth century; in a small tract of 1582 entitled "A newe order for Banqueroupts," an account is given of a decree of the Parlement of Paris as to the conditions on which a cession of goods could be made.

[2] Op. cit. Bk. I. c. xliv; Bk. III. c. xii, pp. 293-294.

[3] For his remedies against the debtor s land see vol. iii 131-132.

[4] P. and M. ii 594; Harbert's Case (1585) 3 Co. Rep. at pp 11b, 12a; Bl. Comm. iii 281.

[5] P. and M. ii 594; for Reeves's erroneous view to the contrary see C.J. Fox's article in L.L.R. xxxix 46-47, 48-52.

last resort. At all times there will be persons whose morality is so much below the average commercial morality of the age, that they do not scruple to take advantage of the credit which, in reliance upon the existence of that commercial morality, is given to them. If it is advantageous to commerce that the standard of commercial morality should be high, and that credit should be given, it is necessary to bring home to such persons, in the only way in which they will feel it, the consequences of their conduct. It is true that the imprisonment of a debtor, who is unable or unwilling to pay his debt, will not necessarily give the creditor his money; but it will tend to stop such abuses of confidence. At the same time it is a means of coercion which requires to be regulated carefully; and in most systems of law it is recognized that it should be used sparingly and in the last resort.

The common law soon discovered that it could not do without this method of execution. In the case of one class of debts it was permitted by statute from an early date. It was provided in 1285 that a debtor by statute merchant could be arrested.[1] But in most cases this form of execution was gradually and indirectly introduced, by means of changes in the process of the courts, and changes in and developments of the forms of action. The manner of its introduction was as follows:—From the first a writ of *capias ad respondendum* had been a part of mesne process in actions of trespass vi et armis.[2] In the thirteenth century this writ was extended to actions of account;[3] in the fourteenth century to actions of debt, detinue, and replevin;[4] and at the beginning of the sixteenth century to actions on the case.[5] It had been laid down in Edward III.'s reign that when a writ of *capias ad respondendum* lay to get the defendant before the court, a writ of *capias ad satisfaciendum* would lie to obtain execution of the judgment.[6] The result was that in practically every case a creditor could take his debtor's body in execution. But, if he elected to adopt this remedy, as he usually did, no other mode of execution was open to him.[7]

Constraint of the debtor's person thus became in England a more general method of execution than in many other countries in Europe. Largely because it was introduced in this indirect way, a mode of execution which required, and in most countries

[1] 13 Edward I. st. 3; vol. iii 132.
[2] P. and M. ii 592.
[3] 52 Henry III. c. 23; 13 Edward I. c. 11.
[4] 25 Edward III. c. 17.
[5] 19 Henry VII. c. 9; as Blackstone says, Comm. iii 282, by virtue of these and other statutes a capias may be had upon almost every species of complaint.
[6] Y.BB. 40 Ed. III. Pasch. pl. 28; 49 Ed. III. Hil. pl. 5; cp. Harbert's Case (1585) 3 Co. Rep. at p. 12a; 3 Salk. 286.
[7] See 21 James I. c. 24; Bl. Comm. iii 415.

received, careful limitation and regulation from the Legislature,[1] was almost entirely unregulated. The results can be read in the pages of Dickens; and, long before Dickens wrote, the abuses and the inadequacy of the different modes of execution known to the common law had aroused attention.

As early as Henry VIII.'s reign it had become obvious that the machinery of the common law was wholly inadequate to the needs of the merchants of the sixteenth century. Henry Brinklow, citizen and mercer of the city of London, who wrote in the later years of Henry VIII.'s reign,[2] shows us that the merchants were beginning to complain that English law lagged behind the laws of other mercantile communities. "Another thing very nedeful to be loked upon is this, that when any merchant or other, by losse of goodes, by fortune of the sea, evel servantys, evyl detters, by fyre, or other wyse, come to an after deale, and not able to pay his credyte at his due tyme, but by force of povertye is constrayned to demand longer tyme—than ye have a parcyell lawe in making of tachmentys,[3] first come, first servyd; so one or ij shall be all payd, and the rest shal have nothyng. And comonly even the rych shal have the foredeale therof by this tachement, to the gret dammage and oppressyon of the pore. For lyghtly the rich have the first knowlege of soch things. Wherfor, in that case it were a godly way to make it in Ingland, as it is in dyverse contryes, whan any such chance falleth, that than the most in nomber of the credytors and most in somme, shal bynde the rest to doo and gyve lyke tyme as doo the most of the credytors. And if it be duly found that the man be so farre at after deale, that he be not able to pay his whole credite in reasonable tyme, that than the lawe may bynd them that every man may have pound and pound alyke, as farre as his goodys will goo, leavyng him somewhat as the lawe shall thynck good. And this lawe shal be both neyhborly and godly."

Brinklow in this passage points to one serious defect in the law—its unfairness to creditors. Equally obviously it was unfair to debtors. Debtors might be either honest and unfortunate, or dishonest; and in both cases the law was inadequate. To shut up an honest but unfortunate debtor in prison, where he lived on

[1] For its regulation in French Law see Brissaud, op. cit. ii 1469-1471; the regulation began as early as 1254—"Saint Louis, en 1254, prit des dispositions qui auraient du la faire disparaître, mais qui eurent, du moins, pour résultat d'accentuer son caractère subsidiaire et d'en faire une voie d'exécution exceptionnelle"; cp. Malynes, op. cit. 293-294.

[2] Complaynt of Roderyck Mors (E.E.T.S.) c. 17. Brinklow was originally a Grey Friar. He became a mercer and citizen of London, married, and died in 1546. He was a strong Protestant, as his works show. This book was written about 1542.

[3] I.e. attachments.

charity or at his own expense, or died of starvation,[1] inflicted much hardship on the debtor without any benefit to the creditor. On the other hand, if the debtor was a dishonest person, who had become insolvent through his own fault, he would very likely be able to secrete some of his ill-gotten gains, and live in comparative comfort in prison, till he forced his creditors to some sort of compromise.[2]

The need for better laws was met in two ways—firstly by the jurisdiction of the Council, and secondly by the Legislature. And during this period we can distinguish two quite distinct lines upon which the Council and the Legislature proceeded. Firstly the law was modified in favour of the unfortunate, and secondly it was sharpened as against the dishonest, debtor. We shall see that it was from the second of these lines of development that the bankruptcy laws spring.

(1) *Modifications in favour of the unfortunate debtor.*

(i) The activities of the Council.

On behalf of the honest but unfortunate debtor the Council repeatedly and actively interfered. Sometimes it arranged or enforced a composition with his creditors. That such compositions were usual in the middle of the sixteenth century can be seen from a precedent for a deed of this kind in Phayre's book;[3] but their effect was liable to be nullified by obstinate creditors. The Council applied pressure to such creditors, and ordered creditors to make

[1] What may be perhaps called the strictly mediæval view of the position of the imprisoned debtor is to be found in Dive v. Manningham (1551) Plowden at p. 68, "If one be in execution he ought to live of his own, and neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle and puts them in a pound. . . . And if he have no goods he shall live of the charity of others, and if others will give him nothing, let him die, in the name of God, if he will, and impute the cause of it to his own fault, for his presumption and ill-behaviour brought him to that imprisonment"; clearly this state of the law was quite unsuited to the economic conditions of the sixteenth century; cp. Brinklow, op. cit. c. 12, for a strong indictment of the hardships inflicted on prisoners at this period; at the end of the period the Legislature intervened; 14 Elizabeth c. 5 § 38, and 39 Elizabeth c. 3 § 13 provided for the assessment of a county rate for the relief of these prisoners; but it would appear from Malynes, op. cit. 294-298, that its intervention was not very effective; and this is borne out by a petition of the poor prisoners in the Fleet prison and elsewhere, who point out that "in no other country is perpetual imprisonment the punishment of debt," Hist. MSS. Com. 3rd Rep. App. 26; for later legislation see below 234-235.

[2] For one illustration see Hudson, Star Chamber 65, 66, cited vol. i 505; and for another see a petition to the House of Lords, Hist. MSS. Com. 4th Rep. App. 5 in which it was alleged that a debtor by collusion was still getting a large part of his income, "and, though nominally a prisoner in the Fleet these fourteen years, yet by Habeas Corpus or otherwise, has liberty to travel where he pleases with his own man as his keeper, and regards not payment of his debts."

[3] A newe boke of Presidentes f. xciib; for this book see vol. v 388-389; the Council's interference in these cases was dictated by much the same considerations as those which dictated its interference with loans at usurious interest

them.[1] Sometimes it directed a creditor to give his debtor time till certain profits expected from a voyage should be realized.[2] Sometimes it appointed commissions to enquire into the cases of persons imprisoned for debt;[3] and though the legality of the powers exercised by these commissions was very doubtful,[4] the commissioners exerted pressure of an indirect but effectual kind upon creditors who would not come into the arrangements which they suggested.[5] This jurisdiction was exercised throughout the earlier half of the seventeenth century.[6] On one occasion, in 1637, the Council stated that they did not think it reasonable that a threat of bankruptcy proceedings should be used to "strengthen the wilfulness of a few against the general and charitable consent of the greatest number of the creditors"; and the Lord Keeper said that debtors who feared to pay, lest they might be made to pay again by a commission of bankruptcy, might lay aside that fear, as he should refuse to issue any such commission. All the debtors who refused to pay, and all the creditors who refused to agree, were ordered to attend the Council and show their reasons.[7]

(ii) The enactments of the Legislature.

During the last half of the seventeenth century the Council ceased to exercise this jurisdiction, and the Legislature soon found it necessary to interfere to relieve the harshness of the law. Two petitions of distressed prisoners were presented to the House of Lords in 1660,[8] and in 1662 and 1664-1665 bills for their relief were considered by the House.[9] But it was not till 1670-1671 [10]

[1] Dasent viii 128 (1573); ix 212-213 (1576); xiii 112 (1581); xv 16, 27 (1587); xix 98, 152 (1590).

[2] Ibid ix 5, 154, 174 (1575-1576)—orders to creditors not to molest a distressed merchant till he got in money due to him in France; ibid xii 7 (1580)—it even relieved a merchant's necessities by giving him a licence to export grain.

[3] Ibid xiii 175 (1581).

[4] Vol. iv 70; vol. v 432-433; Dasent xv 99 (1587)—their doings had given rise to proceedings under the statute of Præmunire; ibid xviii 109 (1589)—a complaint that the working of the commission is hindered by actions at law.

[5] Dasent xxii 384 (1592)—a letter of advice to the commissioners as to their dealings with creditors who refused to accept reasonable terms; apparently the commissioners were to warn the recalcitrants that if they persisted, and afterwards themselves got into difficulties, they must not look for any favour from the Council; cp. ibid xviii 433-434 (1589-1590)—recalcitrant creditors summoned to appear before the Council; Malynes, op. cit. 157, advocated the renewal of the commissions for the relief of distressed prisoners.

[6] See Acts of the Privy Council (1613-1614) 102-103, 169-170, 204, 472, 522-523.

[7] S.P. Dom. 1636-1637, 51, cccxliii 47, 48; cp. ibid 1, cccxvii 1; for a similar case see ibid 1637, 239, ccclxii 37; it appears from these cases that the crown was in the habit of issuing protections in order to facilitate such compositions; for an earlier petition see ibid 1633-1634, 307, ccli 58.

[8] Hist. MSS. Com. 7th Rep. App. 113, 141—in the latter petition it was truly said that the prisons were "sanctuaries for the rich and able debtors, and murdering dens of cruelty to poor men and women."

[9] Ibid 164, 181.

[10] For a petition of these prisoners in 1670 see Hist. MSS. Com. 8th Rep. App. 152.

that anything was done. By an Act passed in that year[1] it was provided that a justice of the peace could cause any prisoner for debt to be brought before him; and that if the prisoner swore that he had no estate above the value of £10, and that he had not conveyed away his estate to defraud his creditors, a certificate should be given to the prisoner, and notice should be given to the creditor to appear at the next quarter sessions.[2] If the prisoner's oath could not there be disproved he was to be discharged.[3] If, however, the creditor insisted on keeping him in prison, he must pay a weekly sum for his maintenance.[4] Notwithstanding the discharge of the prisoner, judgments were to stand good, and new executions against the prisoner's property could be sued out.[5] Enquiries were to be made into the administration of funds given for the relief of poor prisoners;[6] felons and prisoners for debt were not to be lodged together;[7] and certain other abuses committed by gaolers or their officers were prohibited.[8] In 1678[9] this Act was extended to persons imprisoned on mesne process.[10] Prisoners kept in prison with a weekly allowance from their creditors were to be released, if no estate belonging to them could be discovered within three months.[11] Debtors who were labourers could be removed to the workhouse, and could demand their release after two years.[12] The Act was not to apply to debtors who had not been in prison for six months,[13] or who owed more than £500,[14] or to aliens in respect of debts contracted abroad;[15] and a discharge was made conditional on a full disclosure by a debtor of his effects, and of the debts owing to him.[16] In 1690 an attempt was made to prevent debtors from using the Acts to defraud their creditors, by causing themselves to be imprisoned in collusive actions;[17] and further amendments of the law were made in 1694[18] and 1695-1696.[19] It was provided by the latter of these two Acts that the Acts should not apply to debtors taken in execution for the non-payment of fines imposed for offences,[20] to debtors to the king,[21] or to those owing damages for wrongs which were felonious.[22]

[1] 22, 23 Charles II. c. 20. [2] § 1. [3] Ibid. [4] § 2.
[5] § 4; see also 30 Charles II. c. 4 § 5; it was provided by § 8 of the last named Act that the discharge of the prisoner did not release a surety.
[6] 22, 23 Charles II. c. 20 § 9 [7] § 11.
[8] §§ 6-8. [9] 30 Charles II. c. 4. [10] § 1.
[11] § 3; this section provided that the allowance was to be paid, not to the gaoler, but to the prisoner, and § 11 provided that the weekly allowance need not be made if a relation liable to maintain the prisoner was able to do so.
[12] §§ 12, 13. [13] § 9.
[14] § 10; reduced to £100 by 7, 8 William III. c. 12 § 9.
[15] § 18. [16] § 19. [17] 2 William and Mary Sess. 2 c. 15.
[18] 5, 6 William and Mary c. 8. [19] 7, 8 William III. c. 12.
[20] § 8. [21] § 9.
[22] § 15; to encourage recruiting it was provided by § 14 that no one under forty was to get his discharge unless he either enlisted or procured some one else to enlist.

The number of these Acts leads us to think that they were not very effectual, either to procure the release of prisoners, or to put a stop to the malpractices of gaolers or their officers. The justices of the peace were not well fitted to do the duties imposed on them. Gaolers and officials were more likely to side with rich creditors than poor debtors;[1] and the same might probably be said of many of the justices. For these reasons these Acts were probably less effective than the measures adopted by the Council in the sixteenth and early seventeenth centuries.

(2) *The measures taken against dishonest debtors.*

(i) The activities of the Council.

During the earlier part of this period the Council interfered in the case of the fraudulent bankrupt, either to set the law in motion, or to give directions in specific cases.[2] But in this class of case their efforts were seconded, and to a large extent superseded, by the Legislature, at a much earlier period than in the case of the unfortunate debtor.

(ii) The enactments of the Legislature.

It is in the enactments of the Legislature, passed to deal with the dishonest debtor, that we must look for the origins of the law of bankruptcy. All of the bankruptcy Acts passed in this period were Acts passed with this object. All were directed against fraudulent bankrupts, and aimed, not at relieving the bankrupt but at getting his property for the benefit of his creditors.

The first of these Acts was passed in 1542-1543.[4] It recites that "divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties"; and it empowers the Lord Chancellor and certain other officials, and the two chief justices, to seize the property and imprison the persons of such debtors, and to distribute their property among their creditors. The debtors of these persons, and anyone suspected of having in their possession any of their property, could be summoned, examined, and required to make payment or restitution, they could also be required to disclose any facts within their knowledge

[1] This complaint was made in a petition of the prisoners to the House of Lords in 1672-1673, Hist. MSS. Com. 9th Rep. App. 26; a bill to improve the original Act of 1670-1671 was read a first time in 1673-1674, but failed to pass, ibid 37; and another bill of the same kind failed to pass in 1690, ibid 13th Rep. App. Pt. V. 161 no. 322.

[2] Dasent v 344 (1556); vii 47 (1558-1559); x 15, 37 (1577-1578); xii 341-34 (1580-1581); xiv 78, 95, 131, 192 (1586-1587).

[3] Ibid x 66, 391 (1577-1570); xiii 310-311 (1581-1582)—an order that a creditor wh was an ambassador should be paid in full.

[4] 34, 35 Henry VIII. c. 4; Coke, Fourth Instit. 277, 278; vol i 470.

Creditors who got undue preference from absconding debtors could be punished; and collusive recoveries got against these debtors could be set aside. These proceedings could be taken against debtors who withdrew themselves out of the kingdom, or who kept their houses or otherwise concealed themselves, in order to avoid the payment of their debts.

This statute was replaced in 1571[1] by a much more comprehensive statute, which was amended and enlarged by statutes of 1604[2] and 1623.[3] These three statutes contain the bankruptcy law of this period.

These statutes (*a*) define the persons who can become bankrupts; (*b*) catalogue the various possible acts of bankruptcy; (*c*) vest the jurisdiction in bankruptcy in commissioners appointed by the Lord Chancellor; (*d*) assign various powers to the commissioners to enable them to collect and distribute the assets of the bankrupt; (*e*) define their duties to the creditors and the bankrupt; (*f*) provide for increasing in various ways the assets available for distribution among the creditors; and (*g*) define the effect of bankruptcy on the liability of the bankrupt. Let us glance shortly at these seven points.

(*a*) *The persons who can become bankrupts.*—All the Acts confine the class of persons who can become bankrupts to traders.[4] Under the two earlier Acts they must also be British subjects; but the act of 1623 provided that aliens could be made bankrupts, and that they could prove as creditors.[5] It was decided in 1700 that an infant could not be made a bankrupt because the debts of an infant are voidable; and "no man can be a bankrupt for debts which he is not obliged to pay."[6]

(*b*) *The acts of bankruptcy.*—The statute of 1571 declared the following acts, if done with the intention of defrauding or hindering creditors, to be acts of bankruptcy:—departure from the realm; keeping house or otherwise absenting oneself; taking sanctuary; suffering oneself to be arrested for debt; suffering oneself to be

[1] 13 Elizabeth c. 7. [2] 1 James I. c. 15. [3] 21 James I. c. 19

[4] Cp. Monro, Acta Cancellaria 286; it was enacted by 14 Charles II. c. 24 that the mere fact that a person was a shareholder in the East India, African, and Fishery companies should not make him a trader within the meaning of the bankruptcy Acts, and a decision to the contrary was declared to be contrary to law. This privilege was extended to holders of stock in the Bank of England by 8, 9 William III. c. 20 § 47; apparently neither farmers nor inn-keepers were traders within the meaning of the Acts, Meggot v. Mills (1698) 1 Ld. Raym. at p. 287.

[5] 21 James I. c. 19 § 15; apparently, before this statute, where an English debtor abroad attempted to evade his foreign creditors by transferring his property and coming to England, the court of Chancery intervened to help the foreign creditors, Sere and Eland v. Colley (1610-1611) Tothill 68-69; and cp. Monro, Acta Cancellaria 169 *n*; the fact that the bankrupt and the creditor were out of England was immaterial, Wild v. Middleton (1632) Tothill 75.

[6] Rex v. Cole (1700) 1 Ld. Raym. 443.

outlawed or imprisoned; or departing from one's house.[1] The statute of 1604 repeated this list with some small verbal modifications, and required the acts to be done with the intention of hindering or delaying creditors. It added the two following acts if done with a like intent—suffering one's goods and chattels to be attached, and making a fraudulent conveyance of one's lands or goods. It further added the two following acts, whether this intent was present or not—suffering oneself to be arrested for debt and lying in prison six months,[2] and non-appearance when summoned by the commissioners.[3] The statute of 1623[4] added the following: procuring protections; presenting a petition against one's creditors to force them to take less than their original debts, or to get a longer time of payment; being indebted for £100 or more and not paying the debt within six months after arrest, or the suing out of the original writ; being arrested for such a debt and escaping, or getting out by giving common bail.[5]

(*c*) *The jurisdiction in bankruptcy.*—This was vested in "wise honest and discreet persons" commissioned by the Lord Chancellor.[6] Malynes tells us that they were generally counsellors at law joined with some citizens or merchants; and that they generally appointed one or two of the creditors to be the treasurers of the fund to be distributed.[7] They were entitled to be paid for their trouble in executing the commission;[8] and, in case of unfair dealing, they were subject to the control of the court of Chancery.[9]

(*d*) *The powers of the commissioners.*—They could take the body of the bankrupt, and could take and dispose of his property for the benefit of his creditors.[10] They could examine the bankrupt or his wife upon oath.[11] They could imprison him if he refused to answer their questions as to his property;[12] and he could be punished by the pillory and cutting off of an ear if he committed perjury.[13]

[1] 13 Elizabeth c. 7 § 1.
[2] 1 James I. c. 15 § 2.
[3] Ibid § 6.
[4] 21 James I. c. 19 § 2.
[5] For common bail see vol. i 220.
[6] 13 Elizabeth c. 7 § 2.
[7] Op. cit. 156—"The Commissioners appointed by the Lord Chancellor under the great Seal, to execute this commission of the Statute of Bankrupts, must be Counsellors at the law, joyned with some citizens or merchants, which are to seise of the party (which by the said commission is proved to be a bankrupt) all goods, debts, chattels, and moveables into their hands, and to appoint one or two of the creditors to be Treasurers of the same, which is afterwards to be distributed by the said Commissioners, unto all such as they shall find and admit to be right Creditors to the party (and with his privity and consent) upon such specialities, books, or accounts, as they shall produce, and be made apparent unto them."
[8] Hawarde, Les Reports, etc., 342-343, tells us that in 1607 an action was brought against three commissioners (two being members of Gray's Inn and one an attorney) for taking money (£22); the action was dismissed, "And the Lo. Chancellor sayde he was sorrye they took no more (for with a Lawyer Cessans Lucrum damnum est) and yf Commissioners shoulde not have rewarde for their travell and Charges no Commission woulde be executed."
[9] Wood v. Hayes (1606-1607) Tothill 62.
[10] 13 Elizabeth c. 7 § 2.
[11] 1 James I. c. 15 § 7; 21 James I. c. 19 § 6.
[12] 1 James I. c. 15 § 8.
[13] Ibid § 9.

They could summon before them and examine upon oath debtors of the bankrupt, or anyone suspected of being in possession of any part of the bankrupt's property. In case of a refusal to answer they could commit to prison.[1] Fraudulent concealment by a bankrupt of his property to the value of £20 was punishable by the pillory and loss of an ear.[2] They could break open the doors of the bankrupt's house in the execution of their commission.[3] They could assign to a creditor any debt due to a bankrupt, and the creditor could sue for and recover it in his own name.[4] They could make a grant of the bankrupt's entailed lands by deed enrolled, which would hold good as against all persons whose interests the bankrupt might have barred by suffering a recovery;[5] and they could redeem any estates conveyed upon condition by the bankrupt, which might have been redeemed by him.[6] Evasion of the commissioners' powers, by the pretence that the bankrupt was indebted to the king, was prevented by giving the commissioners power to enquire into the real facts.[7] Their powers were not determined by the death of the bankrupt.[8]

(*e*) *The duties of the commissioners to the creditors and the bankrupt.*—The estate must be rateably divided among the creditors.[9] This rule of equal division was applied, even though a creditor had a judgment, statute, recognizance, specialty, attachment, or other security.[10] Until distribution was made among the creditors, other creditors could come in and claim a dividend, on condition of contributing rateably to the cost of the commission; but if they did not come in within four months the commissioners might distribute.[11] The commissioners must, if required, account to the bankrupt for the manner in which they had employed his property, and pay him any surplus after the discharge of all his debts.[12]

(*f*) *Assets available for distribution.*—All these statutes contain provisions for setting aside certain dispositions by the bankrupt of his property, in order to increase the amount available for the creditors. The statute of 1571 provided that after-acquired property of the bankrupt was to be available for the creditors; but not property bona fide conveyed to other persons before the

[1] 13 Elizabeth c. 7 §§ 5, 6; 1 James I. c. 15 § 10; see Bracy's Case (1697) 1 Ld. Raym. 99.
[2] 21 James I. c. 19 § 7.
[3] Ibid § 8; Anon. (1682) 2 Shower K.B. 247.
[4] 1 James I c. 15 § 13.
[5] 21 James I. c. 19 § 12; this is a curious anticipation of the plan adopted by the Fines and Recoveries Act of 1833.
[6] 21 James I. c. 19 § 13.
[7] Ibid § 10.
[8] 1 James I. c. 15 § 17; but it was determined by the death of the king till 5 George II. c. 30 § 44.
[9] 13 Elizabeth c. 7 § 2.
[10] 21 James I. c. 19 § 9.
[11] 1 James I. c. 15 § 4.
[12] 13 Elizabeth c. 7 § 4; 1 James I. c. 15 § 15.

bankruptcy.[1] The statute of 1604 made a more stringent provision. It enacted that all conveyances made by a bankrupt of his property before bankruptcy, unless made in consideration of marriage or for value, could be treated as void ;[2] but, under the statute of 1623, if a conveyance was made after an act of bankruptcy committed, no purchaser for good and valuable consideration could be impeached, unless the commission were sued out within five years of the act of bankruptcy.[3] These provisions aimed at swelling the assets by getting back property which had formerly belonged to the bankrupt. The statute of 1623 aimed also at swelling the assets by taking the property of other persons in the possession of the bankrupt. With that object it introduced the reputed ownership rule. Goods in the possession, order, and disposition of the bankrupt, by the consent of the true owner, could be disposed of for the benefit of the creditors.[4]

(*g*) *The effect of bankruptcy on the liability of the bankrupt.*—None of these statutes discharged the bankrupt from his liabilities, except to the extent to which the creditors had been paid. The statute of 1571 specially provided that all creditors should continue to have all the remedies which they then possessed in respect of any part of the debt which remained unrealized.[5]

The policy of these statutes was well described by Coke in *The Case of Bankrupts.*[6] "The intent . . . was to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts." Therefore, although the property was not taken from the bankrupt till the commissioners had made an assignment,[7] he could not dispose of his property after he had become bankrupt[8]—otherwise he might have made a fraudulent preference and so have defeated the policy of the statutes. When an assignment had been made, the title of the creditor related back to the bankruptcy, so as to avoid all intermediate dealings with it.[9]

The date of the bankruptcy was the committing of an act of bankruptcy; and it was the duty of the commissioners to determine whether such an act had been committed. Necessarily the courts of law reserved power to review this decision. It was said, in *Bonham's Case,* that the court had decided that the finding of

[1] 13 Elizabeth c. 7 §§ 11, 12.
[2] 1 James I. c. 15 § 5.
[3] 21 James I. c. 19 § 14.
[4] 21 James I. c. 19 § 11; cp. Meggot v. Mills (1698) 1 Ld. Raym. 286.
[5] 13 Elizabeth c. 7 § 10.
[6] (1584) 2 Co. Rep. at p. 25b.
[7] Carey v. Crisp (1689) 1 Salk. 108.
[8] The Case of Bankrupts (1584) 2 Co. Rep. at pp. 25a, 26b.
[9] Kiggil v. Player (1709) 1 Salk. 111.

the commissioners that a man was a bankrupt, was traversable in an action of false imprisonment.[1] Similarly, on a writ of habeas corpus, the legality of a commitment by the commissioners could be questioned.[2] It was only a trader who could be made bankrupt; and the question whether a person was a trader within the meaning of the bankruptcy Acts was often before the courts, generally on a reference from the Chancellor.[3] Sometimes this question was determined by the more indirect manner of an action for slander; for the question whether it was an actionable slander to call a man bankrupt depended upon whether he was a trader within the meaning of the Acts.[4]

It was only on the petition of the creditors that a commission could issue;[5] and, on such a petition, the Chancellor held that its issue was a matter of right.[6] The commissioners would then decide whether an act of bankruptcy had been committed, or whether a debt was proved, subject to an appeal to the Lord Chancellor, or a reference to the judges.[7]

The common law decisions upon the interpretation of the Acts turn, for the most part, merely on the construction of particular sections.[8] They do not add very much to the statute law. For these additions we must look rather to the decisions of the Chancellor. We have seen that the court of Chancery would interfere in case of unfair dealing;[9] and towards the end of this period it began to deal with other questions as to bankruptcy administration.[10] One class of these cases turns upon the question whether certain equitable interests could be deemed to be assets. Thus it was held that property settled for the benefit of the wife and children of the bankrupt could not be taken,[11] or even an annuity settled by a father on his son.[12] It was even doubted for some time whether an equity of redemption was an asset assignable

[1] (1609) 8 Co. Rep. at p. 121a, "Because the party grieved has no other remedy, if the commissioners do not pursue the Act and their commission, he shall traverse that he was not a bankrupt, although the commissioners affirm him to be one: as this term it was resolved in this Court, in trespass between *Cutt and Delabarre*, where the issue was, whether William Cheyney was a bankrupt or not, who was found by the commissioners to be a bankrupt."

[2] Bracey v. Harris (1697) 5 Mod. 309.

[3] Monro, Acta Cancellaria 286; Bacon's Ab. *tit.* Bankrupt A, "the usual method when Bankruptcy is denied, is for my Lord Chancellor to order it to be tried in a Common-Law Court, on an Issue, *Bankrupt*, or not"; see that title, and above 237 n. 4, for various cases; the rule that only a trader could be made bankrupt was the same in French law, Brissaud, op. cit. ii 1465.

[4] See e.g. Squire v. Johns (1621) Cro. Jac. 585.

[5] Alderman Backwell's Case (1687) 2 Cases in Chancery at p. 191.

[6] S.C. (1683) 1 Vern. 152.

[7] Above n. 3; Anon. (1676) 1 Chy. Cas. 275.

[8] See Bacon's Ab. *tit.* Bankrupt.

[9] Above 238.

[10] Vol. i 470.

[11] Vandenanker v. Desbrough (1689) 2 Vern. 96.

[12] Moyses v. Little (1690) 2 Vern. 194.

by the commissioners.[1] Another class of cases turns upon the modes of distribution adopted by the commissioners;[2] another upon the rights of different classes of creditors;[3] and another upon the validity of an assignment made before bankruptcy.[4] But perhaps the most interesting questions were those which arose in the case of the bankruptcy of a partnership, and in the case of the bankruptcy of a purchaser of land or goods. In the manner in which the court of Chancery dealt with both these cases we can trace new and important principles of law.

In the partnership cases we see the beginning of the modern rule[5] that the joint estate is primarily liable to the joint debts, and the separate estate to the separate debts. In the earliest of these cases, in 1682,[6] two partners had agreed that debts owing on the joint account should be paid out of the joint stock, and that the joint stock should not be charged with the separate debts. But, on the petition of a separate creditor, the court decreed that the joint stock and joint debts should be divided into moieties; that each moiety of the stock should be charged with a moiety of the joint debts; and that which was over must be applied to pay the separate debts of the partners. If the joint stock was not enough to pay all the joint debts, and either partner paid more than a moiety, he could come in as a creditor for the amount overpaid by him; and presumably his separate creditors would get paid out of any dividend he so got. In subsequent proceedings in the same case, Lord North seemed to think that the agreement of the partners that the joint debts should be paid out of the joint stock was ineffectual, as it could not bind their creditors. But the reporter adds a quære whether the separate creditors could have any better title than the partners under whom they claimed.[7] Whether or not the primary liability of the joint stock to the joint creditors, and the primary liability of the separate estate to the separate creditors, was based on this ground is not clear; but it is clear that in 1715 we get in substance the modern rule.[8] A commission of bankruptcy having issued against two partners, the separate creditors applied to be let in to prove their separate debts against their separate estates. They were allowed to do so; and it was directed "that as the joint or partnership estate was in

[1] Vandenanker v. Desbrough (1689) 2 Vern. at p. 97.

[2] Hitchcock v. Sedgwick (1690) 2 Vern. at p. 162; in 1693-1694 a bill for "the more equal distribution of bankrupts' estates" was thrown out by the House of Lords, Luttrell's Diary iii 285.

[3] 2 Vern. at p. 157; Craven v. Knight (1682) 2 Rep. in Ch. 226.

[4] Meechett v. Bradshaw (1633-1634) Nelson 22.

[5] Pollock, Digest of the Law of Partnership (11th ed.) 159 seqq.

[6] Craven v. Knight (1682) 2 Rep. in Ch. 226, 229; 1 Eq. Cas. Ab. 55.

[7] Craven v. Widdows (1683) 2 Cases in Ch. 139.

[8] Ex pte. Crowder 2 Vern. 706.

the first place to be applied to pay the joint or partnership debts; so in like manner the separate estate should be in the first place to pay all the separate debts; and as separate creditors are not to be let in upon the joint estate until all the joint debts are first paid; so likewise the creditors to the partnership shall not come in for any deficiency of the joint estate, upon the separate estate, until the separate debts are first paid." At an earlier date it had been settled that if a partner embezzled the partnership property and became a bankrupt, the partners could, in priority to the separate creditors, get from his share of the partnership assets the amount which he had embezzled.[1] This seems to be the origin of one of the exceptions to the general rule;[2] but as yet very little has been done to differentiate the various exceptions to this rule, and to ascertain their scope and application.

It was laid down in 1684 that where a bankrupt, having bought land, had not paid all the purchase money, the vendor need not come in as a creditor for the rest of the money; but that the land should be charged with the balance due.[3] In 1690 it was laid down that, when goods had been consigned by unpaid vendors to purchasers, who went bankrupt before the ship conveying them had sailed, then, although the property had passed at law, the vendor could retake the goods. "If they by any means get these goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity."[4] It is clear that in these two cases we have the origins of two exceptional rules in the law of bankruptcy—the rule which gives the vendor of real estate an equitable lien and so makes him a secured creditor, and the rule that an unpaid vendor of goods can stop in transitu as against a bankrupt purchaser.

The bankruptcy law established by these statutes suffered from two great defects. In the first place, it made no sort of differentiation between the unfortunate, and the dishonest or reckless bankrupt. The governing idea of the statutes was that the bankrupt is an offender; and the fact that they provided for no discharge of the bankrupt from his liabilities, as the result of bankruptcy proceedings, is characteristic of this governing idea. The result was that the rogue often escaped while "plain dealing men were laid hold of."[5] In the second place, there is some reason to think that the commissioners who exercised this jurisdiction were not always very competent. It was said in *Alderman Backwell's Case* that

[1] Richardson v. Godwin (1693) 2 Vern. 293. [2] Pollock, op. cit. 172.

[3] Chapman v. Turner (1684) 1 Vern. 267, 268—"in this case there is a natural equity that the land should stand charged with so much of the purchase money as was not paid; and that without any special agreement for that purpose."

[4] Wiseman v. Vandeputt (1690) 2 Vern. 203. [5] Malynes, op. cit. 157.

the fact that the commissioners were liable to be sued, if they had acted wrongly, caused the most sufficient persons to avoid serving;[1] and there is evidence that the administration of the law was in consequence both expensive and dilatory.[2] For both these reasons it is clear that the application of a measure of discriminating equity was needed. It is therefore not surprising that, at the latter part of this period, the Chancellor began to interfere more actively with the administration of the law by the commissioners;[3] that several proposals for a reform of the law were made;[4] and that early in the following period it was materially modified. Even with these modifications, both the law itself and its administration continued to be one of the most unsatisfactory branches of English law till the reforms of the nineteenth century.[5] All these defects were aggravated by the limited scope of the bankruptcy laws, which, as we have seen, applied only to traders; and by the fact that no person, whether or not he came within the scope of these laws, could force his creditors to assent to a composition.

That this was so was largely due to the fact that the abolition of the jurisdiction of the Council in 1641, had left no machinery by which an honest but unfortunate debtor could make an effectual composition with his creditors, unless all the creditors agreed.[6] At one time, it is true, the court of Chancery would, by means of a bill of conformity, compel a minority of creditors to assent to a composition of which a majority had approved.[7] But this practice gave rise to abuses—such bills were filed merely to delay proceedings at law.[8] It was therefore ordered by proclamation in 1621[9] that such bills should be dismissed if the creditors did not consent; and it was enacted in 1623 that the filing of such a bill should be an act of bankruptcy.[10] Several attempts were made at the end of this period to pass Acts to facilitate these compositions.[11] An Act was passed in 1696-1697;[12] but it was repealed in the

[1] "It was a mischief that the Act of Parliament had subjected the Commissioners to an action, so that no sufficient persons . . . would undertake the trouble of it," 1 Vern. at p. 154; see 1 James I. c. 15 § 16 for the procedure in these actions.

[2] S.P. Dom. 1677-1678 644; ibid 1678 85. [3] Vol. i 470-471.

[4] A bill for the better recovery of bankrupt's estates, and for the more equal distribution thereof, failed to pass the House of Lords in 1693-1694, House of Lords MSS. i no. 815; another bill to effect a more equal distribution of insolvent's estates failed to pass in 1694-1695, ibid no. 882.

[5] Vol. i 471-473. [6] Above 234.

[7] Ramsey v. Brabson (1583-1584) Choyce Cases 174; Tothill 25-26 (1613-1614); ibid 47 (1613 and 1626).

[8] Malynes, op. cit. 160. [9] Tudor and Stuart Proclamations i no. 1312.

[10] 21 James I. c. 19 § 2.5; in Alderman Backwell's Case (1683) 1 Vern. at p. 153 it was said by the court that, "Bills of Conformity have long since been exploded, and there was no such equity now in the court."

[11] A bill to facilitate compositions with creditors was considered by the House of Commons in 1679, S.P. Dom. 1679-1680 138, 147; Commons Journals ix 613; a similar bill failed to pass the House of Lords in 1694-1695, House of Lords MSS. i no. 911.

[12] 8, 9 William III. c. 18.

following year.[1] The result was that, right down to the beginning of the nineteenth century, no means were provided for enforcing a just composition with creditors;[2] and this defect was aggravated by the power which each creditor had of oppressing the debtor by taking his body in execution.[3] The resulting hardship on debtors, who were unable for any reason to take advantage of the bankruptcy laws, was forcibly pointed out by the Common Law Commissioners in 1831-1832. "A debtor," they said,[4] "who finding himself in difficulty or even insolvency, but so circumstanced as not to be within the scope of the bankruptcy law, is at present frequently placed in a distressing situation; however willing he may be to do substantial justice by making a cession of his property for the benefit of his creditors, he is often unable to effect his purpose. If he offer a composition, it is in the power of one or two of the creditors, out of mere caprice or in the expectation of being paid in full, to defeat the arrangement, and several cases of great hardship have occurred, when, after a debtor has surrendered the whole of his estate for the benefit of his creditors, he has been arrested and left to lie in prison, without the means of obtaining his liberation."

It would, I think, be true to say that it was this branch of English law which was the most injuriously affected by the abolition of the jurisdiction of the Council. That neither the Legislature, nor the common law, nor equity, had succeeded in constructing a satisfactory body of law, is clear from the fact that the defects pointed out at the beginning of the nineteenth century, are, to a large extent, the same as those pointed out by Brinklow in the sixteenth century.[5]

II

MARITIME LAW

As with commercial, so with maritime law, its main outlines were beginning to assume their modern aspect during this period. This fact emerges clearly from the treatment by the court of Admiralty and by the writers of the period of some of the principal topics of this branch of the law. The topics with which I propose to deal are—The Ownership and Possession of Ships; the Master

[1] 9 William III. c. 29.

[2] The need for some legislation is illustrated by a petition of Robert Ryves, a goldsmith who had been ruined by the stop of the Exchequer (above 186); he prayed that the king would interfere to make a creditor accept a composition approved by all the others, S. P. Dom. 1676-1677 158.

[3] Above 231-232.

[4] Fourth Report, Parliamentary Papers 1831-1832 Pt. I. 14.

[5] Above 232.

and Crew; the Contract of Carriage; and, Some Incidents of the Contract of Carriage.

The Ownership and Possession of Ships

The usual methods of acquiring the ownership of a ship were either by building her, or by capture followed by condemnation,[1] or by transfer from an owner. Such a transfer was usually effected by bill of sale, or by ordinary deed followed by delivery. The delivery was the essential matter;[2] but it could be effected by bill of sale without delivery when the ship was at sea.[3] Sometimes the seller warranted his title to the ship.[4] Suits turning upon questions of title occur fairly frequently—many of them are suits by the true owner against the purchasers from pirates.[5] They illustrate the force of Malynes' caution to the merchants, that it is "dangerous to fraight unknown ships which may be subject to other men's actions, and that in many places where wind and weather may command them to enter."[6] In order to settle questions of title, the court of Admiralty would declare the title at the suit of a plaintiff who complained that another was wrongfully asserting title to his ship.[7]

A claim upon a ship might arise as the result of the hypothecation of the ship by the owner or master to a creditor,[8] or, at this period, from the fact that the claimant had done work upon the

[1] Raylestone c. Guerson (1601) Select Pleas of the Admiralty (S.S.) ii 201; cp. Dasent vi 106-107, 207 (1557) for two cases turning on the question of title by capture.

[2] "The selling of a ship is not a sufficient course to alienate the same; but the quiet possession thereof must be delivered upon the sale made," Malynes, op. cit. 123; this was contrary to the common law rule that the property passed by the sale without delivery, and so the common law courts made the different rule applied by the Admiralty the ground for issuing writs of prohibition, Select Pleas of the Admiralty (S.S.) ii xlix-l.

[3] Ibid i 93—a case of 1540 in which the custom is thus stated, "that all, and every contracte or sale of any shipe goods wares or other merchandyses made or had by any owner . . . thereof to any merchaunte or other person . . . and (the buyer) having a byll of sale thereuppon made and delyvered to hym by the seller, ys good and valuable and . . . the said buyer by vertue of the said custome and delyvery of the said byll of sayle . . . may entre and take possession of the said shipe goods wares and merchandyses so sold . . . at theyr retorne ad portum destinatum withoute any further tradicion"; cp. Dasent xiii 215, 222 (1581) for a case turning on the transfer of a ship.

[4] Browne c. Maye (1551) Select Pleas of the Admiralty (S.S.) ii 16 is a case turning on such a warranty.

[5] Ludkyn c. Edmunds (1546) Select Pleas of the Admiralty (S.S.) i 141-143; Gelder c. Worelond (1552) ibid ii 82; Officium Domini c. Goods ex A Hamburgh Ship (1554) ibid 91; Officium Domini c. The Eugenius (1556) ibid 99; Dasent ix 73 (1575-1576); x 102 (1577).

[6] Lex Mercatoria 124; see Poyntell c. De Billota (1555) Select Pleas of the Admiralty (S.S.) ii 94 for a case which illustrates the force of Malynes' remark.

[7] Kinge c. Gomez (1596) Select Pleas of the Admiralty (S.S.) ii 179.

[8] For such instruments see Select Pleas of the Admiralty (S.S.) i 62-63, ii 69; for the powers of the master to hypothecate see below 240.

ship.[1] In such a case the creditor could realize his debt by arresting the ship, and taking the necessary proceedings in the court of Admiralty. The court could order sale and, if there was more than one creditor, distribute the proceeds among them.[2] If it was a part owner who had thus pledged his share, the others could intervene and pay out the creditors.[3] In that case they could recover against their partner the amount which they had thus paid, in accordance with the ordinary rules relating to partnerships.[4]

Generally ships were owned in common by two or more persons. The frequency with which this occurred had given rise to some definite rules as to their rights inter se. The co-owners were of course entitled to share, in proportion to their shares, in any profits made by the ship, or in any compensation to which the ship was entitled for wrongs committed against her.[5] Conversely, all the owners were liable for wrongs committed by the ship,[6] or for money spent upon necessary repairs. If one part owner made necessary repairs, and the other delayed to pay for four months, he lost his share[7]—a severe rule founded on a passage in the Digest relating to the repair of houses,[8] which was not followed in later law.[9] More difficult questions arose when the co-owners disagreed as to the employment of the ship. It was settled that the disagreement of one co-owner could not force the ship to be idle. The rule was that it must make at least one voyage "upon their common charges and adventures"; but that afterwards, the partner who refused, must either sell his share to the others, or allow them to sail the ship.[10] In the latter case he must share in

[1] Simondson c. Manelli (1597) Select Pleas of the Admiralty (S.S.) ii 185; but in later times the courts of common law regarded such contracts, if made in England with the owner, as giving rise to a merely personal liability, and so they prohibited proceedings taken by such creditors in the Admiralty against the ship, Abbott, Merchant Ships and Seamen (3rd ed., 1808) 137-142; I have purposely chosen an early edition of this book, as it represents the law as it existed before the era of extensive legislative change began; for maritime liens generally see below 270-273.

[2] Re Lappage (1538) Select Pleas of the Admiralty (S.S.) i 69, 70.

[3] Cogley c. Taylor (1548) ibid ii 7.

[4] Thus Welwod, Abridgment of all Sea Lawes Tit. xv, says that, if an owner has been forced to pay on a contract made by the master, "the rest of the owners . . . shall relieve this man *pro rata* of their portions"; for Welwod's book see vol. v 11, 131, 134.

[5] Cougham c. Kindt (1600) Select Pleas of the Admiralty (S.S.) ii 198-199.

[6] Below 252, 267; Malynes, op. cit. 121. [7] Ibid 123.

[8] Dig. 17. 2. 52. 10. [9] Abbot, Merchant Ships and Seamen (3rd ed.) 83-84.

[10] Malynes, op. cit. 120-121; Welwod, op. cit. 40, 41; the rules that one voyage must be made was not followed by the later English law, Abbott, op. cit. 91; as is there pointed out, "the old rule appears to have been framed with a view to the interest of the master, who in former times was a principal owner, and was the person who, with the pecuniary assistance of the other owners, generally caused the ship to be built in the expectation of being employed in the command; an expectation which might be defeated, if the others could sell their shares to strangers, who, acquiring a majority of interest might appoint a friend of their own."

the expense of fitting the ship up for the voyage; he was neither liable for the losses nor entitled to the profit of the voyage;[1] but in case the ship perished the other partners were liable to him for the value of his share.[2] The court of Admiralty would in such a case make the co-owners give him security for the value of his share.[3] Should the majority of the co-owners refuse to continue in partnership with the minority, they must all agree to sell at a value, or to employ the ship on a voyage. If this could not be done, recourse, at this period, could be had to the court of Admiralty, who could settle the matter on equitable terms.[4] In later law, apparently, the only remedy of the minority was to sell their shares to another.[5]

The Master and Crew

Welwod[6] describes for us the ordinary complement of a trading ship of this period as follows: (1) The master—"he who bears charge over all the ship"; (2) The steersman, who was often the same person as the master—"he who directs the ship in the course of her voyage"; (3) the master's mate; (4) the shipwright—"he who attends upon the mending of the faulty parts of the ship"; (5) the boatsman—"he who bears the charge of the ship's boat"; (6) the clerk—"whose office is to write up and make account of all things received or delivered in the ship, together with all the ordinary and needful expenses made upon ship and kippage"; (7) the cook—"a most necessary member as long as there will be bellies"; (8) the ship's boy—"who keeps her continually in harbours"; (9) the mariners.

Here we need only consider the legal position of the master and the mariners.

The master's relation to the owner was determined partly by the terms of the contract of employment, and partly by the common law of the sea.[7] The common law of the sea gave him ordinary powers to freight the ship, to take passengers, to provide necessaries, and to do ordinary repairs.[8] It also gave him extra-

[1] Malynes, op. cit. 121.

[2] Ibid. The rule was justified on the ground of public policy—"ships were made and invented in common for the use of all men . . . and ordained for sailing, and not to be idle and unoccupied."

[3] Abbott, op. cit. 85; see ibid 87-90 for the controversy as to the power of the Admiralty to take these stipulations, which was ultimately settled in George II.'s reign in favour of the Admiralty.

[4] Malynes, op. cit. 121; Welwod, op. cit. 41. [5] Abbot, op. cit. 91.

[6] Op. cit. Tit. vi: "Of persons ordinary in ships." [7] Ibid Tit. viii.

[8] Ibid; Malynes, op. cit. 121, gives the practical advice that, "it is very convenient if the owners be in place that the master do not let the ship to freight, or undertake any voyage without the privity knowledge and advice of the owners or some of them"; see Thomas, Early Mayor's Court Rolls, 243-245.

ordinary powers to borrow money in a foreign country for the needs of the ship, and, for that purpose, to hypothecate ship and cargo or freight.[1] It would seem that these powers were recognized in the Middle Ages in the commercial courts of the Italian cities; and that the transactions themselves were really a variety and a development of the loan on bottomry.[2] The debt so contracted took precedence of all other charges on the ship;[3] and, as in the case of the loan on bottomry, the money borrowed was not repayable unless the ship reached its destination. Further, the master had the power, in case of necessity, to sell the cargo or the ship.[4]

When the master had acted within the scope of the powers conferred upon him by his contract of employment, or by the law, the creditor could enforce his claims against either the owner or the master;[5] and, conversely, the owner could enforce any rights of this kind acquired by the master.[6] Thus contracts made by the master bound the owner even though he had not consented to them, and even though any property acquired under them had been appropriated by the master.[7] It is clear that this is an extension of the principle of agency as recognized by the common law at this period. We have seen that, as in the Middle Ages, the common law made the principal liable only if he had expressly authorized or subsequently ratified the act done.[8] But, according to maritime law, he was liable also for acts done by the agent within the scope of his apparent authority. This was a departure from common law principles which, even at the beginning of the nineteenth century, Abbott thought it necessary to explain and

[1] Welwod, op. cit. Tit. viii; Select Pleas of the Admiralty (S.S.) i 92-93 (1541)—hypothecation of ship and freight in Sicily by the master; ibid ii 68 (1538); ibid ii 191-192 (1599)—sentence of condemnation for money due upon an hypothecation by the master.

[2] Bensa, Histoire du contrat d'assurance au moyen age (French tr.) 14, 15; for the development of the contracts of bottomry and respondentia see below 261-263.

[3] Ibid 15, citing Pegolotti, La practica della mercatuera cxxx p. 132.

[4] Welwod, op. cit. Tit. viii; "or to sell some of the merchants goods, provided that the highest price that the rest of the goods is sold for at the market be repaid to the merchant: which being done, the freight of those goods so sold and repaid, shall be repaid by the master to the owner of the ship . . . except the ship perish in the voyage; in which case only the price that the sold goods were bought for shall be rendered," ibid.

[5] Ibid Tit. xv.

[6] Ibid; Malynes, op. cit. 121—"because herein they do represent and undertake the person of the master, and these privileges are granted to the owners for the good of the common wealth and the augmentation of traffic."

[7] Welwod, op. cit. Tit. xv; Malynes, op. cit. 121—"if there were cause of mending the ship, and the master should spend the same another way, the owner is to satisfy the creditor notwithstanding"; it was otherwise if the master was acting beyond his powers, e.g. if he borrowed money to mend a ship which did not need mending.

[8] Above 227-228.

justify.[1] We shall see that the justification which he put forward—the agent "is seldom of ability to make good a loss of any considerable amount"—is in reality the substantial basis of the extensive modification of common law principles, which is involved in the modern doctrine of the employer's liability for the torts of his employé.[2]

As in the case of the contracts of his employés, so in the case of their torts, the liability, according to maritime law, of the master or owner was also somewhat different from his liability at common law. We have seen that at common law the master or principal was only liable if he had previously authorized or subsequently ratified the tort.[3] But according to maritime law the liability of the master of a ship was more extensive; and, at the end of this period, it was recognized (after some hesitation) that the owner also was subject to this extended liability. I shall consider firstly the case of the master of the ship, and secondly the case of the owner.

(i) It was quite clear that the master was liable to the merchant and passengers, not only for his own torts,[4] but also for the torts of the crew. He, as well as the actual tort feasor,[5] was liable; and liable, some said, to pay double the damage.[6] This extension of the master's liability was, to a certain extent, based upon the Roman rule as to the quasi-delictual liability of nautæ caupones and stabularii for the delicts of their employés.[7] It was justified, as the principle of employer's liability is justified to-day, on the ground of public policy. Welwod explains that this liability is "most justly laid upon the master, because he ought to hire good men. . . . For it is in his own free will to choose his company, and he should not be ignorant of the men he hath to do with; otherwise,

[1] Op. cit. 123-124—"the great responsibility which the laws of commercial nations cast upon the owners for the acts of the master . . . has appeared to many persons at first view, to be a great hardship; but . . . it should always be remembered that the master is . . . appointed by the owners; and by their appointment . . . they hold him forth to the public as a person worthy of trust and confidence; and if the merchants . . . could not have redress against those who appointed him, they would often have just reason to complain that they had sustained an irreparable injury through the negligence or mistake of the owners; as the master is seldom of ability to make good a loss of any considerable amount."

[2] Below 474-475, 477-479.

[3] Above 227-228.

[4] Welwod, op. cit. Tit. ix.

[5] Select Pleas of the Admiralty (S.S.) ii 197-198 (1600).

[6] Welwod, op. cit. Tit. ix; but Malynes, op. cit. 103, does not say that the matter is liable to pay double.

[7] Dig. 4. 9. 1. 2.—"Qui sunt igitur teneantur, videndum est. Ait prætor 'nautæ.' Nautam accipere debemus eum qui navem exercet: quamvis nautæ appellantur omnes, qui navis navigandæ causa in nave sint: sed de exercitore solummodo prætor sentit. Nec enim debet, inquit Pomponius, per remigem aut mesonautam obligari, sed per se vel per navis magistrum: quamquam si ipse alicui e nautis committi jussit, sine dubio debeat obligari"; the idea seems to have been that the master was an "exercitor" *qua* the crew.

if the master were not so obliged . . . there would be a great occasion of stealth and spoil."[1] And it would seem that his liability was even more stringent than that cast upon an employer in our modern law. Malynes and Welwod tell us that for, "whatsoever shall happen through fault negligence or chance which might be avoided, *or if it be done by the passengers or other than himself or his company*, the master is answerable."[2] The words "chance which might be avoided" show that he was not quite in the position of an insurer—in fact to have held him liable as an insurer would have been contrary to the principles of civil liability recognized by the court of Admiralty.[3] But his liability for damage done by passengers or third persons put him almost into that position, as was shown by the case of *Morse v. Slue*.[4] In that case an action was brought against the master of a ship lying in the Thames by the owner of goods on board the ship, because these goods had been stolen by thieves. The master proved that the ship had been guarded in the usual way. It was ultimately held that the case must be decided on common law principles, because the ship was not within the jurisdiction of the court of Admiralty, and that the master was liable as a carrier.[5] But it was quite arguable that, even on the principles applied by the court of Admiralty, he could have been held to be liable.[6] According to these principles his liability would depend upon whether he could show that the damage was quite unavoidable.

(ii) The question whether the owner was liable for the torts of the master or crew was by no means clearly settled at the beginning of this period.

The common lawyers held that he was not liable. In 1606[7] it was argued that the owner was liable in a case in which an English ship, provided with letters of marque, had attacked a vessel belonging to a country with which England was at peace. It was said that in matters which affected public policy owners were at civil law always liable for the torts of their employés; and the analogy of the common law liability of the custom house

[1] Op. cit. Tit. ix; cp. Dig. 4. 9. 1. 1.—"Maxima utilitas est hujus edicti, quia necesse est plerumque eorum fidem sequi et res custodiæ eorum committere. Ne quisquam putet graviter hoc adversus eos constitutum: nam est in ipsorum arbitrio, ne quem recipiant, et nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recipiunt coeundi, cum ne nunc quidem abstineant hujusmodi fraudibus." It is interesting to observe, Dig. 4. 9. 7. 2., that "si quid nautæ inter se damni dederint hoc ad exercitorem non pertinet"—an anticipation of the doctrine of common employment.

[2] Welwod, op. cit. Tit. ix; Malynes, op. cit. 103.

[3] Below 258-259.

[4] Reported 2 Keb. 866; 3 Keb. 72, 112, 135; 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; T. Raym. 220; the date of the case is 1672.

[5] See 1 Mod. 85 n. a.

[6] See the argument for the plaintiff in 3 Keb. 112, 113.

[7] Waltham v. Mulgar, Moore (K.B.) 776.

officer and the marshal was relied on.[1] But Popham denied that any such general principle existed at common law. He admitted that a master might be liable if, having sent his servant to do one kind of illegal act, the servant had done another kind of illegal act: he would not be liable if, having sent his servant to do a legal act, the servant had done an illegal act.[2] The civilians, on the other hand, were not quite clear as to the extent of the owner's liability. According to Welwod and Malynes the owner was not liable for the master's torts;[3] though he might be liable for the torts of a mariner, especially if the mariner had actually been hired by himself.[4] But others thought that the owner was liable to the merchant for the negligence either of the master or of the crew;[5] and in support of this view the quasi-delictual liability for the damage done by nautæ caupones and stabularii imposed upon the exercitor, i.e. the owner or person on whose account the ship was worked, could be adduced.[6] Whether on this ground or not, owners were held liable by the court of Admiralty for the damage done by their employés in the late sixteenth and early seventeenth centuries.[7]

We have seen that, at the end of the seventeenth century, the strict common law principles which governed the liability of masters or principals for the acts of their servants or agents, were wholly unsuited to the commercial condition of the country.[8] It is not surprising, therefore, that Holt should find in these civil law principles a useful technical means of making a very necessary development in the law. In the case of *Boson v. Sandford*[9] he held that a shipowner was liable for damage to goods caused by the master's negligence; and he based his decision on the broad principle that, "whoever employs another is answerable for him, and undertakes for his care to all that make use of him."[10] It is clear that this principle was applicable to other cases besides cases

[1] "Et les Civilians argueont en Court, et Dodderidge prist un diversity que en affaires publick les servants acts chargeront le master et le master respoignera pur son servant. Et il cite 7 Eliz. Dyer lou le servant conceal customes: et 39 H. 6 lou le servant misexecute l'office de Marshal (for some of these cases see vol. iii 387). Et quia traffique est publick entercourse pur le weal del Realm, cestuy que mista un neive en traffique doit provider servants que ne fairont publique offences"; later "Dodderidge dit que le Ley Civil est que la master respondra en touts publique cases," ibid at p. 777.

[2] "Il prist cest rule lou le master mista son servant de faire un act illoyal, le master respondra pur le servant sil mistake en le feazance del act, mes lou il mista son servant de faire un loyal act come icy de prender les biens des enemies le Roy, et il prist les biens des amies, le master ne respondra."

[3] Welwod, op. cit. Tit. xv; Malynes, op. cit. 121. [4] Ibid

[5] Select Pleas of the Admiralty (S.S.) i 131 (1544-1545)—in such a case the master and crew were liable to indemnify the owner.

[6] Above 250 n. 7; cp. Marsden, Collisions at sea (6th ed.) 63 n. l.

[7] Select Pleas of the Admiralty (S.S.) ii lxxi (1575-1576) lxxvi.

[8] Above 228-229. [9] (1691) 2 Salk. 440; 3 Mod. 321.

[10] 2 Salk. 440.

of shipowner and master; and we shall see that Holt, by giving it a wide extension, introduced into English law the modern principle of the employer's liability for the torts of his employé, and helped to free the common law from the restrictions imposed by the idea that the employer's liability for these torts depended solely on the law of agency.[1]

I think therefore, that the recognition by the common law of these new principles owed something to the rules which, from the basis of the civil law, had been evolved in the court of Admiralty,[2] It was, in fact, only natural that, as the necessities arising from a larger commerce were felt in the court of Admiralty at an earlier period than in the courts of common law, we should get in the court of Admiralty the earliest traces of the existence of a principle of modern law which was introduced in consequence of those necessities. In the court of Admiralty the principle was based on the technical reasoning and analogies derived from the civil law: at the common law it was based mainly on expediency, and perhaps to some extent upon certain exceptions to the mediæval rules which governed an employer's liability. Here, as in other cases, ideas were borrowed almost unconsciously, when the influence of the commercial business, of which the common law courts had deprived the court of Admiralty, began to be felt. Of the manner in which these principles were developed by the common law I shall speak more fully in the following chapter.

The master's relation to his crew was founded mainly on the provisions to be found in the laws of Oleron.[3] We see the old rule that the master should consult with his crew as to the expediency of making a start from port,[4] as to the necessity of making a jettison,[5] or of borrowing money on a foreign port.[6] We see the old rules as to the case of a seaman who had become sick in the service of the ship.[7] Similarly the law as to rights and duties of the crew were founded mainly on the laws of Oleron. We see the old rule that the mariner was entitled to carry a small portion of merchandize, or to receive compensation if he did not.[8] The rule was still maintained that if the ship was cast away, so that no freight was earned, no wages were payable[9]

[1] Below 474-475.

[2] We shall see that there are certain earlier cases in which a larger liability had been hinted at, below 453, 473; but it was in the case of Boson v. Sandford 2 Salk. 440 that the new principle was for the first time firmly established, below 474.

[3] Vol. v 120-125. [4] Welwod, op. cit. Tit. viii. [5] Ibid Tit. xvii.

[6] Ibid Tit. viii. [7] Ibid Tit. x; vol. v 121.

[8] Ibid; Welwod, op. cit. Tit. xi—"a mariner may either keep his portage in his own hand or put forth the same for freight."

[9] Jonson c. Bannister (1560) Select Pleas of the Admiralty (S.S.) ii 25—"That the marrynors gonners and other ministers whosoever in eny ship or vessel laboring and travayling upon the seaes shall as well abide beare and suffer thadventure and losse of theire wages and salarie if the shippe or vessell wherein they sayle and serve

—"freight is the mother of wages." On the other hand, if the voyage was abandoned, half wages were due;[1] and these rules existed in substantially their old shape down to the passing of the Merchant Shipping Act of 1854.[2]

The Contract of Carriage

At the present day "a trading ship is employed by virtue of two distinct species of contract: *First*, the contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places; this is usually done by a written instrument signed and sealed, and called a *charter party*. *Secondly*, the contract by which the master or owners of a ship destined on a particular voyage, engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination. A ship employed in this manner is usually called a *general* ship."[3]

It would appear from Malynes that he was only acquainted with the first of these methods of employing a ship. If one merchant could not load the ship, several joined to charter her. No ship, he says should be freighted without a charter party,[4] and bills of lading should be drawn up to declare the contents of the cargo, and to bind the master to deliver in accordance with the charter party.[5] It is clear from his account, and from the specimens of these documents which have come down to us from this period, that these documents had almost attained their modern form.[6] Here I shall first of all say something of the charter party

by mysadventure of the seaes or tempest do perishe in that viage as the owners and laders shall and must in like case beare suffer and sustayne thadventure of theire sayd shipp and goods"; lawyers of the early nineteenth century justified the rule as the counterpart of the rule that gave him his wages, though disabled by sickness in the service of the ship—"As a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases, so on the other hand the law gives him his whole wages, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage," Abbott, op. cit. 424; the historical reason is much more probably to be found in the fact stated in Jonson v. Bannister that the seaman took a share in the adventure—he was entitled to ship goods of his own and get freight for them; this is rendered the more probable by the fact that other rules seem to assume that he was a sharer in the adventure, above 253 n. 8; no doubt the rule was retained when this practice became obsolete in order to induce the men to do their best for the ship.

[1] Tye c. Sprynghan (1561) ibid ii 122-123; Thorneton c. the "Elizabeth Bonaventure," and Jobson owner (1565) ibid ii 131-132.

[2] 17, 18 Victoria c. 104 § 183; reinacted 57, 58 Victoria c. 60 § 157.

[3] Abbott, op. cit. 112.

[4] Op. cit. 97; Welwod, op. cit. Tit. vii—"and this charter party, among all the western merchants, and those of the great ocean, usually is made to perform all things requisite by the laws of Oleron."

[5] Malynes, op. cit. 97.

[6] Ibid op. cit. Part I. c. xxi; Select Pleas of the Admiralty (S.S.) i 35-37 (1531); 81-83 (1538)—charter parties; ibid i 61-62 (1538); 112-113 (1541); 126-128 (1544-1546); ii 59-64 (1549-1570)—bills of lading.

and the bill of lading; and, secondly, of the rules which determined the nature of the obligations of the parties to these contracts to carry.

(1) Under the ordinary contract of charter party the master or owner of the ship acknowledges that he has let the ship to a merchant, and promises to make the ship ready by a fixed date to take in the goods provided by the merchant. He promises that he will sail with the first convenient wind to the port stipulated, and that he will deliver the goods in good condition to the merchant or his factor in accordance with the bills of lading. The ship is to remain at that port for a fixed period to take in such goods as the merchant or the factor shall load in her, return to the port from which she started, and deliver the goods in good condition. The master or owner also covenants that the crew shall consist of so many persons, shall be armed in such a way, and shall be furnished with all proper gear. The merchant, on the other hand, covenants with the master or owner to load the ship within the time stipulated, and to pay so much a ton for freight, on the discharge of the goods, and other customary payments such as primage,[1] petilodeminage[2] or pilotage, and average.[3] Both sides bound themselves in a penal clause to fulfil their covenants with the addition, Malynes says,[4] of other clauses or conditions designed to prevent future litigation. Instances of such other conditions to be found in charter parties of this period are clauses exempting the owner from liability for accidents,[5] providing that certain mischances shall constitute a general average loss,[6] or stipulating that the value of any prizes taken by the ship shall be distributed in certain proportions.[7]

Probably the origins of the bill of lading are to be found in the custom of entering the goods shipped on the ship's book or register; and the rule, resulting therefrom, that the owner or master was not liable for goods not so entered.[8] In the days when the merchants travelled with their goods this entry would be sufficient.[9] But when the merchant ceased to travel, and sent the goods to a given consignee, separate documents would obviously become essential;

[1] A small payment to the master for his care and trouble, Abbott, op. cit. 270; but in the seventeenth century both primage and average were explained as a gratuity to the seamen for care of the cargo, Select Pleas of the Admiralty (S.S.) ii lxxxi.

[2] I.e. Petty Lodemanage or pilotage.

[3] In this connection the word average "denotes several petty charges which are to be borne partly by the ship and partly by the cargo, such as the expense of towing beaconage, etc."; Abbott, op. cit. 270, 271; to be distinguished from general average as to which see below 263-265.

[4] Op. cit. 100.

[5] Select Pleas of the Admiralty (S.S.) i 137 (1545).

[6] Ibid ii 64 (1562).

[7] Ibid i 37 (1531).

[8] Bennett, the History and present position of the Bill of Lading 4-6.

[9] See Thomas, Early Mayor's Court Rolls 244-245 for a case of 1305-1306 which turns on the custom

and it is clear that, if disputes are to be avoided, it will be desirable that each of the parties interested, the consignor, the master of the ship, and the consignee, should have a copy.[1] The first of these developments had taken place at the beginning of the sixteenth century. The bill of lading, like the old entry on the ship's register, was the only evidence of the goods loaded; and the owners were not liable for any goods not therein contained.[2] The second took place in the course of the same century. There is a clear reference to bills drawn in a set of three in 1539;[3] and it was a settled custom when Malynes wrote. He says:[4] "Of these bills of lading, there is commonly three bills of one tenor made of the whole ship's lading, or of many particular parcels of goods, if there be many laders; and the mark of the goods must therein be expressed, and of whom received, and to whom to be delivered. These bills of lading are commonly to be had in print in all places and several languages. One of them is enclosed in the letters written by the same ship, another bill is sent overland to the factor or party to whom the goods are consigned, the third remaineth with the merchant, for his testimony against the master, if there were any occasion or loose dealing; but especially it is kept for to serve in case of loss, to recover the value of the goods of the assurors that have undertaken to bear the adventure with you."

It is clear from this passage of Malynes that when he wrote the form of the bill of lading had become stereotyped; and this is borne out by the records of the court of Admiralty. The earlier specimens are somewhat informal in character; but, by the middle of the sixteenth century, they are very near to their modern form.[5] Thus a bill of lading of the year 1534[6] declares that John Desallez, merchant of London, has loaded at Rouen in a ship called the George of Legh, the master of which is Thomes Karre, so much wine and so many apples, marked with his mark, to be carried to London, "exceptid the casalties and dangers of the sea." The master promises to deliver the goods to the said merchant, his factor, or assigns, he or they paying the freight, primage, and average.

[1] Bennett, op. cit. 6, 7.

[2] The following statement was made in 1534 in the case of Chapman c. Peers, Select Pleas of the Admiralty (S.S.) i 44—"Proprietarii et magistri seu exercitores navium aut eorum bursarii non tenentur neque debentur aut eorum aliquis non tenentur aut debet respondere pro bonis aut rebus in navibus suis invectis seu impositis que in libro raciocinii Anglice the boke of ladyng communiter dicti et nuncupati per dictos mercatores aut eorum factores non inscribuntur me..cionantur aut inseruntur"; see Diamond Alkali Export Corporation v. Bourgeois [1921] 3 K.B. at p. 449 where McCardie, J., accepts this view of the origin of the bill of lading.

[3] Select Plea of the Admiralty (S.S.) i 89; for another instance of the year 1546 see ibid 127-128.

[4] Op. cit. 97.

[5] See references above n. 3.

[6] Select Pleas of the Admiralty (S.S.) ii 61.

It is clear from the form of the bill of lading that the parties intended that delivery should be made to the consignee, to whom the bill has been sent. It is obvious, therefore, that it was a document entitling the consignee to the goods,[1] provided that he pays the freight.[2] But these bills usually provided that delivery should be made to the consignee "or his assigns." Hence, if it were assigned, the assignee could demand delivery. In other words the assignment of the bill of lading passed the property in the goods. This rule was probably established in the court of Admiralty in the sixteenth century;[3] and it was accepted by the courts of common law in 1697. Holt, C.J., said that "the consignee of a bill of lading has such a property as that he may assign it over. And Shower said that it had been adjudged in the Exchequer."[4]

It is probable that the court of Admiralty was prepared to go further, and hold that it was not only assignable but negotiable. In Charles I.'s reign a shipmaster was sued in the Admiralty for delivering a bar of silver to one who had fraudulently obtained the bill of lading. Judgment was given for the defendant; but the owner of the silver got a prohibition and brought an action at common law.[5] It is probably this action of the common law courts which has prevented a bill of lading from becoming a negotiable instrument. Though it resembles a negotiable instrument in the mode by which it can be transferred, it lacks the essential quality of negotiability—a bona fide holder for value cannot get a good title from a holder who had none, and it is not assignable "free from equities."[6] It is simply a contract to carry certain goods which operates as a document of title to these goods. But in one respect the court of Chancery modified the strictness of the common law rules. We have seen that it gave to the unpaid vendor the right to stop the goods in transitu on the bankruptcy of the consignee.[7] But as yet neither the common law rules as to bills of lading, nor the doctrine of stoppage in transitu, have been elaborated. This will be the work of the eighteenth and nineteenth centuries.

[1] We get in 1544 and 1546, Select Pleas of the Admiralty (S.S.) i 127, 128, the proviso that if one bill is performed the others are to lose their effect; as Mr. Bennett says, op. cit. 10, "these provisions seem clearly to contemplate the transfer of the bill of lading as a document of title to the goods shipped—if it had not been customary for the delivery of the goods to be made to the holder of the bill of lading the words which provide that if one bill should be performed the others should be of none effect, would be meaningless."

[2] See Select Pleas of the Admiralty (S.S.) i 110.

[3] See Hurlocke and Saunderson c. Collett (1539) Select Pleas of the Admiralty (S.S.) i 88, 89.

[4] Evans v. Marlett (1697) 1 Ld. Raym. 271.

[5] Select Pleas of the Admiralty (S.S.) ii lxxxi.

[6] Above 166-167.

[7] Above 243.

(2) The records of the court of Admiralty, and, at the close of this period, the cases decided in the common law courts, show that the obligations undertaken by the parties to the contract of carriage were giving rise to a number of definite rules of law.

The master or owners were liable if they failed to supply the ship at the stipulated time. In such a case the merchant could decline to employ the ship, or, if he employed her, he was entitled to recover any damages which he had sustained.[1] They were also liable if they failed to deliver the goods,[2] or if the goods arrived in a damaged condition owing to negligent stowage,[3] to the unseaworthiness of the ship,[4] or to any other form of wrongful act;[5] and this liability for the safety of the goods lasted till the cargo was discharged on to the quay or into a lighter.[6] We shall see that losses occurring through acts done to preserve the ship and cargo were governed by special rules.[7] But how far the master or owners were liable for losses, other than those resulting from acts done to preserve the ship and cargo, which did not arise through their fault, was not very clearly settled in this period.[8] This uncertainty was to a certain extent aggravated by the different rules laid down by the civilians and the common lawyers.

The civilians naturally grounded liability upon dolus or culpa. Therefore they were inclined to hold that, though a person was liable even for accidental loss if he contracted to be so liable, he was not otherwise liable.[9] Thus for a loss arising from an attack by pirates,[10] or for damage done by rats if there was a cat on board,[11]

[1] Malynes, op. cit. 98; Welwod, Tit. vii—"except the master show some excuse of a notorious necessity, or of a chance that could not be eschewed: and then he loseth only his freight"; see Thomas, Early Mayor's Court Rolls 243-245.

[2] De Neronia c. Burye (1540) Select Pleas of the Admiralty (S.S.) i 113; Symonds c. Danyell (1541) ibid 105-106; Revell c. Bona Stringar (1562) ibid ii 124-125.

[3] Ritzo c. Pignea (1597) ibid ii 184-185; Dybdale c. Holmes (1556) ibid ii 101 (bad stowage).

[4] Borneley c. Troute (1586) ibid ii 163-164 (unseaworthiness); Welwod, op. cit. Tit. ix.

[5] Arnolde c. Anthonison (1551) Select Pleas of the Admiralty (S.S.) ii 14 (goods negligently thrown overboard); in Vawse c. Bygot (1540) ibid i 110-111 there is a statement of the general principle—"that the proprietary master or mariner of the shippe . . . ought and is bounden . . . to redeliver the same goods in portu destinato to the person that the same goods were consigned unto in as good condicion as thei were received and taken into the shippe."

[6] Ladyngton c. Hussey (1552) ibid ii 80-81.

[7] Below 263-265.

[8] Bodacar c. Block (1571) Select Pleas of the Admiralty (S.S.) ii 146—liability for non-delivery though the loss was caused by tempest and pillage; cp. ibid i 137 (1545)—a clause exempting the shipowner from liability from certain accidents; cp. Taylor c. Pennincke (1602) ibid ii 202-203—the shipowner specially undertakes all risks; Jaques c. Hulson (1545) ibid i 137—absence of negligence pleaded as a defence; cp. Welwod Tit. ix—the master is only liable for "fault, negligence or chance eschewable."

[9] Taylor c. Pennincke, *last note*.

[10] Welwod, op. cit. Tit. xviii.

[11] Ibid Tit. vii—"the master also must be answerable for that harm which the rats for want of a cat do in the ship to any merchandise."

he would not be liable. But the common law did not ground civil liability upon dolus or culpa. It grounded it upon the fact that the defendant had done some act to the damage of the plaintiff, under such circumstances that the defendant, either by his own contract or by the law, was obliged to compensate the plaintiff.[1] It followed from this principle that a bailee was not excused if the property entrusted to him was damaged by accident; and this strict rule was maintained all through this period.[2] Now a carrier is only a bailee of a particular kind. It followed therefore that a carrier, whether by land or water, was not excused merely because the goods had perished without his fault—he was not excused, for instance, if they had been stolen, in spite of the fact that he had taken all reasonable precautions against thieves.[3] The result was that different rules were applied to determine the carrier's liability according to whether the loss occurred at sea and therefore within the jurisdiction of the Admiralty, or whether it occurred within the body of a county and therefore within the jurisdiction of the common law courts.[4]

That the common law rules were felt to be too strict is clear from Coke's advice to bailees to make special contracts limiting their liability.[5] His advice was followed;[6] and both the inconveniences resulting from the strictness of the common law rules, and from the conflict between the rules of the common law and those of the civil law, were to a large extent obviated by the introduction, into charterparties and bills of lading, of clauses excluding the liability of owners and masters in certain cases.

As a general rule neither freight nor wages were due if the goods were not carried to their port of destination.[7] Of course much depended on the terms of the particular contract. But here again there was, at this period, a divergence between the rules of the common law and the rules of the civil law. As in the case of

[1] Vol. iii 375-377.

[2] Holmes, Common Law 178-180; Southcot v. Bennet (1601) 4 Co. Rep. 83b; vol. iii 344; above vol. vii 451-452.

[3] Woodlife's Case (1597) Moore 462; Holmes, op. cit. 181; Symons v. Darknoll (1628) Palmer 523, Kenrig v. Eggleston (1648) Aleyn 93, cited Holmes, op. cit. 191.

[4] This is brought out by the case of Morse v. Slue (1672) 1 Mod. 85, cited Holmes, op. cit. 192-195; in 1 Mod. 85 n. *a* it was said that, "the master could not avail himself of the rules of the civil law, by which masters are not chargeable *pro damno fatali*."

[5] Southcote's Case (1601) 4 Co. Rep. at p. 84a.

[6] A case of 1554 is the earliest case of a bill of lading in which the exception of perils of the seas occurs, Select Pleas of the Admiralty (S.S.) ii 61; as to the way in which this exception was construed in later times see Abbott, op. cit. 252 seqq.

[7] Above 253 n. 9; cp. Le Buck c. Van Voisdonck (1554) Select Pleas of the Admiralty (S.S.) ii 93—a decree for the repayment of prepaid freight when the voyage had not been performed; among the cases on the early court rolls of the Mayor's Court at pp. 192-193, there is a case in 1305, where the agreement as to the port of destination was varied by the shipper's super cargo.

liability for damage to the goods carried, so in respect to freight and wages, the common law at this period took a stricter view of the obligation of the ship than the civil law. The common law judges seem to have held that the ship earned no freight, even though part of the voyage had been performed, and even though the failure to complete it was caused by no fault of the master.[1] On the other hand, the civil law held in such a case that freight and therefore wages were due for the part of the voyage performed ;[2] and it is this more equitable principle which has prevailed.[3] Similarly Malynes repeats the rule laid down in the laws of Oleron that if the ship was wrecked, the merchant must pay freight on the goods saved.[4] He must also pay freight if the ship became disabled, and the goods were transhipped and so carried to their destination.[5] Any deviation from the proper route, unless caused by inevitable necessity, was a breach of the contract.[6]

On the other hand, the merchant who had chartered a whole ship must provide a cargo for the ship at the day appointed.[7] He was liable to pay the freight stipulated, whether or no he had filled her with cargo ;[8] and the master could refuse to deliver the goods until his freight and other charges were paid.[9] He must pay demurrage if he delayed to load the ship beyond the stipulated period ;[10] and he was liable for any damage caused to the ship by the character of the cargo with which he had loaded her.[11]

Some of the cases of this period, which relate in the colourless language of the pleader the history of the ships employed under these contracts of carriage, contain romances of the sea worthy of

[1] Bright v. Cowper (1612) 1 Brownlow 21—voyage not completed owing to capture by pirates.

[2] Malynes, op. cit. 98—" but if the ship in her voyage become unable without the master's fault . . . the master may either mend his ship or freight another. But in case the merchant agree not thereunto, then the master shall at least recover his freight so far as he hath deserved it " ; Molloy Bk. II. c. 4 § 7, after citing the case of Bright v. Cowper, says that it would have been decided differently by the civil law, see the passage cited Abbott, op. cit. 313 ; it was the rule laid down in the laws of Oleron § 4, above vol. v 122.

[3] Anon. (1701) 1 Ld. Raym. 639 ; Jones v. Hart (1700) ibid 739 ; Abbott, op. cit. 294 seqq.

[4] Op. cit. 101 ; vol. v 122.

[5] Laws of Oleron § 4, vol. v 122 ; the principle was followed by the House of Lords in Lutwidge v. Gray (1737), cited Abbott, op. cit. 298-301.

[6] Select Pleas of the Admiralty (S.S.) i xlvi ; Malynes, op. cit. 121 ; Early Mayor's Court Rolls 243.

[7] Welwod, op. cit. Tit. vii.

[8] Coke c. Fliett (1542) Select Pleas of the Admiralty (S.S.) i 115 ; Gourden c. Lovelake (1552) ibid ii 82-83.

[9] Vawse c. Bygot (1540) ibid i 110-111 ; Bell c. Bryde (1553) ibid ii 84—" whosoever receives any goods out of any ship or boat at the place of their discharge is bound first and before all to provide and pay the freight . . . due to such ship or boat to the master purser or mariners of the same, immediately after the discharge of such goods, or at least according to the contract of affreightment made and entered into."

[10] Thurstone c. More (1557) ibid ii 98-99.

[11] Ibid.

Hakluyt's pen. Perhaps the best is that related in the last of Mr. Marsden's Select Pleas.[1] A London ship was chartered for Lagos. While off Lagos it was attacked by Portuguese, captured, and the crew confined under hatches. The crew blew up the deck with gunpowder and with it their captors, and so regained possession of their ship. They then worked the crippled ship back to London with her cargo intact. It is satisfactory to learn that the court gave the ship half her freight to the use of the owners and crew.

Some Incidents of the Contract of Carriage

Under this head I shall consider certain incidents of the contract of carriage by sea, which, in this period, had already given rise to a number of legal rules.

Bottomry and Respondentia.

If a ship is in a foreign port,[2] either the owner or, in case of necessity, the master,[3] can borrow money on the security of the ship, or of ship cargo and freight. A loan thus contracted is called a loan upon "bottomry"—a Flemish term derived from the figurative use of the bottom or keel to express the whole ship.[4] Similarly the owner of the cargo, or the master in case of necessity, could borrow money on the security of the cargo laden on the ship. To such a loan the term "respondentia" is applied.[5] In both cases the lender can only recover the money lent if the ship arrives safely at her destination;[6] and, because the lender takes the risks of the voyage, the interest charged is proportionately high.[7]

The term bottomry first occurs in the records of the court of Admiralty in 1593;[8] and we have a reference to the contract of respondentia (though not under that name) in Malynes' work.[9] But both contracts were well enough known in Italy in the fourteenth century;[10] and, in their modern form, they are developments of very much older contracts. In Greek law, in Roman law under the name of *pecunia trajectitia*, and in early mediæval law, we meet with contracts of loan, under which the money lent was only repayable if the ship arrived safely.[11] But these earlier contracts differ from the later contracts of bottomry and respondentia. M. Bensa

[1] Steveins c. Savidge (1602) Select Pleas of the Admiralty (S.S.) ii 205-206.
[2] Smith, Mercantile Law (11th ed.) i 576, 577 n. *g*. [3] Above 248-249.
[4] Cargo ex Sultan (1859) Sw. Ad. at p. 510; cp. The Atlas (1827) 2 Hagg. Ad. at p. 58.
[5] Ibid. [6] Smith, Mercantile Law i 574; cp. Bl. Comm. ii 458, 459.
[7] Smith, Mercantile Law i 575; Bl. Comm. ii 459; Malynes, op. cit. 122.
[8] Select Pleas of the Admiralty (S.S.) ii 176; for earlier instances of the contract in the Admiralty records see ibid i 55 (1536), 92-93 (1541); ii 77 (1573).
[9] Op. cit. 122-123.
[10] Bensa, Histoire du Contrat d'Assurance au Moyen Âge (French tr.) 14-15.
[11] Ashburner, the Rhodian Sea Law ccxii-ccxxxiv; Welwod, op. cit. Tit. xiv.

has pointed out that the pecunia trajectitia gave the creditor no lien on the ship or cargo—indeed the borrower was not necessarily the owner of either. The creditor had only a general lien on the goods of the debtor, if this lien had been expressly conferred upon him.[1] But gradually the practice grew up of making the property subject to the risk primarily liable to pay the debt. This development was beginning to take place in Italy in the thirteenth century.[2] When it was complete, the loan on bottomry acquired its distinguishing characteristic of conferring upon the lender a lien on the ship, in addition to the power to enforce payment from the owner personally;[3] and the same consequences followed from the contract of respondentia made by the owner of the cargo, or by the master acting as his agent.[4]

A little later a further development took place, to meet the most usual case in which the loan on bottomry or at respondentia was made—the case where it was made by the master in case of necessity.[5] Here, instead of giving rise to a merely personal right, it created a real right. No personal liability was incurred: the property over which the lien is given was solely liable.[6] In some countries this species of loan on bottomry or at respondentia wholly superseded similar loans contracted by the owner of ship or cargo.[7]

Thus the contracts of bottomry and respondentia assumed their modern form, and fell apart from those contracts of loan under which money was borrowed (to be repaid on the prosperous termination of the voyage) simply on the personal credit of the borrower.[8] The former, as M. Bensa says, originate, not in the classical Roman law, but in the development of that law which

[1] Bensa, op. cit. 14—"Le prêteur ne jouissait d'aucune garantie spéciale sur les choses soumises au risque, précisement parce que rien ne démontrait qu'elles appartinssent à l'emprunteur; il n'avait que droit de gage général sur tous les biens présents ou futurs de son debiteur, et ce droit lui même résultait d'une clause de style par laquelle le debiteur autorisait le créancier à se mettre de lui même en possession des biens et à les vendre sans intervention de justice."

[2] "Peu a peu à l'obligation générale du patrimonie se substitua l'obligation speciale de l'objet soumis au risque, et le contrat . . . créa un droit réel . . . Cette manière de contracter entrée en usage au trezième siècle, se maintint pendant les siècles suivants avec des changements peu importants," ibid; cp. Ashburner, op. cit. ccxxix-ccxxxi, for instances of documents in which there is a special pledge of the ship, or of specified goods, or of all the borrower's goods.

[3] Park, Marine Insurances (1st ed.) 469.

[4] Ibid; Bensa, op. cit. 14-15.

[5] Ibid.

[6] Abbott, Merchant Shipping (14th ed.) 209; Stainbank v. Fenning (1851) 11 C.B. 51.

[7] Bensa, op. cit. 15-16—this happened at Barcelona; "Les ordonnances de 1345 y prescrivirent que le *prestamo a riesgo de mar* revêtit la forme d'un acte public où interviendraient la capitaine et l'écrivain du navire pour déclarer tous deux, sous la foi du serment, que les sommes empruntées à la grosse aventure l'étaient réellement par suite de nécessités urgentes . . . toutes circomstances qui devaient être spécifiés dans le contrat."

[8] Park, op. cit. 469, 470.

took place in the commercial cities of Italy in the Middle Ages.[1]

We have seen that in all these varieties of contract the lender took the risks of the voyage; but only the risks of the voyage. "Therefore if the money miscarry either before the voyage begun or after the term appointed for the full loan, then the peril pertains to the borrower thereof and not to the lender."[2] Similarly, if the money were lost by the negligence of the borrower, he must repay it.[3] The records of the court of Admiralty show that at this period some of these principles, applicable to loans on the personal credit of the borrower, were applied also to loans on bottomry. In the case of *Austen c. Cattelyn* (1541)[4] it was contended that money borrowed by the master for the use of the ship was repayable, although the ship had been lost, because (as the lenders alleged) she was unseaworthy from the start, and the master, having discharged the greater part of the cargo, had deliberately cast away the ship with the rest of the cargo, in order to avoid payment of the loan.

We shall see that these contracts are important in the history of the development of the contract of marine insurance.[5] As late as this period the contracts of respondentia and insurance were sometimes combined in one transaction;[6] and the connection between them has always been intimate and obvious.[7] As Park says, "the lender on bottomry or at respondentia runs almost all the same risks, with respect to the property, on which the loan is made, that the insurer does with respect to the effects insured."[8]

Average.

We have seen that the laws of Oleron provided that when a jettison was made to save the ship, the ship and cargo, if saved, must contribute to the loss. We have seen, too, that the rules laid down in these laws were modified by an ordinance of Edward I.,

[1] As M. Bensa has shown, op. cit. 11-13, the distinguishing feature of these contracts, and their essential novelty, have been obscured by the speculations of the jurists of the fifteenth and sixteenth centuries and later, who were intent upon proving that they were the same as the pecunia trajectitia of Roman Law, and that they were not usurious; as M. Bensa says, at p. 11, these contracts in their modern form have their roots in the commercial customs of the Middle Ages; it may be noted that they are confused by Malynes, op. cit. 122; but not by Welwod, Tit. xiv, who in that title only deals with "money lent to sea called *Nauticum Foenus*."

[2] Welwod, op. cit. Tit. xiv. [3] Ibid.

[4] Select Pleas of the Admiralty (S.S.) i 106-110.

[5] Below 277. [6] Malynes, op. cit. 122-123.

[7] Thus in Joy v. Kent (1665) Hardres 418, to an action on a bottomry bond, it was pleaded that the rate of interest was usurious; Hale, C.B., held that the usury laws could not apply; he said, "this is the common way of insurance, and if this was void by the statute of usury trade would be destroyed"; as we shall see, below 275, the extra rate of interest is in the nature of a premium paid to the lender for the risk he runs.

[8] Park, Marine Insurances (1st ed.) 473.

which provided that the ship should lose the freight on the goods jettisoned, but should not contribute to such a loss.[1] During this period the question what losses should be considered to be general average losses, and what property was liable to contribute to such losses, was worked out in some detail.[2]

The principle of the law is contained in the Digest. "It is provided by the Rhodian law that if merchandize is thrown overboard to lighten the ship, the loss occasioned for the benefit of all must be made good by all."[3] It was necessary that the goods should be deliberately cast away to ensure the safety of the rest; and so the accidental destruction of part of the ship's gear in a storm gave rise to no such claim,[4] since it was not deliberately destroyed to save the ship.[5] The writers of this period repeat the older rules as to the necessity for a previous consultation before a jettison was made;[6] and these rules lived on in some continental codes.[7] As Abbott pointed out, they were not very useful for the purpose for which they were invented, i.e. to secure that a jettison should only be made in a case of real danger;[8] and they have long ceased to be rules of English law.[9]

The case of jettison was the earliest case in which a general average contribution could be demanded. But the principle was easily extended to other cases where ship or cargo had suffered for the good of all. Thus Welwod enumerates the cases of money paid to redeem the ship or goods from a pirate;[10] damage occasioned to the goods and the ship by reason of a jettison;[11] goods lost in consequence of their being unladen into a lighter, for the purpose of enabling the ship to take refuge in harbour, in order to avoid some danger, or to repair;[12] and collision, where neither

[1] Vol. v 123, 124.

[2] Welwod, op. cit. Tits. xvii-xxi; Malynes, op. cit. 109-114; Ridley, A view of the Civil and Ecclesiastical Law 121-124.

[3] Dig. 14. 2. 1.—"Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est."

[4] Welwod, op. cit. Tit. xvii.

[5] Dig. 14. 2. 2. 1—"si conservatis mercibus deterior facta sit navis aut si quid exarmaverit, nulla facienda est collatio, quia dissimilis earum rerum causa sit, quæ navis gratia parentur et earum, pro quibus mercedem aliquis acceperit: nam et si faber incudem aut malleum fregerit, non imputaretur ei qui locaverit opus. Sed si voluntate vectorum vel propter aliquem metum id detrimentum factum sit, hoc ipsum sarciri oportet."

[6] Welwod, op. cit. Tit. xvii; Malynes, op. cit. 113; vol. v 123.

[7] Abbott, op. cit. 329, 330.

[8] "Emerigon, tom. i p. 605, cites an observation of Targa, who says, that during *sixty* years, in which he had been a magistrate at Genoa, conversant with this subject, he had known only *five* instances of regular jettison, all of which were suspected of fraud, because the forms had been too well observed," Abbott, op. cit. 330 n. *g*.

[9] It may be doubted whether they were part of English law at this period; in the case of Whitefeld c. Garrarde (1540) Select Pleas of the Admiralty (S.S.) i 95 no mention is made in the pleading of any preliminary consultation; cp. Mouse's Case (1609) 12 Co. Rep. 63.

[10] Tit. xviii. [11] Tit. xiv [12] Tit. xv

ship was in fault.[1] It was held also in 1575 that, where some part of a cargo of clothes had been taken by the king of Denmark for toll, contribution must be made by the merchants whose clothes had not been taken.[2] But it was laid down by the House of Lords in 1698, in the case of *Sheppard v. Wright*,[3] that no case for a general average contribution arose, unless it was the loss of the goods which perished which contributed to the saving of the goods which were preserved. So that where a ship was pursued by enemies into a harbour, and there unloaded part of her cargo, and then some days after the ship with the cargo left on board was captured, the cargo unloaded was not liable to contribute to the loss.

At this period it was settled that in case of a loss necessary to the preservation of ship and goods, both ship and goods contributed.[4] In later law the freight also contributed;[5] but it is not clear that this was the rule at this period. Clothes, the personal effects of passengers, and provisions, did not contribute.[6] But jewels, articles of clothing, and other things carried as cargo and paying freight, were liable to contribute.[7] At this period, the goods lost were reckoned at their cost price if the loss occurred before the middle of the voyage; but at their market price at the port of destination, if the loss occurred after the middle of the voyage.[8] But later English lawyers evolved a more logical rule. If the ship gets to its port of destination the value is taken as at that place, on the logical ground that "the person whose loss has procured the arrival of the ship at the place of destination should be placed in the same situation with those whose property has arrived at that place; which can only be done by considering *his* goods as having arrived there also." On the other hand, if the ship is compelled to return to the port from whence it started, the goods only contribute according to the cost price.[9]

At this period the master could, as under the laws of Oleron, retain the cargo till the merchants liable had paid their share of the contribution.[10]

[1] Tit. xx; cp. Select Pleas of the Admiralty (S.S.) ii lxxxiv; below 266.

[2] The Elizabeth, Select Pleas of the Admiralty (S.S.) ii 39, 40.

[3] Shower P.C. 18; cp. House of Lords MSS. iii no. 1268; and this it seems was in accordance with the civil law as applied in the sixteenth century, Hicks v. Palington (1590) Moore, K.B., 297.

[4] Welwod, Tit. xvii. [5] Abbott, op. cit. 345.

[6] Welwod, op. cit. Tit. xvii; the civil law rule was otherwise as to clothes and articles of personal adornment, Dig. 14. 2. 2. 2.

[7] Welwod, op. cit. Tit. xvii. [8] Ibid Tit. xxi. [9] Abbott, op. cit. 347.

[10] Welwod, op. cit. Tit. xxi—"The imposed taxation, as likewise the freight, is thought to stick firmly to the said goods; and therefore the master may hold his hand thereon, until satisfaction be made, albeit that commonly the withholding of other men's goods be not allowed"; vol. v 123.

Collision.

We have seen that the rules as to collisions by sea contained in the laws of Oleron were both scanty and primitive.[1] If one ship intentionally collided with another ship at anchor, or, it would seem, while under sail, the master of the former ship and the merchants were liable to pay the whole of the damage; but if the collision occurred by accident or by negligence the loss was divided between the two vessels and their cargoes.[2]

In 1815, in the case of the *Woodrop Sims*,[3] the law as to the incidence of liability for collision at sea was summed up by Lord Stowell in four rules:—(1) If the collision was due to the fault of neither vessel—if it was, in other words, a pure accident—no legal liability is imposed on the owners of either vessel; (2) if the collision was due to the fault of both vessels, the loss must be apportioned equally[4] between the vessels; (3) if the collision is due to the fault of the ship injured no legal liability arises; (4) if the collision is due to the fault of the ship which has injured the other, the injured ship can recover full damages. It was towards the end of this period that the development of the law was beginning which resulted in these rules. But it was only just beginning, as all through the sixteenth century collision cases were very rare.[5] At this period we can only indicate some of the remote causes which shaped the law as we know it to-day.

We have seen that the rules laid down by the laws of Oleron date from a period when the law, not yet having attained to the conception of negligence, could not found liability upon it.[6] But the civilians who practised in the Admiralty naturally founded liability upon dolus or culpa. Therefore it became necessary both

[1] Vol. v 122-123.

[2] Laws of Oleron § 15, Black Book of the Admiralty (R.S.) i 109; Early Mayor's Court Rolls 223 and n. 1, from which these rules seem to have been accepted in 1305.

[3] (1815) 2 Dod. at p. 85—"there are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as when the loss is occasioned by a storm or any other *vis major*: in that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise when both parties are to blame; when there has been a want of due diligence or of skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party; and then the rule is, that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other."

[4] Hay v. Le Neve (1824) 2 Shaw Sc. App. 395; cp. Stoomvaart Maatschappy Nederland v. the P. and O. Steam Navigation Company (1882) 7 A.C. at pp. 818-819 *per* Lord Blackburn; this rule lasted till 1911; The Maritime Conventions Act of that year (1, 2 George V. c. 57 § 1, 1) provides that where both vessels are in fault the liability shall be "in proportion to the degree in which each vessel was in fault"; it is only if it is impossible to establish different degrees of fault that the liability is apportioned equally. § 1, 1 *a*.

[5] Select Pleas of the Admiralty (S.S.) ii lxxxiii.

[6] Vol. v. 122.

to reconsider and to supplement the rules contained in the laws of Oleron. But the rarity of cases in the sixteenth century prevented very much development. All the cases decided seem to be cases in which either the defendant or the plaintiff is clearly in fault.[1] There could therefore be either a clear condemnation or a clear acquittal. There is only one case in which a negligent master was made liable to pay half damages;[2] and there were no cases in which neither or both the ships were to blame. Welwod's treatment of the subject illustrates the scantiness of the law.[3] He lays it down that, if a collision occur through the fault of neither party, both must contribute to the loss.[4] This view of the law seems to have been acted on at least once in the seventeenth century;[5] and it passed into the maritime law of some foreign states.[6] But Welwod goes on to say that this rule will not apply if one of the ships perish, assigning the reason given by the laws of Oleron.[7] On the other hand, he points out that a negligent master may be answerable to the owner of his own or of the other ship by the actio legis Aquiliæ. The liability which he contemplates seems to have been the liability of the master. This is in accordance with the view that the owner is not liable for the master's negligence;[8] and may perhaps partially account for the paucity of cases on the subject. In many cases the master would not be worth powder and shot.

In the seventeenth century cases of collision are more frequent.[9] Was it because the lawyers were coming to the conclusion that the *exercitor*, or managing owner of the ship, could be held liable for the negligence of the master?[10] Whatever the reason, it was clear that a number of new problems awaited the judges of the court of

[1] The plaintiff recovers in the following cases:—(1538) Spysall c. Walters, Select Pleas of the Admiralty (S.S.) i 70-71; (1539) Gyllet c. Style, ibid 83; (1544) Cocke c. Camp, ibid 133-135; (1546) Lorde c. Butter ibid 143-145; (1547) Darcy c. Legg, ibid ii 6, 7; the defendant got judgment in the case of Daniell c. Nokes (1587) ibid ii 167-168, on the ground that the collision was due to the plaintiff's fault.

[2] (1539) Handcocke c. Payne, Select Pleas of the Admiralty (S.S.) i 90—a case settled by arbitration.

[3] Op. cit. Tit. xx.

[4] "If two ships rush and cross one over another, and the company swear their innocence, as that it lay not in their power to stay the same, contribution must be made for one equal upset of both their losses"; it should be noted that Tit. xx, in which he deals with collision, is entitled "Of contribution for lightening and disburdening of ships for their easier entry to the port, and for other chances"; cp. Godolphin, Admiralty Jurisdiction, Introd.

[5] Select Pleas of the Admiralty (S.S.) ii lxxxiv—a case of 1647.

[6] Abbott, op. cit. 342—as he says, in England in such a case, the owners of ship and cargo bear their own loss; such a misfortune was a peril of the sea; and in this English law agrees with the classical Roman Law, Dig. 9. 2. 29. 3.

[7] Vol. v 122 n. 10.

[8] Above 252.

[9] Select Pleas of the Admiralty (S.S.) ii lxxxiii.

[10] Above 252 nn. 6 and 7.

Admiralty. If the injured vessel or the injuring vessel was alone to blame the law was plain enough. But what was to happen if neither was to blame, or if both were to blame, or if the cause of the collision was not clearly ascertainable? In all these cases the court seems to have gone on the principle of dividing the loss between the two ships;[1] and Mr. Marsden points out that at this period the Dutch lawyers were also beginning to follow a similar rule.[2] The final settlement of the sphere of this rule—this judicium rusticum as it has sometimes been derisively called—belongs to the eighteenth and early nineteenth century.

We have seen that the Admiralty lawyers, being civilians, naturally grounded liability upon dolus or culpa; and the logical consequence of this conception is the modern application of the rule of the division of loss to the case where both ships are at fault. When the common law came to found civil liability upon negligence or wrongful intent,[3] the principles which it applied to the cases of collision which fell within its jurisdiction,[4] did not materially differ from the principles applied by the court of Admiralty as laid down in the *Woodrop Sims*.[5] The one great difference was between the common law rule of contributory negligence, and the Admiralty rule as to division of loss.[6] And, whatever may be the comparative merits of these two opposing rules from the point of view of practical utility,[7] it can hardly be denied that, if liability for wrong is to be founded upon dolus or culpa, the Admiralty rule is the more logical of the two.[8] The

[1] Select Pleas of the Admiralty (S.S.) ii lxxxiii-lxxxv; Marsden, Collisions at Sea, note to Chap. vi.

[2] Select Pleas of the Admiralty (S.S.) ii lxxxv, citing Neostadius who says, "curia, cum de culpa authore non constat, vel quod utrobique culpa par erat, damnun commune ad utrumque spectare censuit, condemnavitque reum ut damni semissem præstaret, sententiæ executione in ipsam navem dirigenda mercesque sequestratas."

[3] Below 447-459.

[4] The common law courts had exclusive jurisdiction over claims for damage suffered or committed by a ship within the body of a county; and the court of Admiralty was given a concurrent jurisdiction by 3, 4 Victoria c. 65 § 6, and 24 Victoria c. 10 § 7.

[5] Cayzer v. Carron Company (1884) 9 A.C. at pp. 880-881 *per* Lord Blackburn.

[6] The Judicature Act 1873, 36, 37 Victoria c. 66 § 25. 9 enacted that, for the future, the Admiralty rule was to prevail in all cases of collision between two ships.

[7] See Marsden, Collisions at Sea 122, for a discussion of this question—as he says, the Admiralty rule "prevents the innocent owner of cargo on board either ship from recovering from the wrong-doing owner of either ship more than half his loss: and it works in a very arbitrary and uncertain manner when combined with the statutory limitation of liability."

[8] In The Bernina (2) (1887) 12 P.D. at p. 89 Lindley, L.J., points out that, in a case where the damage has been suffered by the combined negligence of the plaintiff and defendant, the Admiralty rule as to the apportionment of damages is the more logical; cp. L. R. Scott, Collisions at Sea where both Ships are in Fault, L.Q.R. xiii at p. 20—"The Admiralty rule is really an advance upon the common law rule in the direction of apportionment according to blame"; we may regard the rule laid down in the Maritime Conventions Act 1911, above 266 n. 4, as a still further advance in the same direction.

common law rule is, as we have seen,[1] the logical result of the mediæval principle of founding civil liability, not upon negligence, but upon an act which causes damage—if the act which was the immediate cause of the damage was that of the plaintiff he cannot recover. The common law rule dates from a period before the idea of negligence, as one of the foundations of civil liability, had been acclimatized in the common law; and though it may have its merits as a rule of practical utility, neither its name nor its contents altogether harmonize with modern foundations upon which civil liability is now usually based.

Salvage.

That those who rescued persons or property from the perils of the sea should be rewarded, is a principle recognized from the earliest times.[2] But right down to this period the rules of law on this subject are scanty, and, to a large extent, turn upon the character of the cases in which the claims arose.[3] In the case of goods wrecked or derelict, early statutes provided that, if man or beast escaped, the owner should have them, if he claimed within a year and a day.[4] Such goods, if unclaimed, belonged to the crown, and later to the Admiral, as Admiralty droits, unless the privilege of taking them had been granted as a franchise to an individual or a corporation.[5] But those who had salved them were entitled to a reward,[6] the amount of which seems to have been quite uncertain, though it was usually considered that the salvor should have half.[7] In the case of goods recaptured from the enemy the amount to be awarded was in the discretion of the court.[8] In the case of a ship in distress, which was not technically a wreck, the reward of the salvors seems to have been treated sometimes as depending upon the bargain made,[9] sometimes as a matter to be determined by the court.[10] The law was therefore in a confused state. It is clear

[1] Vol. iii 378-379, 382; below 459-462.
[2] Vol. v 85.
[3] Select Pleas of the Admiralty (S.S.) ii xxxii-xxxix.
[4] 3 Edward I. c. 14; 4 Edward I. c. 14.
[5] On the whole subject of the early law of wreck see Select Pleas of the Admiralty (S.S.) ii xxxix-xli; vol. i 560-561.
[6] 27 Edward III. st. 2 c. 13—goods which cannot be called wreck are to be restored to their owners, who are to pay those who have salved them the amount assessed by sheriffs or other local officials with the advice and consent of four or six "dez meillours et plus suffisauntes prodehomes du pays."
[7] In 1333 half was alleged to be due by custom, Select Pleas of the Admiralty (S.S.) i. xxvi; in a writ to the justices in 1377 to try a case of wreck, there is a direction that a proper reward be paid to the salvors, ibid i xliv; in Henry VIII.'s reign half was awarded to the salvors of a ship, ibid i lxx; in Maye c. Hawkyns (1573) ibid ii 149 there is a decree for £938 out of a total value of £1150.
[8] Saunderson c. Richardson (1546-1547) ibid i 146-148; Richardson c. Saunderson (1553) ibid ii 87-88; in the latter case there is an allegation that by law only £5 was due in such cases; but the court evidently did not consider that this was the law.
[9] Ibid ii xxxiii; Horne c. Delapyn (1538-1539) ibid i 66-67.
[10] Maye c. Hawkyns (1573) ibid ii 149.

that the amount which could be fairly claimed must to a large extent depend upon the circumstances of the particular case. Therefore, in the course of the seventeenth century, the practice grew up of allowing the court in all cases to assess the amount due, upon proper proceedings being instituted for this purpose. The first case in which this occurred was in 1633.[1] It was a case in which proceedings had been taken to have a ship condemned as a wreck. "The owners and salvors intervened 'pro eorum interesse,' and the salvors claimed a moiety of the property, 'or a verie good and sufficient reward,' as due to them by custom. This was the common form of a salvage action throughout the seventeenth and eighteenth centuries." If the salvage service were performed on land the common law courts prevented the court of Admiralty from assuming jurisdiction. But they applied a similar rule. The salvor could retain possession of the goods until a proper compensation was made; and, if the parties could not agree to the amount, a jury could assess it on proper proceedings being taken.[2]

The Maritime Lien.

At the present day many of the incidents of the contract of carriage by sea result in the creation of a maritime lien. The maritime lien has been defined as "a privileged claim upon a thing in respect of service done to it or injury caused by it, to be carried into effect by legal process."[3] Thus it is "a right acquired by one over a thing belonging to another—a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner, either directly, or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always coexists with a right against the res. The right against the res may be conferred on such terms, or in such circumstances, that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry."[4] The chief cases in which a maritime lien arises at the present day are the cases of bottomry, salvage, wages, masters' wages disbursements and liabilities,[5] and damage. Thus it appears that at the present day

[1] Select Pleas of the Admiralty (S.S.) ii xxxvi-xxxvii.
[2] Abbott, op. cit. 383-384.
[3] The Ripon City [1897] P. at pp. 241-242 *per* Gorell Barnes, J.
[4] Ibid at pp. 242-243.
[5] The lien for masters' wages disbursements and liabilities was given by 57, 58 Victoria c. 60 § 167, 1 and 2.

a maritime lien can arise either ex contractu or quasi ex contractu or ex delicto.

These maritime liens differ wholly from common law liens, because they are not dependent upon the continued possession by the lienor of the property subject to the lien;[1] and they differ also in some respects from equitable liens.[2] The question arises, How did they originate? On this question different theories have been advanced; and probably different theories may be true in respect of the very different kinds of maritime lien recognized by modern law. It is clear, at any rate, that we must, in discussing this question, distinguish between the liens which arise from contract or quasi contract, and those which arise from delict.

We must probably look to an application of the Roman law of hypothec for the origins of the contractual or quasi contractual liens.[3] The civil law recognized that a person who repaired or fitted out a ship was a privileged creditor;[4] and from this it is no long step to take to say that such a person had a tacit hypothec on the property fitted out or repaired. Probably also this development was helped forward by the ordinary form of Admiralty process, under which the ship was arrested. But of this I shall speak a little later.[5] At any rate, in the sixteenth century, we find such a lien existing by express agreement in the case of bottomry,[6] and by implication of law in the case of non-payment of money due for repairs,[7] and perhaps in the case of non-payment of wages;[8] and in the seventeenth century a similar lien was recognized in the case of salvage services.[9]

It is not probable that the lien which arises from damage (such as collision) arose from an adaptation of the principle of hypothec. In some continental laws, it is true, it may have had this origin.[10]

[1] "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor require possession. This was well understood in the civil law, by which there might be a pledge with possession and a hypothecation without possession, and by which in certain cases the right travelled with the thing into whosoever possession it came," The Bold Buccleugh (1850-1851) 7 Moo. P.C. at p. 284; vol. vii 511-513.

[2] Ibid 513.

[3] Gorell Barnes, J., in the Ripon City [1897] P. at p. 239, seems to favour this view.

[4] Dig. 42. 5. 26—"qui in navem exstruendam vel instruendam credidit vel etiam emendam, privilegium habet"; see also ibid 42. 5. 34; and 20. 4. 5.

[5] Below 272. [6] Above 262. [7] Above n. 4, 262.

[8] In the sixteenth century there appears to be very little evidence of a maritime lien for wages, see e.g. Tye c. Sprynghan (1561) Select Pleas of the Admiralty (S.S.) ii 122-123—a personal action; cp. ibid 131-132 in a suit of 1565, against a ship and the owner, it appears the ship was arrested because the mariners were unable otherwise to recover their wages from the owner; in 1597, ibid ii lxxiv (no. 69), there is a decree against the ship for wages, necessaries, debts, and bottomry.

[9] Ibid ii xxxvi-xxxvii. [10] See Abbott, op. cit. (14th ed.) 1011 n. *b*.

But we do not find this development in English law. Two very different views have been put forward on this matter. Mr. Justice Holmes regards it as a surviving form of noxal liability, which must be attributed to the same set of legal ideas as those in which the deodand originated.[1] But there are several objections to this view. In the first place, very slight traces of the existence of such a lien appear in the early records[2]—in fact its existence was not finally established till 1850-1851.[3] But if we are to seek its origin in these primitive notions as to noxal liability, it is precisely in the early records that we should expect to find it prominent. In the second place, it is not very likely that primitive ideas of this kind would be found in a court, the law and practice of which were moulded on the civil law. In the third place, it was an idea which ran counter to the older opinion that the owner was not liable for the torts of the master and crew.[4] Even as late as 1802 it was argued that the "torts of the master cannot be supposed to hypothecate the ship, nor to produce any lien on it."[5] On these grounds the rival view put forward by Mr. Marsden seems to be preferable. His view is that this lien arose from an inference drawn from the Admiralty process of arresting the ship in order to compel payment.[6] But it may be said, if this is so, we might expect this lien to have arisen very much earlier than it actually appears. The answer to this objection appears to be as follows:—In the seventeenth and eighteenth centuries the common law courts prevented the court of Admiralty from excercising jurisdiction over individuals personally; but they did not prevent the court from exercising its jurisdiction over a thing hypothecated or subject to a lien.[7] In this period the court claimed to exercise both these kinds of jurisdiction. As often as not the arrest of the res was mere process to compel appearance—alternative to an arrest of the person.[8] But when the court was prohibited from exercising this personal jurisdiction, the actio in

[1] The Common Law 25-27.

[2] Marsden, Collisions at Sea (6th ed.) 70-71; one such case is to be found in Anon. (1661) 1 Keble 44.

[3] The Bold Buccleugh (1850-1851) 7 Moo. P.C. 267; cp. The Ripon City [1897] P. at p. 241; The Veritas [1901] P. at p. 310.

[4] Above 252.

[5] Browne, Civil Law (2nd ed.) ii 140 cited by Gorell Barnes, J., in The Veritas [1901] P. at p. 310.

[6] Collisions at Sea 70-71—"there are to be found in the books cases which give some countenance to the doctrine that in Admiralty the ship is the real defendant; that the ship is sued because it is she that has done the wrong, and she that pays the recompence. But it is submitted that this view of the liability of the ship in Admiralty is not well founded. . . . The process of Admiralty courts against the ship seems clearly to have originated, not in any such idea as that involved in the law of deodand, or in the noxal action of the civil law, but simply as a ready and effectual means of compelling the wrongdoer to appear and defend the action or to make recompence."

[7] The Dictator [1892] P. at pp. 310-311 *per* Jeune, J. [8] Ibid 311-313.

rem, founded on the arrest of a res, came into greater prominence.[1] By an inversion of cause and effect not uncommon in legal history, it came to be thought that, whenever a res could be arrested in order that a claim might be asserted against its owner, a lien over that res existed. This seems to have been the line of reasoning used by the court in the case of *The Bold Buccleugh*, which finally established the existence of this lien.[2]

At this period, therefore, the modern law as to maritime liens is still very remote. We see one root of it in the liens which arise by contract express or implied. But the other root—the prominence given to the Admiralty jurisdiction in rem by the prohibition of its personal jurisdiction, and the inference drawn from that prominence—are as yet in the future.

III

INSURANCE

In modern law insurance would not form merely a section of a chapter on the Law Merchant. The contract to which we look to save us harmless not only from the risks incident to life itself, but also from the risks incident to the various business and social activities of life in a civilized society, and to the obligations which a paternal government places upon the most deserving of its subjects, would certainly demand and deserve a chapter to itself. On the other hand, if we look at insurance only from the point of view of its origins, we should not give it even a section to itself, but should class it simply as one of the topics of maritime law. I shall adopt neither of these methods. Remembering the important place which this contract was beginning to fill even in this period, I shall treat it as a separate topic; and, remembering that we must look for its origins, and for the earliest and most important sphere of its application to maritime law, I shall treat it as a topic which belongs peculiarly to the Law Merchant. In this section I shall deal, firstly, with the origins of the contract of marine insurance; secondly, with the beginnings of the development of this form of insurance in English Law; and, thirdly, with the origins of other forms of insurance.

[1] The Dictator [1892] P. at p. 313 *per* Jeune, J.

[2] "A maritime lien is the foundation of the proceeding in rem . . . and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, then a maritime lien exists," 7 Moo., P.C., at p. 284; as Gorell Barnes, J., points out in The Veritas [1901] P. at p. 310 this reasoning is not strictly true, as there may be rights to proceed in rem though no maritime lien exists.

The Origin of the Contract of Marine Insurance

Insurance has been defined [1] as a contract by which one party (the insurer) in consideration of a premium, undertakes to indemnify another (the insured) against loss. The researches of M. Bensa [2] have proved that the earliest variety of this contract was the contract of marine insurance; that as a separate and independent contract it dates from the early years of the fourteenth century; and that it was evolved, like many other of our modern mercantile institutions, in the commercial cities of Italy.[3] As M. Lefort has said, this contract was not devised by a legislator. It was the last term in the evolution of various legal devices invented to provide against the risks of the sea;[4] and though there is no evidence of the existence of an independent contract of insurance before the beginning of the fourteenth century, we can see in these various devices the germs from which this contract was evolved. And, even when in practice it had come to be recognized as a distinct species of contract, it still continued to be disguised under the forms of a sale, an exchange, or a maritime loan, in order to prevent any question whether it was illegal on the ground that it infringed the laws against usury.[5]

Among both the Greeks and the Romans we meet with stipulations, accessory to the contract of carriage, which settled the incidence of the risk of loss of, or damage to, the goods carried.[6] For instance, either the carrier[7] or the consignee[8] might guarantee

[1] Smith, Mercantile Law (11th ed.) 451.

[2] "Il contrato di assicurazione nel medio evo; studi e ricerche (1894)"; I cite from the French translation, Histoire du Contrat d'Assurance au Moyen Âge, traduit par Valéry, Introduction par Lefort (1897); Vance, Insurance Law, Essays in Anglo-American Legal Hist. iii 104-108, gives some account of M. Bensa's conclusions.

[3] Bensa, op. cit. 18-24.

[4] "Le contrat d'assurance maritime n'est pas dû au génie d'un legislateur; c'est le dernier terme d'une série d'évolutions par lesquelles s'est manifestée l'idée de prévoyance dans la lutte contre les fortunes de mer, lutte qui devait être d'autant plus vive que de jour en jour augmentait l'importance des vies et des intérêts confiés aux caprices des flots," op. cit. Introd. vi.

[5] Petrus Santerna, De Assecurationibus Pt. I. §§ 4-6 (Tractatus Universi Juris vi Pt. I. 348b), cites and refutes various authors who had held insurance contracts void on this ground; as he says, § 6, "susceptio periculi simpliciter non facit conventionem illicitam nisi alias sic illicita"; and he argues, §§ 10-16, that even a loan of money to X, who pays a premium to the lender to insure it, is not usury.

[6] For some account of these arrangements see Vance, op. cit. 99-103; Lefort, op. cit. vii; Ashburner, The Rhodian Sea Law, ccxii-ccxxi, gives the fullest account of the maritime loans at Greece and Rome, which are the direct ancestors of the insurance contract.

[7] Thus Cicero states, Epist. ad Fam. II. Epist. 17 (cited Vance, op. cit. 99) that the government should not bear the risks of the transportation of certain public money from Laodicea—"Laodiceæ me prædes accepturum arbitror omnis pecuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ periculo."

[8] Suetonius states that Claudius assumed the risks of corn transported to Rome, Life of Claudius V. c. 18 (cited Vance, op. cit. 99)—"Nam et negotiatoribus certa lucra proposuit, suscepto in se damno si cui quid per tempestates accidisset."

the safe arrival of the goods carried. The maritime loan—*pecunia trajectitia*—can be analysed into a contract of *mutuum* with a contract of insurance added to it[1]; for the higher interest paid by the borrower represented a premium, in consideration of which he was not liable to pay if the ship were lost. Then again we meet, in the earlier mediæval period, mutual associations formed to guard against certain risks of the sea, as for instance against the risks which arose from the issue of letters of marque, or from the practice of reprisals;[2] and at Genoa there was established an institution—the Officium Robarie—to give redress against Genoese citizens who had committed acts of piracy against any trader, which really gave a sort of state insurance against this particular risk.[3]

More immediately connected with the development of the contract of insurance were the stipulations as to risk, introduced into the ordinary commercial contracts of the thirteenth century. Indeed, M. Valery thinks that, in the thirteenth century, some of these contracts, e.g. contracts of sale or loan, were never intended to be sales or loans, but insurances.[4] Thus in the contract of "*commenda*," under which A advances money or other property to B to trade with, there is usually a stipulation as to the party on whom the risk of accidental loss is to fall.[5] In the contract of *mutuum* it is probable that, though it evaded the canonical prohibition of usury by calling itself *mutuum* "*gratis et amore*,"[6] the lender often paid over the money advanced with a deduction, in consideration that nothing should be payable if the money were lost by accident; and such a deduction is, as M. Bensa has said, a true premium of insurance.[7] Similarly, contracts of sale or exchange (*cambium*) were used to disguise transactions intended to operate as loans at sufficient interest to compensate the lender,

[1] Above 261; Lefort, op. cit. vii; cp. Ashburner, op. cit. ccxvi, ccxvii; Dig. 22. 2. 1. thus defines *pecunia trajectitia*—"trajectitia ea pecunia est quae trans mare vehitur . . . Sed videndum an merces ex ea pecunia comparatæ in ea causa habentur? et interest, utrum etiam ipsæ periculo creditoris navigent: tunc enim trajectitia pecunia fit."

[2] Lefort, op. cit. vii n. 4. [3] Ibid 3.

[4] Contrats d'Assurance Maritime du XIIIe Siècle (1916), in which he analyses certain documents printed by Blancard, Documents inédits sur le commerce de Marseille.

[5] Bensa, op. cit. 2—"les clauses relatives aux risques figurent de très bonne heure dans les contrats de commande, car on conçoit aisément l'intérêt du commandité à s'affranchir de toute responsabilité à raison des cas fortuits dont pouvaient avoir à souffrir les marchandises qui lui étaient confiées"; for this contract see above 195-197.

[6] Bensa, op. cit. 3.

[7] Ibid 3, 4—he conjectures that "les intérêts étaient prélevés dès le moment de la formation du contrat sur la somme prêtée, exactement comme cela se pratique encore aujourdhui pour l'escompte des effets de commerce. S'il était possible de démontrer la vérité de cette conjecture, il faudrait voir dans cette retenue operée au profit du prêteur, le payement d'une prime d'assurance en retour de laquelle il assumait les risques du prêt."

both for the use of his money, and for the provision that nothing was to be payable if the money were accidentally lost.[1] The form of a contract of sale was adapted to this purpose as follows: "Instead of B buying goods with money lent by A, A buys the goods himself and sells them to B, and the price which B agrees to pay will be (*a*) payable at a future date; (*b*) contingent upon the safe arrival at the place of payment, either of the original goods or the goods into which they have been converted; and (*c*) sufficient to meet the sum paid by A with maritime interest. Similarly in the case of exchange, B received coins from A on the terms of paying different coins (which would be of a different value) at another time or place; and according as the coins were at the risk of the borrower or lender, the value of the coins to be returned would differ.[2] The difference between the rates of exchange, according as the money was repayable in any event, or only on the prosperous termination of the voyage, represents again a premium of insurance.[3] As M. Bensa has said,[4] it is only necessary to split up such arrangements into their component parts in order to arrive at the idea of an independent contract of insurance. "It would only be necessary for a third person to intervene between a purchaser who intended to purchase goods arrived safely, and a vendor who wished to throw on the purchaser the risks of the sea, and to offer to take these risks for the sum which the course of trade and the rate of exchange had fixed as the difference in the price, according as one or other party took these risks."[5]

In 1347 we have in the archives of Genoa what is perhaps the oldest contract of insurance; and the archives of Florence show that, in the first twenty years of the fourteenth century, it was an ordinary commercial transaction in the commercial towns of Italy.[6] But, as we have seen, the contracts in which the market value of the element of risk had been thus worked out were chiefly contracts of maritime loan, and all were concerned with the risks incurred in transport—generally by sea.[7] It is not surprising,

[1] Bensa, op. cit. 3 n. 2, tells us that in the notarial acts at Genoa we find the expressions, *nomine accomendationis*, *nomine venditionis et puri cambii*, *mutuo gratis et amore*, used quite indifferently.

[2] Ashburner, op. cit. ccxxv; Bensa, op. cit. 9.

[3] Ibid 9, tells us that there are, "innombrables exemples de contrats de change accompagnés de l'une des deux clauses, 'rendu sauf à terre,' ou 'aux risques de mer.' Dans la *Pratica della Mercatura* de Pegolotti p. 200, on voit que, selon qu'une lettre de change tirée de Florence sur l'Angleterre renfermait l'une ou l'autre de ces clauses, le banquier percevait une commission de 10 sous, ou bien seulement de 20 petit sous par 100 marcs. La difference de ses deux taux montre que, dans le premier cas, on payait une véritable prime d'assurance."

[4] Bensa, op. cit. 10. [5] Ibid.

[6] Ibid 20 et seq. Some have wished to maintain that Portugal was the place from which the contract came; Bensa has proved the correctness of the opinion of Stypmann and Pardessus that it comes from Italy.

[7] We do find, however, that the risks of transport by land were insured; Bensa, op. cit. 22, says that it appears from the Florentine documents that contracts of insur-

therefore, to find that when the contract of insurance first appears as an independent contract, it is modelled on the maritime loan, which developed into the contract of bottomry.[1] No very large modification was needed. In the maritime loan the debtor, who has borrowed the money, declares that he has received the sum advanced, and promises to restore an equivalent sum on the safe arrival of the ship or goods: in the insurance the insurer plays the part of the debtor, states that he has received the amount for which the ship or goods are insured, and promises to repay it in the event of the ship or goods not arriving safely.[2] It was only natural that the earliest insurers should be shipowners—they could charge a smaller premium because they could more easily guarantee a safe arrival;[3] and it was inevitable that those who drew up the earliest contracts of insurance should be the same persons as those who were in the habit of drawing up contracts of loan on bottomry.[4] Hence it was from the latter contract that some of the most important of the technical terms applicable to insurance at the present day (such, for instance, as "policy" and "premium") were originally taken.[5]

But later in the century the form changed. It came to be modelled on a sale;[6] and the analogy of a sale was used to explain its incidents. The contract of sale was adapted to the purposes of an insurance by regarding the property insured as sold to the insurer, subject to a resolutive condition in the event of its safe arrival. It was for this reason that the goods were at the insurer's risk during the whole of the voyage, and that he could sue for their recovery during this period.[7] Two important

ance were made "non seulement en vue des risques des marchandises sur mer, mais aussi en vue des risques du transport par terre"; further it seems, op. cit. 46, that the premium for these risks was about half that for maritime risks; but even in the middle of the seventeenth century this form of insurance was comparatively rare; Marquardus, De Jure Mercatorum et Commerciorum II. 13. 11 says, "illa est super rebus quæ terra, hæc quæ mari transvehuntur; rara illa frequens hæc."

[1] Ibid 28; for this contract see above 261-263.

[2] "Il y avait, toutefois, une différence: tandis que dans la prêt à la grosse le débiteur, c'est a dire l'emprunteur, déclarait avoir reçu la somme qui lui était vraiment avancée et s'engageait à restituer une somme équivalente en cas d'arrivée à bon port; dans l'assurance, au contraire, le débiteur, c'est a dire l'assureur, feignait d'avoir reçu la somme assurée, s'engageant à la payer à l'assuré dans le délai convenu, sauf dans le cas d'arrivée à bon port du navire ou des marchandises," Bensa, op. cit. 28.

[3] Ibid 24. [4] Lefort, op. cit. xi.

[5] Ibid xi, xii; cp. ibid xii n. 2 citing Straccha, De Assecuratione Gl. xv 2 who says, "trajectitia pecunia instar cujus assecuratio inventa est."

[6] Bensa, op. cit. 28—at Genoa, "a partir de 1368, dans tous les actes génois d'assurance, l'assuré s'oblige à payer la somme assurée nomine venditionis et puri cambii."

[7] Two passages from the Consilia of the Genoese lawyer Bosco, cited Bensa, op. cit. 29, 30, make this quite clear—"Si contingeret res vel merces, super quibus facta est assecuratio, perdi, assecurator solvit pretium et valorem pro quo assecuravit, et recuperat merces quæ sunt suo periculo a se emptæ, si recuperari possunt"; and "Si contingat res illas super quibus est facta securitas capi, dictæ res tanquam effectæ assecuratorum pro parte qua assecuraverunt super ipsis, per eos vindicantur et recuper-

principles of insurance law flowed from this conception. In the first place, the insured must be the owner, or at least have some interest in the property insured.[1] A man cannot transfer to another what he does not own. Therefore from the first the contract was a true contract of indemnity, and not a mere wager on the safe arrival of ship or merchandise.[2] In the second place, if the ship or goods did not arrive safely, and the resolutive condition failed to operate, the insurers were entitled to so much of the property insured as could be recovered.[3]

During the fourteenth century the business of insurance grew and flourished. In the first half of the fourteenth century Florentine and Genoese merchants treated the cost of insurance as a regular part of the cost of transport.[4] Genoa seems to have been the centre of the insurance business. Societies of insurance brokers, employed solely in this business, were known there[5]; and that their business flourished can be seen from the fact that, on a single day in 1393, a Genoese notary made more than eighty insurance contracts.[6] The growing popularity of the contract naturally caused it to become still further separated from the contract of loan on bottomry, or the contract of sale. Shipowners, as such, ceased to act as insurers; and the magnitude of the sums assured led to the practice of several persons joining in the contract, by writing their names under the policy, with the proportion of the sum assured for which they were prepared to answer.[7] Moreover, the form of the contract tended to grow less elaborate. Its legality being now fully recognized, it ceased to be disguised under the form of a loan or a sale. It came to be regarded as a distinct species of the large genus innominate contract, reducible to the formula "*do ut facias*—I the insured give a premium that you the insurer may undertake a risk."[8]

antur, et de ipsis tanquam propriis disponunt, quasi tanquam res venditæ ex die contractæ assecurationis toto viagio fuerint ipsorum emptorum et assecuratorum periculo."

[1] Bensa, op. cit. 34. [2] Ibid 34. [3] Above 277 n. 7.

[4] Bensa, op. cit. 21—citing as authority the books of Francesco del Bene and Company, of Florence.

[5] Ibid 48.

[6] Ibid 47; Bosco in no. 369 of his Consilia (there cited) says, "Marcus propter lucrari fecit plures assecurationes sicut faciunt plurimi mercatores de Janua quorum aliqui de nullo alio vivunt quam de hujusmodi quæstu, qui quandoque est utilissimus, quandoque damnosus, secundum discretiones assecurantium et secundum cursum temporum et fortunæ blandimenta vel adversiones."

[7] Bensa, op. cit. 24.

[8] Straccha, De Assecuratione, Introd. 47—"Et illud quæritur, rem tuam mari vel terra exportandam salvam fore promisi periculum suscipiens, et periculi gratia pretium, an nominatus seu magis innominatus contractus censeatur? Et innominatum contractum esse censit Baldwinius . . . suscipio enim periculum ut des . . . et sic facio ut des"; equally also, if looked at from the point of view of the insurer, it is a contract of "Facio ut des," for these innominate contracts, "judicantur diversi modo, ex parte dantis est do ut facias, ex parte vero facientis est facio ut des, non inspecto ordine contrahendi, sicut in emptione et venditione, locatione, et similibus."

In early days there was no rule as to the form in which the contract must be drawn up. There is reason indeed to think that, in the earlier part of the fourteenth century, contracts of insurance were sometimes made verbally.[1] But the procedural advantages obtained by getting the contract drawn up in writing by a notary or a sworn broker, led the parties in almost all cases to adopt this method of contracting.[2] In the first instance these contracts were sometimes very informally drawn. Mere notes of the necessary clauses to be inserted in the agreement were taken.[3] Probably the instrument was embodied in complete form only if it was necessary to take legal proceedings upon it.[4] But it is clear that the practice of employing sworn brokers will lead to the evolution of a stereotyped form. The form which the brokers of Genoa, Florence, and Pisa evolved in this century has in substance shaped the policies of our modern law.[5] It was substantially the form on which Straccha[6] commented in the sixteenth century; and it was the form which many governments in the same century, partly for fiscal reasons, and partly on account of the convenience of having one definite form which all traders understood, made obligatory for all insurance contracts.[7]

This growth of the practice of insurance caused, in the first place, the ascertainment and elaboration of the rules of law governing the contract; and, in the second place, its regulation by statutes which were passed, either in the interests of the state, or in the interests of the parties to the contract. Since these rules and statutes are the basis of the insurance law observed in Europe and in England at the present day, we must glance briefly at them.

(1) We have seen that, from the first, the contract of insurance was a contract of indemnity, and that therefore the person insured must have some interest in the subject matter of the insurance. This requirement sometimes gave insurers the opportunity of evading their obligations, and led to the insertion of clauses which bound the insurers to pay whether or not the

[1] Bensa, op. cit. 34—"Les documents que nous possédons admettent, en effet, la possibilité de conclure le contrat *cum scriptura vel sine*."

[2] Ibid 30. [3] See the specimen cited ibid 31, 32. [4] Ibid 31.

[5] "Les polices florentines et pisanes étaient assez conformes, dans leur ensemble, aux polices modernes. . . . Aussi convient il peut-être de conjecturer qu'a Gènes également les polices d'assurance contenaient ces clauses detaillées dont les polices florentines et pisanes nous revelent l'usage, et qu'elles differaient par là des instruments dressés par les notaires," ibid 33.

[6] De Assecuratione; the form is at the end of the Introd., and the rest of the treatise consists of 40 Glosses on the form. The form is dated 1567; cp. Bensa, op. cit. 33.

[7] See Magens, Insurances ii 4-7, for two forms of policy prescribed at Florence by the ordinance of 1523.

insured had any interest.[1] But the prevalence of these clauses soon gave rise to the serious evil of facilitating, by means of insurance, mere wagering contracts on the safety of ships or other property insured.[2] The merchandise assured was, in the earlier contracts, described with some minuteness, which gave place, in later contracts, to a more general description.[3] The ship on which the merchandise was loaded, was described; and the names of the captain, the consignor, and owner were inserted.[4] It was very rarely that the ship was not designated, and the insured allowed to load in any ship he pleased.[5] At first the insurance was always for the voyage. Time policies (which never exceeded a year) were, however, introduced in the course of the fourteenth century.[6] From the earliest time the route was prescribed; and any deviation, unless allowed by the policy, avoided the contract.[7] The risks against which the insurance was made were generally carefully specified; but generally they excluded risks arising from the barratry of the master; and sometimes certain other risks also.[8] Sometimes the policy specified a time within which, in default of news, the ship was to be presumed to be lost.[9] In case of capture and rescue it was a disputed point as to whether the insurers were liable to pay.[10] The better opinion seems to have been that they were liable; and policies sometimes provided that they should not be liable, if they redeemed the goods and delivered them safely at their destination.[11] The one duty of the insured was to pay the premium; and this payment must always be made in advance.[12] Sometimes provision was made for the

[1] Bensa, op. cit. 35, citing Bosco, Consilia 392 p. 611—"nisi instrumenta assecurationum essent ita lati et ita ampli tenoris, fatui essent facientes se assecurari quia assecuratores propter non solvere mille cavillationes excogitarent."

[2] Ibid 36.

[3] Ibid 37—eventually, "ou on vient même à ne plus specifier que les objets precieux et certaines catégories de marchandises; pour toutes les autres, on employait la formule générale *super rebus, et mercibus.*"

[4] Ibid 38. [5] Ibid 38, 39. [6] Ibid 39.

[7] Ibid 39-41—the question what amounted to a deviation seems to have given rise to a good many questions.

[8] Ibid 42-44; see especially the clause taken from a Florentine policy of 1397 cited at p. 43—"Les risques que les assureurs courent . . . sont ceux de Dieu, de la mer, des gens, du feu, du jet à la mer, de la retention par le fait des Seigneurs ou des Communes ou de toute autre personne, ou de représailles, ou d'arrêt, et de tout autre cas, peril, fortune, empêchement ou sinistre qui, de quelque facon que ce soit, pourrait se produire, ou se serait produit, et quels que puissent être les cas et dans quelques conditions qu'ils se réalisent, excepté ce qui pourrait concerner le lest et la douane."

[9] Ibid 44.

[10] Ibid 44; for similar doubts in English law see below 291.

[11] Ibid 44.

[12] Ibid 45—as M. Bensa says, this custom as to payment in advance may have originated when the contract took the form of a fictitious sale; under this form the insurer declared that he had received the sum for which the property was insured; and, when the contract took this form, "l'assureur n'aurait pas eu d'action pour en poursuivre le payement"; later this custom passed into enacted law.

cancellation of the policy and the return of the premium, if e.g., owing to the abandonment of the voyage, the risk was never incurred.[1]

(2) The earliest legislation[2] on the subject of insurances comes from Genoa and Florence. The earliest enactment is a Genoese statute, which comes from the last quarter of the fourteenth century.[3] It was directed to the prohibition of insurances on foreign ships—a prohibition which was never very effectual, and was shortly afterwards repealed,[4] and to laying down certain other conditions as to the validity of the contract. For instance, insurances made after the loss was known were declared to be void; and the loss was deemed to be known if any one person had heard the news.[5] Other statutes were passed to impose a tax upon insurances,[6] to settle the form of the contract,[7] and to provide a short and effective procedure for the enforcement of claims upon insurance policies.[8] Towards the end of the fifteenth century, the greater freedom allowed to the parties to make what terms they pleased, led to an increase in the practice of making insurance contracts solely for the purpose of wagering; and the legislature at Genoa made attempts to prohibit them, which were not very successful.[9] But none of these statutes covered very much ground. It is to the statutes of Barcelona that we must look for the first comprehensive code of insurance law.[10] These statutes, as finally codified in 1484, have had a large influence upon the insurance law of the rest of Europe, partly because, being printed and circulated with the Consolato del Mare, they shared its fame and influence;[11] and partly because, being compiled at a later period than the earliest Italian legislation, the law was more settled, and therefore better fitted for codification.[12] They were a model for the various codes of insurance law which the chief

[1] Bensa, op. cit. 46-47.

[2] On this legislation generally see ibid chaps. v-vii.

[3] Ibid 52—we have not got its text, but we can gather its substance from the commentary contained in the Consilia of Bosco; it must be before 1383, as an addition to it was made in that year, ibid.

[4] Ibid 54—repealed in 1408 for fiscal reasons; for similar laws elsewhere and their modification see ibid 53, 81-85.

[5] Ibid 52, 53—the loss is known if it has come to the knowledge of a single person.

[6] Genoa (1401) ibid 53.

[7] Florence (1523) Magens, Insurances ii 1 § 2.

[8] Bensa, op. cit. 72-80; see e.g. the Venetian law of 1468, cited ibid 80.

[9] Ibid 84-88, 104; M. Bensa seems to dispose successfully of the view of Prof. Vivante that the growth and extension of insurance contracts was due to the use made of them to make wagers; as M. Bensa says, "assurément, les paris ont contribué à augmenter le nombre de ces contrats; mais ce n'est qu'après qu'ils étaient déjà devenus fréquents, grâce à la réalité du besoin auquel ils donnaient satisfaction."

[10] For the text of the statutes see Pardessus, Lois Maritimes v 493-554, 507-543; they are summarized by Bensa, op. cit. chap. vi.

[11] Ibid 50; for this code see vol. v 70-71.

[12] Bensa, op. cit. 50, 51, 57, 58.

trading countries of Europe passed in the sixteenth and seventeenth centuries.[1]

This legislation is comprised in five statutes which were passed at Barcelona from 1435-1484. They deal with all aspects of insurance law, and settle the leading principles which underlie it. The statute of 1435[2] is the basis of the later law. Among other topics, it deals with the capacity of the parties,[3] insurances on foreign ships,[4] the proportion which the value of the property insured must bear to the amount of the insurance[5] the rules as to presumption of loss,[6] the regulation of insurance brokers,[7] the payment of the premium,[8] the form of the contract,[9] the procedure to enforce it[10] Some small modifications were made in the following year;[11] and in 1458[12] considerable modifications were made in the direction of allowing greater freedom to insurers and insured.[13] Additional rules were made as to the payment of the premium,[14] as to proof of the loss,[15] and as to the procedure to enforce the contract;[16] and there were some new rules as to the cancellation of the policy when the risk was not incurred.[17] In 1461[18] evasions of the rules as to insurances on foreign ships, by making use of the machinery of a sale or a loan, were prohibited. In 1484[19] all these rules were summed up in the comprehensive code which, as I have said, has had a very large influence on the development of the law throughout Europe.[20] The chief change made was the abolition of all restrictions on the insurance of foreign ships.[21] But this freedom obviously tended to encourage mere wagering policies. In order to discourage them, insurances on ships or cargoes sailing beyond the Straits of Gibraltar, were prohibited, unless they were destined for Barcelona;[22] and rules were made to suppress the practice of insuring non-existent cargoes.[23] Further provisions were made to invalidate contracts made after the loss

[1] For the text of some of these later laws see Magens, op. cit. ii 23-30—Antwerp 1563; ibid 30-49—Spanish ordinances of 1556, 1588, and 1618.

[2] Pardessus, op. cit. 493-502. [3] § 3. [4] § 1. [5] §§ 2, 4.
[6] § 15. [7] §§ 8, 17-20. [8] § 11. [9] § 9. [10] §§ 12-14.
[11] Pardessus, op. cit. 502-504. [12] Ibid 507-521. [13] § 1.
[14] § 12. [15] § 14. [16] §§ 8, 9, 18-22. [17] §§ 14, 15.
[18] Pardessus, op. cit. 521-523. [19] Ibid 523-543.

[20] "Les véritables *Ordinacions sobre les seguretats*, qui, traduites en plusieurs langues, ont exercé une si grande influence sur la jurisprudence maritime de la Mediterranée, et aux quelles l'on a coutume de se référer quand on parle de la portée de lois de Barcelone, ne sont pas autre chose que l'ordonnance de 1484, ou la matière reçut sa réglementation définitive," Bensa, op. cit. 67.

[21] § 1.

as Bensa says, op. cit. 68—"les assurances *in quovis* n'étaient pas admises par le droit maritime catalan. La crainte des simulations et des paris, qui avait inspiré cette restriction, était telle qu'elle eut pour résultat de faire défendre absolument les assurances portant, soit sur les marchandises . . . voyageant au dela du détroit de Gibraltar . . . soit sur les bâtiments naviguant dans les mêmes parages."

[23] § 9.

had occurred,[1] and as to the presumption of loss from the non-receipt of news.

These statutes give us, as M. Bensa has pointed out, a very complete picture of the insurance law of the fifteenth century. They are, as I have said, especially important in the early history of this contract in England and in other European countries; for it was the Italian and Spanish insurance law of this century which was already making its influence felt in the trading cities of the Netherlands, and was soon to make its appearance in England.[2] To its adventures in England we must now turn.

The Introduction and Development of the Contract of Marine Insurance in England

As we might expect, the earliest mention of a policy of insurance in England is to be found among the records of the court of Admiralty. Insurance, as was pointed out in a sixteenth-century petition to the Council, "is not grounded upon the lawes of the realme, but [is] rather a civill and maritime cause, to be determined and discided by civilians, or els in the highe courte of the Admiraltye."[3] This earliest policy is to be found in the record of the case of *Broke c. Maynard*[4] (1547), in which an action was brought by the insured on a policy written in Italian, and subscribed by two underwriters. The action was defended on the ground that the insurers had already paid part of the sum, and that they had received no part of goods which had been salved. It was further alleged that there had been a deviation. The case shows that at this date the practice of insurance was well known in England; and that this was the fact was specifically stated in the case of *Ridolphye c. Nunez*[5] (1562), in which the custom in the city of London of making insurances through agents is thus set out in the pleadings: "The use and custome of makynge bylls of assuraunce in the place commonly called Lumbard Strete of London, and likewyse in the Burse of Antwerpe, is and tyme out

[1] § 17.

[2] Genoese underwriters were established at Bruges in 1370, Bensa, op. cit., 101; "L'Espagne d'abord et pour peu de temps d'ailleurs, puis la Flandre, l'Angleterre et la France, en recueillant les traditions et les coutumes de l'Italie, lui succédèrent dans la mission de les développer conformément aux transformations amenées par la marche du temps, et aux formes nouvelles du commerce terrestre et maritime," ibid 105.

[3] Select Pleas of the Admiralty (S.S.) ii lxxvi.

[4] Ibid 47; possibly the case of Emerson c. De Sallanova (1545), ibid lxvi, which turned upon a claim on an indemnity given against the withdrawal of a safe conduct by the king of France, may be an earlier case of insurance; cp. Vance, Essays A.A.L.H. iii 110.

[5] Select Pleas of the Admiralty (S.S.) ii 52, 53; in 1573-1574 insurance is referred to as an ancient custom among merchants, Dasent, viii 105-106.

of mynde hath byn emongst merchants usinge and frequentinge the sayde severall places, and assurances used and observed, that the partie, in whose name the bill of assurance is made, ys not bounde to specifie in the same whether the goods assured are for his owne or for any other man's accompte. . . . And yf any mysfortune chauncethe to the same gooddes in such sort assuryd, the sayde partie, in whose name the byll of assurance is made, maye demande and oughte to recover them againste the assurers by vertue of the sayd custome as his owne propre gooddes, although they perteyne to some other. . . . And further he doothe alledge that commonly merchants, by all the tyme above declared, have and doo cause ther gooddes to be assured from porte to porte by ther factors and other ther frends havinge noo interest or propretie in the gooddes assured, and yet thassurance goodd, and thassurers bounde tanswere the losse of such gooddes yf any happen."

The Italian origin of insurance law is clear on the face of the policies which we find in the records of the court of Admiralty.[1] The earliest policy which appears there is, as we have seen, written in Italian;[2] and in form they are very similar to the Italian policies of this period. A comparison between some of them, and the form of policy prescribed by the Florentine legislation of 1523,[3] will make this quite clear. They are not of course precisely similar. They are not drawn up in one stereotyped form, and they therefore vary both in length and in contents. Some are quite short, while others contain larger and more elaborate clauses. Two policies contain a "sue and labour" clause;[4] and a Dutch policy of 1638 contains a renunciation of the Antwerp Insurance Orders, and an agreement to submit to arbitration in the case of any disagreement.[5] But the clause which nearly all the English policies of this period contain—which in a modified form our modern policies of marine insurance still retain—to the effect that this policy shall be of as much force and effect as the surest writing or policy heretofore made in Lombard Street,[6] probably had the result of producing a uniformity in the legal effect of all these

[1] Select Pleas of the Admiralty (S.S.) ii 45-59.
[2] Ibid 47.
[3] Magens, op. cit. ii 4-7.
[4] Select Pleas of the Admiralty (S.S.) ii 56, 58, 59; below 290.
[5] Select Pleas of the Admiralty (S.S.) ii 59.
[6] In the policy of 1547, ibid 48, the clause runs as follows: "As for the aventure that the assurers shall stande at, it is to be understoode that this preasente writinge hathe as muche forse as the beste made or dicted byll of surance which is used to be made in this Lombarde Streete of London"; in the form of marine insurance set out in the first schedule to the Marine Insurance Act 1906, 6 Edward VII. c. 41, it runs as follows: "And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London."

policies. It showed that the parties intended to incorporate into their contracts the rules of the law merchant generally understood to be applicable to them;[1] and it therefore enabled the parties to appeal to, and the court to apply, these rules in any litigation which might arise.

The growth of England's foreign trade in the latter part of the sixteenth century increased the importance of insurance law; and, from 1574 onwards, the Council began to consider the expediency of putting this new business under some form of regulation, and of providing some means by which the rights of the parties under insurance contracts could be quickly and easily enforced. That the Council might be informed as to the actual rules observed, an order was sent in 1574 to the Lord Mayor of London to collect and certify the orders made and the rules applied by the merchants in matters of insurance.[2] But nothing was done that year, although the order was repeated.[3] In 1575 the Lord Mayor was further directed to fix the prices for making and registering policies of insurance.[4] But apparently nothing was done, as later in the same year he was again directed to summon experienced merchants and civilians, and, with their help, to collect this information and reduce it to writing;[5] and it was necessary to repeat the order in 1576.[6]

In the meantime the Council had resolved to act upon its own knowledge, and to adopt two measures, which may well have been suggested by the practice of other commercial nations. In the first place, they proposed to regulate the business of insurance by setting up an office for the making and registering of insurances. In the second place, they proposed to create a special commission, consisting of merchants and civilians, for the speedy trial of these cases, in order that the merchants might, "the better followe theire trades without incomberaunce or molestinge the one the other by suites at lawe, bothe to the hinderance of traffick and of her Majesty's customes."[7]

[1] Thus the Council tell the Lord Mayor, whom they had directed to write down the rules and orders relating to insurance, to follow the customs of other countries as to the fees payable.

[2] Dasent viii 321.

[3] Ibid 337.

[4] Ibid 397.

[5] Ibid ix 43 (1575).

[6] Ibid 163—"Whereas letters have been often written to him and his predecessours to consider for some order to be made for matters of assuraunce, the wante whereof doth dailie brede grete troubles, he is now required to sende unto their Lordships without delaie that hath been doune in that behalf, and also the perfect note of the rates that hath ben set downe for the registering of assuraunces, and therein to use the more expedicion for that, upon the certaine knowledge thereof, their Lordships are to procede therein to the furtheraunce of her Majesties service."

[7] That this was their object was stated in a letter written by the Council to the chief justice of the King's Bench and the judge of the Admiralty in 1601, Dasent xxxi 253; as it was said in a petition to the Council in 1570, "the matter . . . constethe and standeth muche uppon the orders and usages of merchauntes by whom rather than

(1) The regulation of the business of insurance took the form, usually followed in the sixteenth century both in England and abroad, of the grant to an individual of a monopoly right to make and register insurances, and to charge fees for his services.[1] It was a plan which provided regulation, and, not only paid its own way, but also might be made to provide some revenue to the government. About the year 1574 a grant was made to Richard Candler, giving to him and his deputies the sole right of making and registering "insurances and policies and other instruments belonging to merchants."[2] It is not surprising to find that both the notaries[3] and the brokers[4] protested; and very probably it was the delay caused by these objectors, which caused the Lord Mayor to be so slow in returning to the Council the information about insurances, which it desired him to collect.[5] Notwithstanding this remonstrance, the grant took effect, and it is probable that it was the origin of the "Office of Assurances" mentioned in the statute of 1601.[6] But, in order to meet the objectors, the Council, as we have seen,[7] directed the Lord Mayor of London to nominate commissioners to consider the question of fees and regulations. These commissioners proceeded to settle the fees which could be taken in the Office, and to make regulations which permitted others, besides Candler and his deputies, to draw up policies.[8] To this Candler not unnaturally made objections, which are contained in a paper which he sent to Walsingham in 1576.[9] It is probable

by course of law yt may be forwarded and determyned," Select Pleas of the Admiralty (S.S.) ii lxxvi.

[1] Vol. iv 346-347; see the regulations for the registration of insurances contained in the Guidon de la Mer, cited Martin, History of Lloyd's 42-44; and it would seem that there was a similar office at Antwerp, ibid 39.

[2] We have an account of this monopoly in the protests against it made by the notaries and brokers, which John Strype printed in his edition of Stow's Survey (published 1720) ii 142; Martin, History of Lloyd's 36-41, has also given the material portions; the whole of it is printed by Tawney and Power, Tudor Economic Documents ii 246-251.

[3] The notaries (sixteen in number) stated that they "lived upon the making of policies, intimations, renunciations and other writings granted unto the said Candler," and that this grant would mean their utter overthrow; cp. Scott, Joint Stock Companies iii 364; for the notaries see vol. v 78-79, 114-115.

[4] The brokers (thirty in number) complained that the grant was a gross infringement of the liberty of the subject, and prophesied that it would open the door to many inconveniences to the merchants—"If all this serving merchants occasions should be committed to one particular person, it were not possible but great discommodities and losses would happen to many for lack of dispatch . . . that it would be a great bondage to merchants to be tied to one particular person, who might either for favour or reward dispatch one man, and for displeasure or ill-will delay another."

[5] Above 285.

[6] 43 Elizabeth c. 12; Malynes, Lex Mercatoria 105, 106.

[7] Above 285. [8] Martin, History of Lloyd's, 39-41.

[9] "Yf evvery man maye make pollicies that will, the case will be souche that the saide Richard Candeler shal not have the regestringe of the tenthe pollecy of assewraunce that shal be made, for that he shall not knowe on whom to complayne for not registring their assewraunces. And so his said office shall not be able to cowntervaille his charges," ibid 40.

that the rates found by the commissioners were accepted as fair by the government. On the other hand, the government insisted upon all insurances being registered at the Office, and perhaps upon the sole right of making them, conferred upon Candler or his deputies.[1] As it was said in a marginal note on Candler's petition, it was on these provisions in the patent that the government relied for the redress of "deceipt in Assewraunces";[2] and, though the notaries and brokers remained unsatisfied, there is no evidence that the merchants seriously objected.[3] After all, similar regulations were in force in continental countries.

(2) For the trial of insurance cases the Council appointed a body of commissioners. We have not got the list of commissioners; but it would appear that they consisted of merchants and civilians,[4] and that the judge of the court of Admiralty was the chief commissioner.[5] Whether or no they included any common lawyers I cannot say. But, in at least one important case, merchants, civilians, and common lawyers were included in the commission.[6] The object which the Council had in view was, as they explained at a later date, to provide that "soche dyfferences as might fall out betwixt merchantes touchinge this matter should be handled and decyded amonge themselves by soche as have best knowledge and experience in those affaires."[7] It is thus clear that, here again, the Council intended to follow foreign precedents, and establish a mercantile court consisting of both merchants and lawyers, which should administer mercantile custom without those formalities of procedure and pleading which delayed the hearing of cases in the regular courts of law.[8]

But, though tribunals of this kind were found to be perfectly

[1] Dasent ix 177 (1576); Martin, op. cit. 40.

[2] "So longe as every man maye make his owen pollecy the decipt in Assewraunces will nevir be redressed, which is the greatest cause of the erection of the saide Office," ibid 40, 41. It was probably owing to the trouble over Candler's Patent that in 1576 one Henriques Roderiguez petitioned for a monopoly of the brokerage of insurances, promising to pay half the penalties imposed on those who infringed this monopoly to the Queen, Select Pleas of the Admiralty (S.S.) ii xvi.

[3] It would appear from the letter of the Council in 1601, Dasent xxxi 252-253, that the merchants complained, not of the existence of the regulations, but of their ineffectiveness.

[4] Ibid x 232 (1578); xi 360, 393 (1579-1580); xii 25, 69, 199 (1580); see ibid 199, 200 for a case sent to them by the Council and recommended by the French ambassador—apparently the insurers had refused to pay.

[5] Ibid xiii 359-360 (1581-1582); on one occasion, xiv 214 (1586), four civilians were appointed arbitrators, and on another occasion two civilians and the judge of the Admiralty, xx 202 (1590-1591).

[6] Ibid ix 168, 230 (1576)—the persons named were the Master of the Rolls, Justice Southcote, Sir Thomas Gressham, Dr. Hamond, Dr. Forde, Edward Osburne, Alderman Barne, Thomas Alderzey, Benedict Spinola, and Hectour Nonnez; and later the two Chief Justices were added; it was stated that the case was, "so strainge as requireth the advice and consultacion of such as be experienced in those kinde of dealinges."

[7] Ibid xxxi 253.

[8] See vol. v 150.

satisfactory on the Continent, this tribunal set up by the Council was not a success. In 1601 the merchants "that use to assure goodes," stated, in a petition to the Council, that the orders made by the merchants and confirmed by the Council were not obeyed; and that some refused "to submytte and conforme them selves to the order of Commyssioners appointed to heare those causes, beinge chosen of skillfull merchantes and sworne by the order of the Lord Maior to deale indyfferently and uprightlie, to the great trouble of honest traders and the incouradgement of soch merchantes as have no meanynge to performe their bergaines."[1]

The reason for the failure of the insurance commissioners is probably to be found in the fact that both the court of Admiralty and the courts of common law continued to exercise a competing jurisdiction; and that both were eager to retain and to enlarge it. In 1547 the Admiralty proceeded against a plaintiff for contempt because he had sued in the city of London court;[2] and in 1556 it proceeded against another plaintiff because he had sued before a commission appointed by the Chancellor.[3] In the common law courts there is, it is true, only one reported case during this century of an action upon a policy of insurance.[4] But the action of assumpsit, as developed in the latter part of this century, was quite capable of affording a remedy upon these policies; and Malynes[5] tells us that many such actions were brought. It is clear that these competing jurisdictions afforded many opportunities to the dishonest and the litigious. Such persons could put pressure on their opponents by a refusal to submit to the summary jurisdiction of the commissioners, which would compel them to have recourse to a formal trial before a law court.[6] And, even if the case were brought before the commissioners, it would seem that they sometimes declined to obey their orders, perhaps under the plea that legal proceedings were pending in the Admiralty or at common law. The fact that the Council had not given, and indeed could not give, exclusive jurisdiction to these commissioners was fatal to their efficiency.

[1] Dasent xxxi 252, 253.

[2] Broke c. Maynard, Select Pleas of the Admiralty (S.S.) ii 47.

[3] Ibid lxvii.

[4] A case of 1589 cited in Dowdale's case (1606) 6 Co. Rep. at p. 47 b.

[5] Op. cit. 106—he explains that he attended before the committees engaged on the Act of 1601, and that it passed with some difficulty, "because there were many suits in law by action of Assumpsit before that time, upon matters determined by the Commissioners for Assurances, who for want of power and authority could not compel contentious persons to perform their ordinances."

[6] "Of late years divers persons have withdrawen themselves from that arbitrarie course (i.e. settlement by arbitration), and have soughte to drawe the parties assured to seeke their moneys of everie severall Assurer, by Suites commenced in her Majesties Courtes, to their greate charges and delayes," 43 Elizabeth c. 12 Preamble

In consequence of the petition of the merchants to the Council in 1601,[1] the chief justice of the King's Bench and the judge of the Admiralty were directed to hold an enquiry;[2] and the result of this enquiry was a resolution to strengthen the jurisdiction of the commissioners, by giving it statutory authority. The statute of 1601, which was passed with some difficulty through Parliament,[3] evidently intended to set up for London a commercial court of the ordinary continental type, for the hearing of actions upon policies of marine insurance. The preamble sets out the antiquity, the prevalence, and the advantages of the custom of marine insurance, and recites the measures taken to decide the controversies arising by the arbitration of commissioners. The statute then enacts that the Lord Chancellor shall be empowered to appoint a standing commission to hear all cases arising upon all policies of insurance entered in the London Office of Insurances. This commission was to consist of the judge of the Admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight "grave and discrete merchants." These commissioners, or any five of them, were to adjudicate upon insurance cases "in a briefe and summarie course, as to theire discretion shall seeme meete withoute formalities of pleadinges or proceedings."[4] They were given power to examine on oath, or to commit to prison those who disobeyed their final decrees.[5] An appeal from their decision could be brought to the court of Chancery; but execution was not to be suspended pending an appeal.[6] The commissioners were to be sworn to act honestly, and no commissioner interested in any case could take any part in the decision of that case.[7]

Thus a commercial tribunal of the continental type[8] was for the first time established in England by statutory authority. But it suffered from two grave defects. Firstly, its jurisdiction was confined to policies registered in the London Office of Insurances, so that it did not extend to insurances made in other seaport towns. Secondly, it did not exclude specifically the jurisdiction of the courts of common law and the court of Admiralty. It is possible that, if the king and Council had continued to exercise the control over the courts which they exercised in the Tudor period, these defects might have been remedied. But the constitutional controversies of the seventeenth century were fatal to institutions which depended upon the prerogative. The Office of

[1] Above 288.
[2] Dasent xxxi 252, 253.
[3] Malynes, op. cit. 106.
[4] § 1.
[5] § 2.
[6] § 3—the sentence must be satisfied or the money deposited with the Commissioners.
[7] § 4.
[8] Vol. v 150.

Insurances seems to have disappeared; and the new court was left to wage an unequal contest with the victorious common law. There was indeed an attempt in 1662 to remedy certain minor defects in the Act.[1] For instance, the necessary quorum was reduced from five to three;[2] and power was given to punish parties or witnesses who refused to appear,[3] to make orders against the person or goods of a defendant,[4] and to issue commissioners to examine witnesses beyond the sea.[5] But these amendments were wholly ineffectual in the face of the determined opposition of the common lawyers. They held that a judgment of the court was no bar to subsequent proceedings at law;[6] that it could hear disputes only as to policies of marine insurance;[7] and that, even in these cases, it could act only when it was the insured who was plaintiff.[8]

The natural result was that, during the sixteenth and seventeenth centuries, the law of insurance was in a very backward state. Neither in the court of Admiralty in the earlier part of this period, nor in the courts of common law and equity in the latter part, were any very general or certain rules evolved. This fact is proved by some of the decisions of these tribunals.

In the court of Admiralty it is assumed in several cases that the contract of insurance is a contract of indemnity. It follows that the insurer who has paid is entitled to the goods salved, on paying salvage for them;[9] and that, if goods salved were not made over to the insurers, they were not liable to pay the sum assured.[10] It was in order to induce the insured to do their utmost to salve the goods for the benefit of the insurers that the "sue and labour" clause was inserted in these policies.[11] It is fairly clear

[1] 13, 14 Charles II. c. 23. [2] § 2. 1.
[3] § 2. 2. [4] §§ 3. 2, 5. 1. [5] § 3. 1.
[6] Came v. Moye (1658) 2 Sid. 121.
[7] Denoyr v. Oyle (1649) Style 166-167. There was however a doubt whether the court might not have jurisdiction on a life policy if the assured was going to sea "on merchants affairs."
[8] Delbye v. Proudfoot (1693) 1 Show. 396.
[9] Select Pleas of the Admiralty (S.S.) ii 149 (1573), Lopez, an insurer, gets recaptured goods, paying salvage.
[10] Cavalchant c. Maynard (1548) ibid ii 45—in a defence to an action on a policy it is stated that, "yf any of the goods so assured shulde within the tyme of assurance . . . fall to any wrack . . . and yet sume parte of the same happen to be savyd that parte . . . which shulde be so saved . . . oughte to be devyded equallye betwene thassurers . . . accordinge to every assurers proporcion . . . before any assurance can be demanded of them"; Broke c. Maynard (1547) ibid ii 47; cp. ibid ii lxx (1573) action for freight on wine brought to London by insurers after the ship had been wrecked.
[11] Ibid ii 56—a French policy of 1565; 58—a Dutch policy of 1638; in the former policy the clause runs, "And we gyve to him . . . ample powar to helpe and gyve order for to save them said shippes and marchandises or part of the same to sell and distribute them yf ned be aswell to our prouffytte as dommage withowte asking us leave or license. And we shall paye all charges averedge and expenses whiche shall beren at the sewte and saving of them said shippes and merchaundisses be yt that there be anythinge recovered or not."

that deviation was a defence to an action on a policy;[1] and that no news of a ship for a year was presumptive evidence of its loss.[2] We can see the influence of the continental rules in the assumption that a reassurance is invalid;[3] but apparently an insurance upon the goods of alien enemies was at this period valid[4]—though, after some conflict of opinion, such insurances have been finally decided to be invalid.[5] It is clear too that the benefit of a policy could be assigned.[6]

In the courts of common law it was clear that deviation was fatal to the policy;[7] but that for a loss occurring before the deviation the insured could recover.[8] There were also a few cases as to the interpretation of the risks borne by the insurers. It was held at law that pirates were a "peril of the sea";[9] and in equity that the term "restraint of princes" did not cover a restraint due to the wilful default of the insured.[10] The ship and goods insured were at the peril of the insurers till the ship arrived and was unloaded, if the policy was so expressed;[11] but in England, as abroad, there was some doubt as to the insurer's liability if the ship was captured, and then recaptured, before being taken *infra prasidia*.[12] It was clear that when the ship had been taken *infra prasidia* and condemned, the original owner lost his property in her;[13] and Holt ruled in 1699 that, as the property in the ship was gone, the insurer was freed from liability.[14] But, as late as 1712, the question was treated as open to argument, though the court inclined to adopt Holt's view.[15] There was an important case, noticed by several reporters, upon the stipulation that the

[1] Broke c. Maynard (1547) Select Pleas of the Admiralty (S.S.) ii 47.

[2] De Salizar c. Blackman (1555) ibid ii 49; cp. ibid lxviii (1562-1563)—a year and a day is the period stated; it was to obviate questions of this kind that the clause "lost or not lost" was inserted in insurances, Malynes, op. cit. 107.

[3] Ravens c. Hopton (1561) Select Pleas of the Admiralty (S.S.) ii 120.

[4] Ibid ii, xv, lxviii (1562-1563); lxx (1569-1570); cp. Park, Marine Insurance (1st ed.) 15, 16; and see above 281-283 for the earlier continental rules.

[5] Furtado v. Rogers (1802) 3 B. and P. 191, overruling Lord Mansfield's view in Planche v. Fletcher (1779) 1 Dougl. 251.

[6] Duckett c. Barne (1570) Select Pleas of the Admiralty (S.S.) ii 143.

[7] Green v. Young (1702) 2 Salk. 444; this decision is really the converse to earlier cases which held that loss after a deviation enabled the holder of a bottomry bill to sue, Western v. Wildy (1684) Skin. 152; cp. Williams v. Steadman (1694) Holt, K.B 126.

[8] Green v. Young (1702) 2 Salk. 444.

[9] Pickering v. Barkley (1672) 2 Rolle Ab. 248—the merchants gave evidence that this was the view held by the court for assurance cases; s.c. reported by Style 132; cp. Barton v. Wolliford (1688) Comb. 56.

[10] (1690) 2 Vern. 176.

[11] Anon. (1685) Skin. 243.

[12] Above 280.

[13] Anon. (1642) March N.R. 110.

[14] Anon. (1699) 1 Ld. Raym. 724.

[15] Assievedo v. Cambridge (1712) 10 Mod. 77—a report of the arguments of the civilians; on this argument the court inclined in favour of the insurer, but the point was ordered to be argued by the common lawyers in the following term; cp. Park, op. cit. 81-82.

ship was "warranted to depart with convoy." It seems to have been settled that the stipulation was satisfied if she so departed, even though she was afterwards separated by tempest, and captured.[1] The question of the possibility of parol variations of a policy gave rise to two decisions.[2] It was settled both at law and in equity that if the risk was not run the premium could be demanded back.[3] The court of Chancery [4] differing from the courts of law,[5] held that if the insured had no interest the policy was void. Whether the fact of having advanced money on bottomry was a sufficient interest was not perfectly clear.

It is obvious that these few cases cover very little ground. It is also obvious that it was owing to the defects of the procedure of the common law courts and the court of Chancery that the cases were so few. At common law it was necessary to bring a separate action against each of the underwriters; and either the underwriters or the insured could compel their opponent to proceed to trial on all these actions.[6] If a case was reserved, counsel were left to draw it up at their leisure.[7] These cases were often argued in private, so that the decision could never be a guide to any future case.[8] In fact not much guidance could be expected from such of these cases as were heard in open court, since both judges and counsel were ignorant even of the meaning of the ordinary technical terms used by merchants and seamen;[9] and the judge consequently left the case to the jury without any explanation of the principles applicable.[10] It was apparently the custom always to hear two arguments;[11] and in these, as in other

[1] Jefferies v. Legendra (1692) Carth. 217; s.c. 3 Lev. 321; 2 Salk. 443; 1 Show. 320—a long report of the argument for the plaintiff; 4 Mod. 58; cp. Lethulier's Case (1693) 2 Salk. 443; Bond v. Gonsales (1704) 2 Salk. 445.

[2] Kaines v. Sir R. Knightly (1682) Skin. 54; Bates v. Grabham (1703) 2 Salk. 445.

[3] Martin v. Sitwell (1692) 1 Show. 156; Deguilder v. Depeister (1684) 1 Vern. 263.

[4] Goddard v. Garrett (1692) 2 Vern. 269; Harman v. Vanhatton (1716) 2 Vern. 716.

[5] Assievedo v. Cambridge (1712) 10 Mod. 77 at p. 80; Depaba v. Ludlow (1721) 1 Comyns 360.

[6] Park, op. cit. xli; cp. Goram v. Fouke (1672) 2 Keble 722; and the preamble, to 43 Elizabeth c. 12, cited above, 288 n. 6.

[7] Park, op. cit. xliii.

[8] Ibid xlii.

[9] See Pepys, Diary iii 363-365, for an amusing account of the trial of an insurance case in 1663 before Hyde, C.J., at the Guildhall—"it was pleasant to see what mad sort of testimonys the seamen did give, and could not be got to speak in order; and then their terms such as the judge could not understand; and to hear how sillily the counsel and judge would speak as to the terms necessary in the matter, would make one laugh."

[10] "In former times the whole of the case was left generally to the jury, without any minute statement from the bench of the principles of law, on which insurances were established; and as the verdicts were general, it is almost impossible to determine from the reports we now see, upon what grounds the case was decided," Park op. cit. xlii.

[11] Ibid xliii.

cases, it was always possible to delay the proceedings at law by filing a bill in equity.[1] Nor was the court of equity any more satisfactory. Its delays were notorious.[2] It was out of touch with commercial life and ways of thought. The somewhat over-fine standards of morality, which it was beginning to require, were hardly suited to the world of trade. A court, for instance, which could decide that it would not assist the holder of a bottomry bond because it carried unreasonable interest,[3] which refused to accept the value set upon the goods in a valued policy,[4] was obviously out of touch with the elementary principles of commercial and maritime law applicable to these transactions.

If we compare the state of the law of insurance at the end of the seventeenth century with its state at the end of the sixteenth century, we can see that it has made no appreciable progress. At neither period had there been any legislation, comparable to that of continental states, directed against obvious abuses, such as the practice of cloaking mere wagers under policies of insurance. At neither period had much progress been made in the work of converting those mercantile customs and that continental jurisprudence, which Malynes describes,[5] into ascertained rules of English law. In one respect indeed there had been retrogression. The business of underwriting was subject to some sort of control in the sixteenth century; but in the seventeenth century, that control ceased with the disappearance of the Office of Assurances.[6] It was not till the early part of the following century that the Legislature attempted to repress some of the abuses which were disfiguring the law; and it was not till later in that century that Lord Mansfield evolved from mercantile custom and foreign precedents the principles of our modern law. Similarly we must look to the same period for the humble beginnings, at Lloyd's coffee house, of the voluntary association which has supplied, far more efficiently than any governmental institution, that measure of control over the business of underwriting which had been attempted by the Council in the sixteenth century.

[1] Vol. i 465 and n. 4; Thus in Harman v. Vanhatton (1716) 2 Vern. 716, a plaintiff, having recovered on an insurance, brought an action on a bottomry bond, alleging that, though the ship was lost, there had been a deviation; a bill was then filed in equity to stay this action, which was dismissed.

[2] Vol. i 423-424, 426, 437-439.

[3] Dandy v. Turner (1701) 1 Eq. Cas. Abr. 372; cp. the remarks on this case made by Park, op. cit. 477, 478.

[4] Le Pypre v. Farr (1716) 2 Vern. 716.

[5] Op. cit. chaps. xxv, xxvii, xxviii.

[6] In 1693-1694 Luttrell, Diary iii 264, mentions a project "to make his majestie sole insurer of all ships at a moderate rate, which should lye in bank at the custome house, to answer the merchants losses"; but it came to nothing.

The Origins of Other Forms of Insurance

I have dealt so far only with marine insurance. During the whole of this period it was by far the most important branch of insurance law. It was the only branch which the Council attempted to regulate; and it was the only branch which the Legislature noticed.

Analogous to insurances against the risks of transport by sea are insurances against the risks of transport by land. We have seen that this species of insurance was known abroad;[1] and perhaps it was known in England[2]—though there is not much evidence as to this.[3] Gradually, in addition to these insurances of property against the risks of transport, insurances against other dangers to property developed. But, during the sixteenth and seventeenth centuries, the only other danger to property which could be insured against was danger by fire; and as yet it was only houses that could be insured.[4] As early as 1591 a system of fire insurance was in operation in Hamburg; and proposals to establish this kind of insurance in England had been made in 1635 and 1638.[5] But it was not till after the Great Fire that it was actually established. In 1667 Barbon established an office which, in 1680, was transferred to a company.[6] In 1682 the City of London started a rival undertaking.[7] About the same time two partners established a mutual society, known as the Friendly Society; and in 1696 another mutual society, known as the Hand in Hand, was started.[8]

But, before fire insurance had developed, insurances against risks, not to property, but to the person, were known both on the

[1] Above 276 n. 7.

[2] Malynes, op. cit. 107—"other assurances are made upon goods and merchandises sent by land from one place to another, by the conductors or carriers to Venice, Frankford, or any other places, wherein the goods commonly are declared, and the mark also: and this manner of assurance is especially performed by the conductors, who take for the charges a certain allowance for every pound weight that the goods do weigh, and moreover, 2, 3 or 4 upon the hundred pounds in value that the said goods are esteemed to be worth: and he doth appoint a sufficient guard of souldiers to convey the same by land and rivers to the places intended, which nevertheless by a stronger power have many times been taken by the freebooters."

[3] Scott, Joint Stock Companies iii 374 n. 2, cites the Merchant's Dayly Companion (1684) 355, in which mention is made of insurances of goods "sent by wagon or cart etc. by land from all robbers or thieves."

[4] It was not till 1706 that Charles Povey founded an office to insure against losses of goods and merchandise by fire, Scott, Joint Stock Companies iii 374.

[5] Ibid iii 372. [6] Ibid. [7] Ibid 373; Luttrell's Diary i 135.

[8] Scott, Joint Stock Companies iii 373; it is there pointed out that there was a difference between the Joint Stock and the Mutual Societies—"the former, through the security deposited in the names of trustees, were in a position to pay claims, even although the sums, received from premiums, had already been exhausted. A mutual society on the other hand was constituted on the basis of exacting less for premiums, and making up any deficit, when required, by a levy upon its members."

continent and in England. Of the early history of this form of insurance I must say a few words.

In modern times the contract of insurance against risks to the person takes the form either of life or accident insurance; and both are very different in character from the insurances against risks to property. Life insurance is a contract of indemnity in so far as it enables the insured to make provision against death or the incapacities of old age. But it is also both in England [1] and elsewhere [2] a method of investment; and it is this aspect of the contract which is the most important, and causes it to differ essentially from insurances against risks to property. Insurances against risks to property are, as we have seen,[3] simply contracts of indemnity. The result is that, if the loss occurring from the happening of the risk is otherwise made good, the insurer is not liable, because the loss has not been incurred. On the other hand, the contract of life insurance is not simply a contract of indemnity. It is an absolute promise to pay at the death of the insured a fixed sum of money, in consideration for the payment of certain premiums during life, the amount of which is calculated by reference to the probable duration of the life insured.[4] The amount insured is payable whether or not any loss is incurred as a result of the death; and in this important respect the contract of accident insurance resembles the contract of life insurance.[5]

During this period we can see nothing resembling the modern contracts of life or accident insurance. The statistical knowledge, which has rendered those contracts possible in modern times, was wholly wanting;[6] and even if it had been available, it is probable

[1] Below n. 4.

[2] Bensa, op. cit. 89—"L'assurance sur la vie, telle qu'on la concoit aujourd'hui, n'est, à proprement parler, un véritable contrat d'indemnité. Au fond, cet acte de prévoyance revient à n'être que l'accumulation des épargnes qu'il est loisible à tout particulier de faire selon sa condition de fortune, le rôle de la Compagnie qui assure se bornant à garantir à l'assuré qu'une mort prematurée ne viendra pas empêcher la formation du capital qu'il a entrepris de constituer par ses économies."

[3] Above 278, 290.

[4] This is clearly explained by Page Wood, V.C., in Law v. London Indisputable Life Policy Co. (1855) 1 Kay and J. at p. 228; he said: "policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payments"; cp. Dalby v. India and London Life Assurance Co. (1854) 15 C.B. at p. 387; "life assurance," said Parke, B., "is a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of his life."

[5] Bradburn v. The Great Western Railway (1874) L.R. 10 Ex. 1.

[6] Valery, Les Origines De L'Assurance sur le Vie 7-10; Pardessus, op. cit. v. 331-332, thought that it was possible that the contract of marine insurance was able to be

that the dangers and uncertainties of life in a comparatively turbulent age would have made these contracts commercially impossible. But we do see in Italy in the Middle Ages, and in England during the sixteenth and seventeenth centuries, a few insurances against certain risks to the person, which we can regard as the germs from which our modern life and accident insurances have grown up.

M. Bensa has shown that in Italy in the Middle Ages there are instances of contracts of insurance against certain kinds of risks to the person.[1] There are insurances against risks of pregnancy,[2] against death by the plague,[3] or against death generally for a certain limited period.[4] It is interesting to note that in some of these policies, as in modern life policies, there are stipulations as to the parts of the world to which the insured may travel. But it is probable that these insurances were never very frequent—the definition of the contract of insurance given by Straccha in the sixteenth century does not cover them.[5] And, when they began to develop, they were so often made a disguise for mere wagers, that they were prohibited in Italy, Spain, and the Netherlands.[6] Consequently they never developed, as marine insurance developed, into an independent form of contract. The specimens which

developed in Italy because the progress made in mathematical studies gave insurers some basis for the calculation of risks; but, as Bensa, op. cit. 47-48, says, as yet no proof of the truth of this conjecture has appeared. The fact that it was marine insurance that was principally developed, and the fact that the risks were pretty constant and well known, would seem to point to the fact that the risk was calculated by the practical instinct of the parties to the contract; as Bagehot says, Economic Studies 9, "men of business have a solid judgment—a wonderful guessing power of what is going to happen—each in his own trade."

[1] According to Petrus Santerna, De Assecurationibus et Sponsionibus Mercatorum, Pars Secunda §§ 7-21, the legality of insurances upon various miscellaneous events was determined by considering whether a stipulation, made conditional on the happening or not happening of these events, would have been valid; as "omnis causa non inhonesta, etiam extranea, justificat stipulationem" (§ 18), so on all events not illegal or immoral an insurance can be made; apparently even mere wagering contracts (§§ 21-23) are valid, provided that the wager is not made upon any illegal game or event—though, "magis solatii causa quem lucri concipiuntur."

[2] Bensa, op. cit. 90-94; at Genoa a person accused of illicit connection with another's slave was presumed to be the father of the child, if the slave, and her master and mistress (being persons of good repute) swore to their belief in his guilt, and there was any other corroborating fact; such a person was liable to a heavy fine, which was doubled if the slave died; it was this risk which was frequently the subject of insurance.

[3] Ibid 97. [4] Ibid 95.

[5] De Assecuratione, Introd. 46—"Assecuratio est alienarum rerum, sive mari, sive terra exportandarum periculi susceptio, certo constituto pretio."

[6] Valéry, Les Origines de L'Assurance sur la Vie 5; a good illustration of this legislation is to be found in § xxxii of an Ordonnance of Philip II., which was published by the Duke of Alva while he was governor of the Netherlands; it runs as follows: "et pour empêcher les abus, fraudes, dols, et crimes commis à l'occasion des assurances sur la vie des personnes, et des gageures sur voyages et autres inventions semblables, nous les avons prohibées et défendues, les prohibons et défendons comme nuisibles et contraires au bienêtre général et comme de mauvais example," Pardessus, op. cit. iv 116.

M. Bensa has collected are in the form of a sale. The insurer declares that he has bought a certain amount of property from the insured, and that he has promised to pay a fixed price for this property by a certain date—the date being that on which the risk terminates. The fixed price represents the amount of the insurance. It is then declared that if a certain event—the risk insured against—does not happen, the money is not to be payable.

There is some evidence that contracts of this kind were known in England during this period.[1] In the only two cases on the subject which have got into the books we have an insurance upon the life of one who was going abroad,[2] and an insurance upon the life of a certain person for one year;[3] and Rolle says that the latter form of insurance was in common use both among merchants and others.[4] In other words, we get, as in the Middle Ages, insurances in view of certain definite risks, or for a definite period. But, it would seem from Rolle's statement, that these insurances were beginning to be used more extensively than in the Middle Ages; and Rolle's statement is corroborated by Malynes. Malynes says:[5] "Other Assurances are made upon the lives of men, for divers respects, some because their estate is meerly for term of life, and if they have children or friends to leave some part of their estate unto, they value their life at so many hundred pounds, for one or more years, and cause that value to be assured at five, six, ten, or more for every hundred pounds, and if he do depart this life within that time, the assurors pay the money; as it happened of late, that one being ingaged for Sir Richard Martin knight, Master of the Mint, caused £300 to be assured upon the life of the said Sir Richard, being some ninety years of age, and therefore gave twenty and five *pro centum* to the assurors: the ancient knight died within the year, and the said assurors did pay the money. Also one Master Kiddermaster having bought an office of the six clerks of the Chancery, and taken up money of others, caused for their assurance for many years together two thousand pounds to be assured upon his life after four and five in

[1] There is an account in the records of the court of Admiralty of an action between the representatives of William Gibbons and sixteen underwriters, who had insured his life from June 18, 1583, for twelve months; the insurance was for the sum of £383 6s. 8d. and the premium was 8 per cent.; the insured died May 29, 1584, and the underwriters disputed payment on the ground that the insurance only lasted for twelve periods of twenty-eight days; the court gave judgment for the representatives of Gibbons, Encycl. Brit. *tit.* Insurance.

[2] Denoyr v. Oyle (1649) Style 166-167.

[3] Sir Robert Howard's case (1700) 2 Salk. 625; s.c. 1 Ld. Raym. 480.

[4] "Issint si home garrant que tiel home viver a un an, car ceo est le common use del securers enter marchants et autres, Trin. 39 Eliza. B.R.," Rolle, Ab. *Action sur case* (A) 3 i p. 97.

[5] Op. cit. 107.

the hundred, until he had paid that money; which is very commodious. Likewise a traveller undertaking a voyage to Jerusalem or Babylon, delivering out money payable at his return, will providently assure a sum of money upon his life, either to secure some men that do furnish him with money to perform his voyage, and to put forth the greater sum, or to leave some means unto his friends, if he should die and never return."

Malynes makes it clear that these kinds of insurances against personal risk were beginning to be used somewhat as they are used in modern times. It was beginning to be discovered that "men cannot invent or imagine anything but the value of it may be assured."[1] But as yet this discovery was a new thing. It is not till the eighteenth and nineteenth centuries that the legal incidents and consequences of these new forms of insurances, whether against personal risks or against risks to property other than risks of transport, begin to be defined.

The developments of legal doctrine described in this chapter show that, by the end of the seventeenth century, the foundations of English commercial and maritime law had been laid. Commercial law, and large parts of maritime law, had ceased to be separate bodies of law, and were being absorbed into the system of English law. It was only those parts of maritime law, which were still administered by the court of Admiralty, which as yet remained to some extent outside that system. The accomplishment of this result had necessarily involved a large reception of foreign principles; but those principles had been modified by contact with a common law which, as the result of the political controversies of the seventeenth century, had won a position of supremacy in the state; and they were being adapted to a legal system in which the law was supplemented by a system of equity administered in a distinct tribunal. As I have already pointed out, the need for this modification and adaptation caused the development of English commercial and maritime law to be slower than in states where they were administered in separate tribunals, which applied

[1] Malynes, op. cit. 107; this is illustrated by a tale about a lottery told by Pepys' Diary iv 192; in this lottery each ticket cost £10 and there was only one blank, and, says Pepys, "the wisest man I met with was Mr. Cholmley, who insured as many as would, from drawing of the one blank for 12d; in which case there was the whole number of persons to one, which I think was three or four hundred. And he so insured about 200 for 200 shillings, so that he could not have lost if one of them had drawn it, for there was enough to pay the £10; but it happened another drew it, and so he got all the money he took"; in the case of Davenant v. Midy (1695-1696) House of Lords MSS. (N.S.) ii p. 196 no. 1009 there is mention in 1695-1696 of an appeal to the House (which never came to a hearing) which turned on "policies of insurance concerning the taking or not taking of towns."

the principles which civilians and canonists had for centuries been developing from a basis of Roman law.[1] But, from the point of view of the common law, the absorption of this new domain of commercial law was absolutely necessary to the consolidation of its position of supremacy in the state. It did for that part of the common law which was concerned with private relations, what the results of the political controversies of the seventeenth century had done for that part of it which was concerned with public law. For just as the results of those political controversies had made it the supreme law in the state, so this absorption of the domain of commercial law gave it its continued supremacy over the private law of the future.

Down to the seventeenth century the land law had been by far the most important branch of the common law. The common law possessed a body of principles applicable to this part of the law, which were both more numerous and worked out into greater detail, than the principles applicable to any other part of the law. The broad result of the developments related in this chapter was to establish commercial law as a rival to the land law—a rival which will in the succeeding centuries oust the land law from its old position. But this result will not be accomplished immediately. The immediate results were a broadening of the horizon of the common lawyers, and a consequent willingness to receive new ideas and new points of view, which were conditions precedent to the continued supremacy of a law which claimed to guide the legal development of a progressive state. Nor are these results surprising. This commercial law which had been thus received into the common law was jus gentium; and its reception had the same results upon the mediæval fabric of the older parts of the common law, as the reception of the Roman jus gentium of the peregrine prætor had long ago had upon the jus civile.

Already at the end of the seventeenth century these results had begun to be apparent. We cannot, it is true, say that they produced much direct effect upon the land law. That law, as we have seen, continued to be very mediæval right down to the reforms of the nineteenth century; and, in spite of those reforms, it still bears many marks of the fact that it is a branch of our private law which dates from that feudal period when it was much more than merely private law. But we have seen that the new needs and new ideas of this age had left their marks even on the land law, and that its rules were being adapted to the new needs of landowners. On all other branches of the common law the effect of the ideas which came with this new commercial jurisdiction is beginning to be directly apparent. We have seen that the

[1] Vol. v 153-154; vol. vi 522.

result of Holt's controversy with the merchants over the negotiability of promissory notes, was to make it clear that the lawyers must adapt their technical rules to the needs and usages of commerce;[1] and the manner in which other branches of the common law were developing show that the lawyers were alive to this necessity. We have already seen that the development of the law of bailment,[2] of the conception of a chose in action,[3] and of many branches of the law of contract,[4] illustrate this fact; and that it is to a small extent reflected in the statutory developments of the criminal law as to forgery,[5] larceny,[5] and shipping.[6] We shall see in the following chapter that it is also reflected in the developments made in the law both as to specific torts, and in the principles of liability for tort.

[1] Above 176.
[2] Vol. vii 432-433, 450-455, 461-463; above 259.
[3] Vol. vii 515 seqq.
[4] See above chap. iii § 2.
[5] Vol. iv 501-503.
[6] Vol. vi 400-401.

CHAPTER V

CRIME AND TORT

THREE sets of influences have shaped the technical development of this branch of the law during this period—the Legislature, the new ideas introduced by the Council and the Star Chamber, and the doctrines of the common law. I have given some account of the first[1] and second[2] of these influences in the first Part of this Book. In this chapter I shall deal mainly with the third of these influences—the doctrines of the common law—and show how these doctrines, as both expanded and modified by the first two of these influences, have created our modern law of crime and tort.

In this, as in the mediæval period,[3] the influence of the Legislature upon the growth of the criminal law has been great. We see it in the creation of new statutory treasons either to meet particular political emergencies, or to supplement the deficiencies of Edward III.'s Statute of Treason. We see it no less in the creation of various new felonies. Some of these were intended to supplement the law of treason by providing a more severe punishment for such offences as riots, seditious libels, or conspiracies. Others were directed to an object which, at this period, was considered to be closely cognate to the suppression of offences akin to treason—the penalizing of dissent from the national church, whether the dissenter was a Roman Catholic, a Protestant, or an atheist. Others created new or extended old offences against person or property. Others were connected with that long series of statutes in which the state had prescribed its policy in relation to industry and commerce.[4] Others were passed to penalize certain forms of immorality, which the weakness of the ecclesiastical courts made it expedient to hand over to the common law. And the activity of the Legislature was not exhausted by the creation of these new treasons and felonies. We have seen that this period is marked by the creation of many new crimes below the degree of felony. These "misdemeanours" are definitely criminal offences, and become gradually quite distinct from those

[1] Vol. iv 492-532; vol. vi. 399-407.
[2] Vol. v 167-214.
[3] Vol. ii 449-453; vol. iii. 277.
[4] Vol. iv 314 seqq.; vol. vi. 313 seqq.

quasi-criminal trespasses which are so striking a feature of the mediæval common law.[1] They are either less serious forms of similar offences which rank as felonies, or they are minor forms of wrongdoing, which are, for the most part, matters to be dealt with by the justices of the peace sitting in their petty or quarter sessions. It was the creation of these misdemeanours which won back to the field of criminal law many forms of wrongdoing, which the emphasis laid in the Middle Ages on the civil aspect of trespass had tended to annex to the field of tort.

But this enlargement of the field of criminal law was not due entirely to the Legislature. It owed at least as much to the new ideas introduced by the Council and the Star Chamber. We have seen that it was through the influence of the procedure of the Star Chamber that the criminal procedure of the common law tended to acquire rules, which, by giving many advantages to the Crown, increased the strength of the criminal law.[2] The Star Chamber also materially helped the development of the law as to riot, and created the law as to the illegality of attempts to commit crimes. It added important new elements to the crime of conspiracy, and it created the crime of libel. It helped to enlarge the ideas of the common law as to fraud; and by its firm action in regard to such offences as maintenance, champerty, and embracery, it helped to make them less serious menaces to the proper administration of the law, and thus to reduce them to the comparatively unimportant position which they hold in modern law.[3]

Both the enlargement of the criminal law by the Legislature, and the new doctrines of the court of Star Chamber, necessarily exercised important effects upon the development of many common law doctrines in the sphere of crime and tort. But in both spheres the common law contributed something of its own. In the sphere of treason we shall see that it added to the law the doctrine of constructive treason; and that this addition, to a large extent, rendered unnecessary those statutory extensions of Edward III.'s statute, which were so frequently made during the sixteenth and seventeenth centuries.[4] In the sphere of felony it developed and filled up the somewhat bare outlines of the mediæval common law as to the essentials of the common law felonies. One or two illustrations of this process will indicate the manner in which the rules of this branch of the modern criminal law were built up on the basis of mediæval principles.

The readiness with which all classes resorted to lethal weapons to assert their rights, or to avenge any insult real or fancied, gave abundant opportunity for elaborating the distinctions between the

[1] Vol. iii 317-318, 370-371.
[2] Vol. v 188-196.
[3] Ibid 201-203.
[4] Below 309-310.

various kinds of *homicide*, and, in particular, the distinction between murder and manslaughter.[1] Thus it was ruled in 1553[2] that, if A set on B intending to kill him, and C suddenly intervened in the combat, and B was killed, though it was murder in A, it was only manslaughter in C; and, it would seem from Plowden's comment, that this ruling settled a point of law which had long been doubtful.[3] In 1612 it was ruled that if a man, being provoked, in hot blood beat another with a weapon not likely to cause death, and it did cause death, he was only guilty of manslaughter;[4] but it was held in 1666 that the fact that there was provocation would not reduce the crime from murder to manslaughter, if the accused had used a weapon likely to cause death,[5] a decision which was approved by Holt, C.J., in 1698.[6] On the question what would amount to a provocation, it was ruled in 1666 that mere words would not be an adequate provocation for homicide; "but if upon *ill* words both parties suddenly fight, and one kill the other, this is but manslaughter, for it is a combat between two upon sudden heat."[7] But other cases show that this question gave rise to many difficult questions and divisions of judicial opinion.[8] In cases where the death had not followed immediately upon, and was not solely occasioned by, the stroke, the law was inclining to the view that the person who gave the stroke was guilty of homicide;[9] but that a person who, without using physical violence, had occasioned a death by "working on the fancy of another," or by unkind or harsh usage, which was not ordinarily calculated to have this effect, was not guilty.[10] The rules as to

[1] For a more detailed account of the development of the law during this period see Stephen, H.C.L. iii 46-73; for the development of the principles of criminal liability in relation to homicide and other crimes see below 433-446.

[2] Points ruled at the sessions held at Salop, Plowden at p. 100.

[3] "Quod nota bene lector, for I have heard this greatly doubted, viz. if the master lies in wait in the highway to kill a man, and his servants attend upon him, and the master does not make his servants privy to his intent, and afterwards he, for whom the master lies in wait comes, and the master attacks him, and his servants seeing their master fighting, take his part, and all of them kill the man, whether or no this should be murder in the servants. . . . But this is by the above rule of the Court put out of doubt, viz. that it shall only be manslaughter in the servants," ibid at p. 101.

[4] John Royley's Case, Cro. Jac. 296.

[5] R. v. Grey Kelyng 64-65.

[6] R. v. Keite, 1 Ld. Raym. at p. 144.

[7] Resolutions preparatory to the trial of Lord Morley, Kelyng 55.

[8] R. v. Huggett (1666) Kelyng 59-62; the whole subject was fully dealt with in the elaborate judgment in R. v. Mawgridge (1707) Kelyng 119 in which all the judges except Trevor, C.J., concurred; R. v. Oneby (1727) 2 Ld. Raym. 1485; see Stephen, H.C.L. iii 70-73.

[9] Hale P.C. i 428-429. "This hastening of the death (by the wound or stroke) is homicide or murder . . . in him that gives the wound or hurt, for he doth not die simply *ex visitatione Dei* . . . and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned and wise judge justice *Rolle* frequently direct."

[10] "In foro humano it cannot come under the judgment of felony because no external act of violence was offered . . . and hence it was that before the statute of 1 Jac. cap. 12 (vol. iv 510-511) witch-craft or fascination was not felony," ibid 429.

what facts would prove that a man had killed another by misadventure [1] or se defendendo [2] were being elaborated. Similarly the cases in which homicide was justifiable were restated; [3] and the construction of the statute of 1532,[4] which excused from guilt those who killed persons attempting robbery or murder in or near the highway, or in mansion houses, gave rise to a number of decisions as to the cases which fell within its protection.[5] The suicide of Hales, J., in 1554 gave rise to a restatement of the rule that this form of homicide was murder, because it was of malice propense; [6] but we shall see that it was during this period that the lawyers were beginning to develop certain constructive extensions of this requirement of malice, which in many cases gave it a very artificial meaning, and tended to render very technical the distinctions between the different forms of homicide.[7]

The inconvenience caused by the very narrow ground covered by *larceny*,[8] led the judges to widen it as far as possible, by holding that a very small physical interference with the property would amount to an asportation.[9] The differences of judicial opinion as to whether the appropriation of the bed linen by a lodger in furnished apartments was larceny,[10] led, as we have seen, to a statute which declared that in such a case larceny had been committed; [11] and the relations both of husband and wife, and of the co-owners of property, led to some difficulties where goods were appropriated by a wife or a co-owner.[12] In the case of *robbery* the law was inclined to construe somewhat liberally both the acts which amounted to the taking of property by "putting in fear," and the acts which amounted to "a taking from the person"; [13] but the view was strictly adhered to that there must have been a taking, and that the taking must have been effected by violence or putting in fear.[14] It was during this period that the essentials of the offence of *burglary* were precisely ascertained.[15] It was settled, after some conflict of opinion, that there must be an actual break-

[1] Coke, Third Instit. 56; R. v. Levett (1640) Cro. Car. at p. 538.
[2] Hale, P.C. i 479-485.
[3] Vol. iii 312; Foxley's Case (1601) 5 Co. Rep. at ff 109b, 110a.
[4] Vol. iii 312 n. 3. [5] Hale, P.C. i 487-488.
[6] Hales v. Petit (1563) Plowden at p. 261 *per* Dyer, C.J.
[7] Below 435-437. [8] Vol. iii 361-366. [9] Hale, P.C. i 508.
[10] R. v. Raven (1662) Kelyng 24—held not to be larceny; but this decision was doubted, see ibid 81-82; Hawkins, P.C. Bk. i c. 33, § 10.
[11] 3 William and Mary c. 9 § 5; vol. vi 402.
[12] Hale, P.C. i 513-514. [13] Ibid i 532-533.
[14] See the case of R. v. Harman (1620), cited Hale, P.C. i 534-535.
[15] Ibid 549-550. I stated, vol. iii 369, that for the rule that burglary must be committed at night no earlier authority than a case of Edward VI.'s reign has been cited; but Marowe, Reading, Oxford Studies vii 378, states the rule as an essential part of the offence. It is possible that it was not a perfectly well settled rule when Marowe wrote in 1503—though he states it as such; and that the sixteenth-century statutes, cited vol. iii 369, had something to do with its definite settlement.

ing, and that a mere breaking in law[1] was not sufficient.[2] On the other hand, an entry gained under false pretences in order to commit a felony, was a sufficient breaking,[3] and so was the breaking of an inner door by one who had come in through an open door or window.[4] In the case of *arson* we have seen that it was settled in this period that a man who had burned his own house was not guilty of this crime.[5]

The distinctions between principals in the first and second degree, and between principals and accessories were elucidated by their application to the facts of various cases;[6] and we shall see that the principles of criminal liability established in the Middle Ages were elaborated, and in some respects modified.[7]

The enlargement of the sphere of misdemeanour during this period was due rather to the action of the Legislature[8] and the Star Chamber,[9] than to the action of the common law. But the common law showed a tendency to follow this lead, and to hold that obvious wrongs, which did not amount to felonies, were misdemeanours. Thus in *Holmes's Case* the court held that the offence of burning one's own house, though it did not amount to arson, was a misdemeanour punishable by fine and imprisonment.[10] In this period, however, as in the mediæval period,[11] it is in the sphere of tort, rather than in the sphere of crime, that the common law made its most important contribution to the law as to wrongs under the degree of felony. We have seen that, even in the mediæval period, there were some signs that new developments were beginning in this sphere; and that the means by which these developments will be made will be a liberal use of the action on the case.[12] All through this period this development proceeded rapidly. It followed, firstly, that certain rules applicable to certain specific torts began to be developed, with the result that these torts began to assume their modern characteristics; and, secondly, that the mediæval principles of civil liability began to be added to and modified.

[1] "Everyone that enters into another's house against his will or to commit a felony, tho' the doors be open, doth in law break the house," Hale, P.C. i 551.

[2] "And altho' in the remembrance of some yet alive Sir Nicholas Hide chief justice did hold that a breaking in law was sufficient to make a burglary . . . yet the law is that a bare breaking in law . . . is not sufficient to make a burglary without an actual breaking," ibid i 551-552.

[3] Kelyng 42-43; cp. R. v. Cassy and Cotter (1666) ibid 62-63.

[4] R. v. Cassy and Cotter, Kelyng 62-63; R. v. Johnson (1666) ibid 58-59; it was held in the last cited case that if no door had been broken, but only a trunk or box, the offence did not amount to burglary.

[5] Vol. iii 370 n. 7.

[6] (1553) Plowden 97-98; Kelyng 52-53; Hale, P.C. i 615-618; vol. iii 307-310.

[7] Below 433-446.

[8] Vol. iv 512-521; vol. vi 402-405.

[9] Vol. v 197-214.

[10] (1635) Cro. Car. 376.

[11] Vol. iii 318, 370-371.

[12] Ibid 406-407, 407-411.

But, in certain cases, the development of the law relating to those wrongs, which hover on the border line of crime and tort, was complicated by the two somewhat different streams of doctrine, which originated in the courts of common law and in the Star Chamber. When the jurisdiction of the Star Chamber was abolished, many of the doctrines which it had developed were taken over by the common law courts. These courts were therefore obliged to co-ordinate and reconcile these divergent streams of doctrine. No doubt the common law was enriched by the reception of these new ideas. But they tended to produce a development of the law which was not altogether harmonious, or altogether convenient; and we shall see that its results are plainly visible to-day in such branches of the law as defamation[1] and conspiracy.[2] In particular, it tended to obscure still further the line between crime and tort. In the Middle Ages and later, the double nature of, and the wide field covered by trespass and its offshoots, effectually prevented any real distinction between tort and crime, based upon the nature of the act done.[3] In this period, the fact that the Star Chamber treated certain acts as criminal, while the common law courts remedied the same or similar acts by a civil action on the case for damages, made it more impossible than ever to draw any distinction on these lines. "If," says Professor Kenny,[4] "we know any particular occurrence to be a crime, it is easy to ascertain whether or not it is also a tort, by asking if it damages any assignable individual. But there is no corresponding test whereby, when we know an occurrence to be a tort, we can readily ascertain whether or not it is also a crime. We cannot go beyond the rough historical generalization that torts have been erected into crimes, whenever the law-making power had come to regard the mere civil remedy for them as being inadequate."

The only certain lines of distinction are to be found in the nature of the remedy given, and the nature of the procedure to enforce that remedy. If the remedy given is compensation, damages, or a penalty enforced by a civil action, the wrong so redressed is a civil wrong. If the remedy given is the punishment of the accused, which is enforced by a prosecution at the suit of the crown, the wrong so redressed is a crime or criminal in its nature.[5] Even this test sometimes fails to establish a clear line of difference.[6]

The need to adjust the doctrines of the mediæval criminal

[1] Below 361-367.
[2] Below 379-384, 392-394.
[3] Vol. iii 317-318, 370-371.
[4] Outlines of Criminal Law, 20-21.
[5] See the classification of the various kinds of proceedings which may be taken against wrongdoers in Kenny, op. cit. 16-17.
[6] See Attorney-General v. Bradlaugh (1885) 14 Q.B.D. 667.

law to their new environment in the modern state; the need to modify, to enlarge, and to elaborate the law of tort and the principles of civil liability, to meet the new demands caused by the more varied and complex life of such a state; and the need to adjust and to harmonize the two similar yet divergent lines of doctrine, which, during the sixteenth and seventeenth centuries, were being simultaneously developed by the common law courts and the Star Chamber—all had their influence on the technical development of many of the rules of the law of crime and tort. One or other of these causes is historically at the root of the most salient of these developments during this period. With these developments I shall deal in this chapter under the following heads :—§ 1. Constructive Treason and other Cognate Offences; § 2. Defamation; § 3. Conspiracy, Malicious Prosecution, and Maintenance; § 4. Legal Doctrines Resulting from the Laws against Religious Nonconformity; § 5. Lines of Future Development; § 6. The principles of Liability.

§ 1. Constructive Treason and other Cognate Offences

Constructive Treason

The three clauses of Edward III.'s Statute of Treason which are designed to protect the safety of the state, are the clauses which make it treason to compass or imagine the king's death, to levy war against the king, and to adhere to his enemies.[1]

The last of these clauses can be briefly dismissed. It has not been extended by construction in the same way as the first two clauses. The only difficulty which has arisen in connection with it has been the difficulty of deciding whether adherence to the king's enemies out of the realm is included in it.[2] This difficulty arises solely from the wording of the clause, which enacts that it shall be treason, "if a man do levy war against our Lord the King in his realm or be adherent to the king's enemies in his realm giving to them aid and comfort in the realm or elsewhere."[3] This clause might be construed to mean that the words "or elsewhere" govern only the words "giving to them aid or comfort," so that adhering to the king's enemies outside the realm is not treason; or it might be construed to mean that the words "or

[1] For this statute see vol. ii 449-450; vol. iii 287-293.

[2] All the authorities on this subject are collected in R. v Casement [1917] 1 K.B. 98.

[3] "Si homme leve de guerre contre notre dit Seigneur le Roi en son Roialme ou soit aherdant as enemys notre Seigneur le Roi en le Roialme donant a eux eid ou confort en son Roialme ou per aillours."

elsewhere" govern the whole clause, so that adhering to the king's enemies, and it would seem also the levying of war,[1] outside the kingdom are treason.[2] It would seem from the precedents cited by Hale that, before the statute, adhering to the king's enemies outside the kingdom was treason;[3] and it seems to have been assumed that the statute had not altered the law. This is reasonably clear from a dictum in a case of 1382, in which it was laid down that, if a man adhered to the king's enemies in France, "his adherence shall be tried where his land is, as has been often done of adherents to the enemies of the king in Scotland."[4] If he had no land, Hale thought that he might be tried in any county in England, which is by no means improbable.[5] No doubt there was some difficulty as to the trial of persons who had thus committed treason out of the kingdom, owing to the difficulties arising from the rules of venue.[6] But we have seen that this difficulty was removed by the statute of 1543-1544;[7] and the wording of that statute makes it clear enough that, in the opinion of the Legislature, acts committed abroad might amount to treason.[8] It follows, therefore, that Coke,[9] Hale,[10] and Hawkins[11] were well warranted in holding that adhering to the king's enemies outside the kingdom was an offence which came within the scope of Edward III.'s statute. Later cases have all laid down the law in the same way;[12] and, after an elaborate review of the authorities, this interpretation was finally established as correct in 1916 in the case of *R. v. Casement*.

It is the first two of these three clauses of the statute, and especially the first, which have been widely extended by judicial construction. I shall deal firstly with the clause as to compassing

[1] There seems to be no authority on the question whether levying of war out of the realm is treason; but the reasoning of R. v. Casement [1917] 1 K.B. 98, and the authorities on which that decision is based, clearly apply; on the other hand, Coke, Third Instit. 9, and Hale, P.C. i 130, 154-158, seem to say that the levying of war must be in the realm; and Kenny, Criminal Law 269, takes this view.

[2] R. v. Casement [1917] 1 K.B. at p. 122 *per* Lord Reading, C.J.

[3] Case of Poynter, *Claus.* 7 Ed. III. part 1 m. 9, Hale, P.C. i 166; case of Culwin *Claus.* 7 Ed. III. part 1 m. 15, ibid 167-168.

[4] Fitz. Ab. *Trial* pl. 54—"Si home soit adherent as enemys le roi en Fraunce sa terre est forfetable, sa adherauns serra trei lou sa terre est come ad este souvent foitz fait des adherauntz as enemies le Roy en Escoce"; the translation is taken from the note to R. v. Casement [1917] 1 K.B. 145.

[5] P.C. i 170. [6] For these rules see vol. v 117-119, 140-143.

[7] 35 Henry VIII. c. 2; vol. iv 524.

[8] See R. v. Casement [1917] 1 K.B. at p. 124 *per* Lord Reading, C.J.

[9] Third Instit. 10-11. [10] P.C. I. cap. xv. [11] P.C. Bk. ii. cap. xxv § 46.

[12] See the cases cited in R. v. Casement [1917] 1 K.B. at p. 128; the opinion of the law officers in 1775, cited ibid at p. 143; Mulcahy v. R. (1868) L.R. 3 H. of L. at p. 318; R. v. Lynch [1903] 1 K.B. 444; note also that in R. v. Vaughan (1696) 13 S.T. at p. 525 Holt, C.J., laid it down quite generally that, "for a subject of England to join with the king's enemies, in pursuit of a design to burn or take any of the king's or his subjects' ships, that is an adherence to the king's enemies."

or imagining the king's death, secondly with the clause as to levying of war against the king, and thirdly with the later history of this branch of the law.

(1) *Compassing or imagining the king's death.*

The act made treason by the statute of Edward III. is not the killing of the king, but the compassing or imagining his death—the intention to kill him.[1] Therefore in 1660 the judges resolved that the regicides should be indicted for compassing; and that the actual murder of the king "should be made use of as one of the overt acts to prove the compassing of his death."[2] Even in the mediæval period, the judges had seen that the fact that the gist of the offence was an intention to kill the king, could be used to extend its scope; for they had held that the mere speaking of words might be an overt act which evidenced such an intention.[3] They had seen as clearly as their successors that such an intention can be proved only by overt acts, "for the thought of man is not triable"; and that the statute could be extended by inferring an intention to kill from overt acts which were only remotely connected, if they were connected at all, with a formed intention to kill the king. But these cases were not followed. The modern construction of this clause, though it started from somewhat similar premises, was elaborated under a different set of legal and political conditions, and, unlike these mediæval constructions, it resulted in the establishment of a definite body of legal doctrine.

The Tudor kings respected the law; and they were well aware that nothing could be more dangerous to the security of their none too secure throne than any attempt to pervert it. It was for this reason that, during the first sixty or seventy years of the sixteenth century, many statutes were passed to extend the scope of treason,[4] and that very little is heard of any constructive extension of this clause of Edward III.'s statute. Hale, commenting on the statute of 1540-1541, which made certain riots treason, remarks that it shows, "how careful they were in this time not to be overhasty in introducing constructive treasons, and to shew how the opinions of the parliaments of Edward VI., queen Mary, queen Elizabeth went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 E. 3 beyond the letter

[1] Vol. iii 292-293.

[2] "It was resolved that the indictments should be for compassing the death of the late king (the very compassing and imagining the king's death, being the treason within the stat. 25 Ed. 3) and then that we might lay as many overt acts as we would, to prove the compassing of his death: but it was agreed, the actual murder of the king should be precisely laid in the indictment, with the special circumstances as it was done, and should be made use of as one of the overt acts, to prove the compassing of his death," Kelyng 8.

[3] Vol. iii 293. [4] Vol. iv 492-498.

thereof."[1] The repeal of the new treasons created by Henry VIII. on the accession of Edward VI., and the repeal of Edward VI.'s statutes on the accession of Mary,[2] show that the creation of new treasons, even by Parliament, was not a popular exploit. It could hardly be expected, therefore, that the courts would undertake their manufacture.

But, though there was always a tendency to revert to the statute of Edward III., it was abundantly clear that that statute was wholly inadequate to protect the state. The Legislatures which repealed Henry VIII.'s and Edward VI.'s statutes were always obliged to re-enact some of the provisions of those statutes.[3] The result was that, by Elizabeth's reign, the nation had begun to grow accustomed to the necessity for an extended law of treason, and to acquiesce in it. This changed attitude was due, not only to the existence of these statutes, but also to two other causes. In the first place, the modern territorial state was now well established. It was coming to be generally recognized that allegiance to the state ought to override all other ties. Hence it was realized that the statute was, as Stephen has said, "worded too narrowly if it was to be construed literally."[4] In the second place, the dangers to the queen's life from the constant Roman Catholic plots, and the certainty that possibly the existence of the English state, and certainly its orderly development, were bound up with her safety, led the nation to acquiesce in any measures that could be devised to preserve it. Hence the constructive extensions of this clause of the statute came to be not only acquiesced in, but even approved as necessary means of defence in a time of national emergency. Under these circumstances, it is not surprising to find that it was in the latter part of the sixteenth century, that the constructive extension of this clause of the statute began to be made.

It would seem that, even before this date, the Legislature was aware that the vagueness of Edward III.'s statute made the exact content of its clauses by no means certain. Hale, while admitting that it was "a fair topical argument," that the offences made treasons by new and temporary Acts were not treasons within Edward III.'s statute, yet points out that it is by no means conclusive; for some of these new treasons turned out to be within that statute; and certain statutes which made offences felonies "have this wary clause, 'the same not being treason within the statute of 25 E. 3.'"[5] The vagueness of the statute helped the

[1] P.C. i 293. [2] Vol. iv 495. [3] Ibid. [4] H.C.L. ii 263.

[5] "That tho' generally it be a fair topical argument, that when offences are made treasons by new and tempolary Acts, they were not treasons within the statute of 25 E. 3, for if they were, they needed not to have been enacted to be treason by new statutes, as introductive of new laws in such cases, yet that doth not hold universally true, for some things are enacted to be treason by new, yea, and temporary laws,

judges to extend it; but, as I have already pointed out, the fact that it was the intention to kill the king, and not his murder, which was made treason, was the main reason why this clause could be so extensively construed. As we shall now see, the construction put upon it grew gradually more and more extensive, till it came to include much of the ground covered by the clauses relating to the levying of war against the king and adhering to his enemies.[1]

It is obvious that an intention to kill the king must be proved from overt acts, which show that the person doing them had such an intention. "This compassing, intent, or imagination," says Coke,[2] "though secret is . . . to be discovered by circumstances precedent, concomitant, and subsequent." Now it is clear that it is only from overt acts, which obviously point to a design to kill the king, that an intention to kill him can properly be inferred. But the judges, in considering overt acts alleged to prove this intention, did not limit themselves to overt acts of this kind. They considered the overt acts of the accused "with all endeavour for the safety of the king."[3] Therefore they were led to rule that acts which showed an intention, not to kill him, but to put any kind of restraint or force upon him, might be good evidence of an intention to kill him.

We can see the doctrine in its initial stage in Coke's Third Institute. Treason, he says, must be proved by an overt act, "as if divers do conspire the death of the king, and the manner how, and thereupon provide weapons, powder, poison, assay harness, send letters, etc., or the like, for execution of the conspiracy. Also preparation by some overt act to depose the king or to take the king by force and strong hand, and so imprison him till he hath yielded to certain demands, this is a sufficient overt act to prove the compassing and imagination of the death of the king: for this upon the matter is to make the king a subject, and to dispoil him of his kingly office of royal government. And so it was resolved by all the judges of England, Hil. 1 Jac. Regis, in the case of Ld. Cobham, Lord Gray, and Watson and Clark, seminary priests: And so had it been resolved by the justices Hil. 43 Eliz. in the case of the earls Essex and Southampton, who intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her counsel, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt act for compassing the death of the queen. And so by woeful experience in former times it

which yet were treason by the statute of 25 E. 3, as will appear in the sequel. And therefore the statutes of 1, 2 Ph. and M. cap. 3, 1 E. 6 cap. 12, 23 Eliz. cap. 2, making several offences felony, have this wary clause, *the same not being treason within the statute of* 25 *E.* 3," Hale, P.C. i 261.

[1] Below 314-318. [2] Third Instit. 6. [3] Coke, ibid 6.

has fallen out in the cases of Ed. 2, R. 2, H. 6, and E. V. that were taken and imprisoned by their subjects."[1] Similarly, "if a subject conspire with a foreign prince beyond the seas to invade the realm by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king."[2] And, if such overt acts were advocated in a published book, the writing and publication of such a book was an overt act of compassing.[3] Further, Coke decided in *R. v. Owen*[4] that saying that the king, being excommunicated by the Pope, may lawfully be deposed and killed by any whatsoever, and that such killing was not murder, was treason. Though, as we shall see, Coke held that merely speaking scandalous words of the king was not treason, he was of opinion that words which, to use Bacon's phrase, "disabled the king's title,"[5] and a fortiori words which incited to his murder, were an overt act which proved the compassing of his death.

Clearly in Coke's day the constructive extension of this clause of the statute had begun. That it had begun was due largely to the political conditions prevailing in England and Europe. Coke's illustrations make this clear. All the acts ruled to be overt acts proving a compassing of the king's death were obviously dangerous to him, and might easily lead to his death; and this was especially true in Elizabeth's reign, when the fate of the Reformation seemed at times almost to depend upon her life. But this constructive extension had not as yet gone very far; and neither Coke nor most of his colleagues were prepared to push it much further. Thus, firstly, Coke was of opinion that mere scandalous words of the king, importing that he was unfit to reign, unless they were words which disabled his title, were not an overt act from which a compassing of his death could be inferred—"it is commonly said that bare words may make a heretick, but not a traytor without an overt act";[6] and this was agreed to be law by all the judges in *Pine's Case* in 1629,[7] after an exhaustive survey of the earlier precedents. Some of the mediæval precedents, it is true, pointed

[1] Third Instit. 12. [2] Ibid 14.

[3] "Cardinal Poole . . . in his book of the supremacy of the Pope, written about 27 H. 8, incited Charles the Emperor, then preparing against the Turk, to bend his force against his natural sovereign lord and country; the writing of which book was a sufficient overt act within this statute," ibid 14.

[4] (1616) 1 Rolle Rep. 185.

[5] Spedding, Letters and Life of Bacon v 109.

[6] Third Instit. 14.

[7] Cro. Car. 117—"the speaking of the words before mentioned, though they were as wicked as might be, were not treason. For they resolved that unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute 25 Edw. 3, c. 2 for imagining the death of the king etc., and the indictment must be framed upon one of the points in that statute; and the words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them."

in the opposite direction; and some lawyers, including Bacon,[1] would have liked to follow them. But probably the judges were influenced by the wording of the statutes which had, in the preceding reigns, created new treasons. In many cases treasonable words had been made only a misdemeanour for the first offence, which shows, as Hale points out,[2] that, in the opinion of the Legislature, "words, tho' of an high nature, were not treason, nor an overt act of compassing the king's death." Secondly, though, as we have seen, Coke agreed that treasonable words set down in writing and published were an overt act of treason by compassing the king's death,[3] in *Peacham's Case*[4] neither he, nor many of the other judges, could be persuaded that the writing of treasonable words in a sermon, which was never preached or published, nor intended to be preached or published, was treason.[5] No doubt opinion was divided on this point;[6] but Peacham, though found guilty, was not executed. It would seem that Coke regarded such an unpublished document as being equivalent to mere words, or perhaps, as they were not published, as even less heinous. Thirdly, Coke laid it down that a mere conspiracy to levy war was "no overt act to or manifest proof of the compassing of the death of the king within this Act," on the somewhat inconclusive ground that so to hold would confound the several clauses of the statute.[7]

These limitations upon the constructive extension of this clause of the Act were not wholly logical. They were, as I have said, largely the product of the political conditions of the day; and it is clear that they were distasteful to the crown lawyers of James I.'s reign. Bacon, in his conference with Coke on *Peacham's Case*, contended that "there be four means or manners whereby the death of the king is compassed or imagined. The first by some particular fact or plot. The second by disabling his title; as by affirming that he is not lawful king, or that another ought to be king, or that he is an usurper or a bastard, or the like. The

[1] Spedding, Letters and Life of Bacon v 109, 120; cp. vi 92-93.

[2] P.C. i 315; and cp. his comment on 1, 2 Phillip and Mary c. 3 at p. 312.

[3] Above 312 and n. 3.

[4] (1615) Cro. Car. 125; Spedding, Letters and Life of Bacon v 127.

[5] "Edward Peacham was indicted of treason for divers treasonable passages in a a sermon which was never preached, or intended to be preached, but only set down in writings, and found in his study; he was tried and found guilty, but not executed. Note, that many of the judges were of opinion that it was not treason," Cro. Car. 125.

[6] Thus Chamberlain, writing to Carleton Feb. 20, 1614, says, "the king since his coming hath had the opinion of the judges severally in Peacham's Case, and it is said that most of them concur to find it treason. Yet the lord chief justice is for the contrary," cited Spedding, op. cit. v 121 n.; for James's own view that Peacham was guilty of treason see ibid 105-106.

[7] "One of them (i.e. the different treasons set out in the Act) cannot be an overt act for another. As for example: a conspiracy is had to levy war, this (as hath been said and so resolved) is no treason by this Act until it be levied, therefore it is no overt act or manifest proof of the compassing of the death of the king within this Act . . . for this were to confound the several clauses," Third Instit. 14.

third by subjecting his title; as either to pope or people; and thereby making him of an absolute king a conditional king. The fourth by disabling his regiment, and making him appear incapable and indign to reign."[1] Coke's view that mere words coming under the fourth head were not treason, unless accompanied by some other overt act, prevailed.[2] But some of the more general rules laid down by Bacon were, as we shall now see, destined to prevail in the succeeding centuries; and even unpublished writings and mere words were, at the latter part of the seventeenth century, allowed to have a weight which it is difficult to suppose would have been approved by Coke and his fellow judges.

Thus, by the beginning of the seventeenth century, the constructive extension of this clause of the statute had begun. During the latter part of that century it made rapid progress. Firstly, it was laid down in 1663 that a conspiracy to levy war could be regarded as an overt act to prove a compassing of the king's death.[3] Hale approved of this resolution;[4] and he pointed out that some of the sixteenth-century cases were not wholly consistent with Coke's opinion to the contrary.[5] He endeavoured to reconcile Coke's opinion with the new construction of this clause, by drawing a distinction between a mere constructive levying of war[6] and an actual levying of war. He held that a conspiracy to levy what was merely a constructive war was not, and a conspiracy to levy an actual war was, an overt act to prove a compassing of the king's death.[7] This distinction is accepted by Foster,[8] and is undoubtedly good law; but it is doubtful if it really expresses Coke's meaning. The much more probable view is that the constructive interpretation of this clause had been extended between the dates of Coke's and Hale's works. It was both an obvious and an inevitable extension, but it was none the less an extension. Secondly, it was laid down in *R. v. Twyn*[9] that the printing of a book, in which the people were incited to sedition, to rebellion,

[1] Spedding, Letters and Life of Bacon v 109. [2] Above 312.

[3] "It was resolved and agreed by all now as it was before in *Tong's case*, and *Sir H. Vane's case*, that the meeting and consulting to levy war is an overt act to prove the compassing the king's death within the stat. of 25 Ed. 3. Altho' the consulting to levy war is not actual levying within the statute, and so cannot be indicted thereupon, for that treason of levying war, yet if they be indicted for the treason of compassing and imagining the king's death, that consulting to levy war is an overt act to prove that treason, altho' Co. Pl. Cor. 14 delivers an opinion against this," Kelyng 20.

[4] P.C. i 119.

[5] Ibid i 120-122; it is clear, for instance, that the line between a conspiracy with a foreign prince to invade this country, which Coke admitted to be a good overt act to prove a compassing of the king's death, and a conspiracy to levy war, is very thin, see ibid 122.

[6] For what amounts to a constructive levying of war see below 319-321.

[7] P.C. i 122-123. [8] Crown Law 213. [9] (1663) Kelyng 22.

and to the killing of the king, was an overt act, which could be used to prove a compassing of his death. This was in conformity with Coke's opinion.[1] But in *Algernon Sidney's Case*[2] this ruling was extended to cover the case of a writing, in which it was in effect alleged that the king was subject to Parliament, and that kings could be deposed.[3] As it was not proved that the paper was published,[4] this goes very near to holding, contrary to Coke's view, and in accordance with actual verdict in *Peacham's Case*, that the mere writing of such a paper was an overt act of compassing the king's death.[5] This ruling could only be justified in one of two ways—either on the unproved assumption that the writing was intended to be published, or, on the stronger ground, that it was so connected with the other overt acts alleged, that the writing, though not published, was evidence to support and explain them.[6] The latter ground was, as we shall see, accepted as good law after the Revolution.[7] Thirdly, shortly after *Pine's Case*,[8] in which, as we have seen, it had been laid down that merely scandalous words spoken of the king did not amount to treason,[9] it had been laid down in *R. v. Crohagan*[10] that, if words purporting an intention to kill the king were accompanied by an overt act, which seemed to imply an intention to put the intention into execution, this would amount to treason. In that case the accused, being at Lisbon, had said, "I will kill the king if I may come to him." He had then come to England, and, when arrested, had spoken scornfully of the king. It was held that he was rightly convicted for compassing the king's death. This case came near to that of *R. v. Owen*;[11] but the court seems to have laid some stress

[1] Above 312 and n. 3.

[2] (1683) 9 S.T. 818.

[3] See the indictment ibid at p. 819; and the passages from the book read to the court, ibid at pp. 855-858.

[4] Sidney denied that he had ever published anything in his life, ibid 878; and no evidence was offered that he intended to publish these papers.

[5] Thus Jeffreys, C.J., said in his summing up, "in the next place I am to tell you, that though some judges have been of opinion that words of themselves are not an overt act; but my lord Hales nor my lord Coke, nor any other of the sages of the law, ever questioned but that a letter would be an overt act sufficient to prove a man guilty of high treason; for *scribere est agere*," ibid at p. 889.

[6] "Another thing which I must take notice of to you in this case, is to mind you, how this book contains all the malice and revenge and treason that mankind can be guilty of: it fixes the sole power in the parliament and the people; so that he carries on the design still, for their debates at their meetings were to that purpose. And such doctrines as these suit with their debates; for there a general insurrection was designed, and that was discoursed of in this book and encouraged," ibid at p. 893; Foster admits, Crown Law, 198, that if, "the papers found in Mr. Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published."

[7] Below 316-317.

[8] (1629) Cro. Car. 117.

[9] Above 312.

[10] (1634) Cro. Car. 332.

[11] (1616) 1 Rolle Rep. 185; above ; Hale, P.C. i 115-116, draws from these cases the moral that words, "that are expressly menacing the death or destruction of the king, are a sufficient overt act to prove that compassing of his death"; in Crohagan's Case he lays stress on the act of coming to England.

upon the facts that the words were accompanied by the overt act of coming to England, and that he had used scornful words when arrested; and this is the manner in which the case was explained and justified by later lawyers.[1] It followed that words could give a treasonable colour to an otherwise innocent overt act. It is, therefore, not surprising that, in 1660, the judges showed a tendency to minimize the importance of the difference between written and spoken words. "Words spoken," it was said,[2] "are the same thing if they be proved. Words are the natural way for a man whereby to express the imaginations of the heart. If it be *any way* declared that a man imagineth the king's death, that is treason within the stat. 25 Edw. 3." And this tendency appears in Jeffreys' summing up in *Sidney's Case*.[3]

The view that there was no difference between written and spoken words was not followed after the Revolution. The rule adopted was in accordance with the cases decided earlier in this century—*R. v. Owen*, *Pine's Case*, and *R. v. Crohagan*. "Loose words," said Holt, C.J., in 1696,[4] "spoken without relation to any act or project are not treason: but words of persuasion to kill the king are overt acts of high treason; so is a consulting how to kill the king; so if two men agree together to kill the king, for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining is an overt act"; and words, as Foster says,[5] "may explain the meaning of an overt act." But it was only under these conditions that words could be an overt act of treason. Similarly, the view that unpublished writings could be given in evidence to prove an overt act of compassing, was rejected. Such writings can only be given in evidence if they are relevant to enforce or explain other overt acts charged in the indictment. Thus, as Foster explains,[6] "the papers found in Lord Preston's custody, those found where Mr. Layer had lodged them, the intercepted letters of Dr. Hensey, were all read in evidence as overt acts of the treason respectively charged on them. . . . For those letters

[1] Foster, Crown Law 203. [2] Kelyng 13. [3] Above 315 n. 6.

[4] Charnock's Case 2 Salk. 631: "the difference (between words and writings) appeareth to me to be very great, and it lieth here. Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction. . . . Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers. They are frequently the effect of a sudden transport, easily misunderstood and often misreported," Foster, Crown Law 204.

[5] Crown Law 204; he says that the reasons which Hale gives for this rule (P.C. i 111-115, 323) "founded on temporary Acts or Acts since repealed, which make speaking the words therein set forth felony or misdemeanour, are unanswerable," ibid 201.

[6] Ibid 198.

and papers were written in prosecution of certain determinate purposes which were all treasonable and then in contemplation of the offenders, and were plainly connected with them." The rule as so settled was probably the rule which Hale considered to be the law.[1]

But, except in these two cases, the seventeenth-century decisions, extending the constructive interpretation of this clause, were adopted, and even carried further, after the Revolution. And, here again, the extension was probably inevitable. If a conspiracy to levy war, and the publication of a writing advocating the deposition of the king, or merely arguing that it is lawful to depose him, are overt acts which can be given in evidence to prove the compassing of his death, it will be difficult to draw the line at these acts. It will be difficult to rule out any acts done in preparation for any other act, which, if accomplished, will be an overt act. That no attempt was made to draw the line is clear from the case of Lord Preston.[2]

Foster's summary of that case is as follows:[3] "Lord Preston and two other gentlemen had procured a smack to transport them to France, but were stopped before they got out of the river, and their papers seized. Among the papers was found a scheme intended to be laid before the French king or his ministers for invading the kingdom in favour of the late king James II.; with many letters, notes and memoranda, all tending to the same purpose. Lord Preston upon his trial insisted, among other matters, that no overt act was proved upon him in Middlesex, where all the overt acts were laid, for he was taken with the papers in the county of Kent. But the court told the jury, that if upon the whole evidence they did believe that his lordship had an intention of going into France, and to carry those papers thither for the purposes charged in the indictment, his taking boat at Surrey stairs which are in Middlesex, in order to go on board the smack, was a sufficient overt act in Middlesex. Every step taken for those purposes was an overt act."[4] The last sentence contains the gist of the matter. It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act. As the future Lord Eldon contended, when, as

[1] Hale, P.C. i 118; Foster, Crown Law 198.

[2] (1691) 12 S.T. 646.

[3] Crown Law 196.

[4] "Gentlemen give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and made use of the papers to that end, then every step he took in order to it, is high treason wherever he went; his taking water at Surrey stairs in the county of Middlesex will be as much high treason as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken," *per* Holt, C.J., 12 S.T. at p. 740.

attorney-general, he was prosecuting Hardy in 1794,[1] any act which showed that the person doing it intended "to put the king in circumstances in which, according to the ordinary experience of mankind, his life would be in danger," might be given in evidence as an overt act of compassing his death. It followed that this clause of the statute could be made to cover the ground covered both by the clause against levying war against the king, and by the clause against adhering to his enemies.[2]

It was attempted in 1794 to apply these doctrines to the activities of the Constitutional and the London Corresponding Societies.[3] They were advocating universal suffrage and annual Parliaments; and they carried on their propaganda through their branches, and through a convention in which their branches were represented. They asserted that they only wished to press for these reforms by constitutional means. The Crown asserted that they were preparing for the deposition of the king and the establishment of a republic. The jury, by acquitting them, showed that they did not believe the contentions of the crown. But this acquittal by no means meant the end of the doctrine of constructive treason. As Stephen has pointed out, it was applied in 1797 and 1798.[4] But the trials of 1794 showed that it was an exceedingly unpopular doctrine; and the acquittals may have been partly due to that fact.[5] However that may be, it was in 1795[6] that we got the first of those statutory interferences with the doctrine, which have ended by putting the law on a different basis. But with this legislation I cannot deal till I have considered the constructive extension of the clause as to levying war against the king.

(2) *Levying war against the king.*

The offence declared to be treason by Edward III.'s statute was the actual levying of war, and not a conspiracy to levy war. A conspiracy to levy war was not made treason by the statute; and this defect was, as we have seen, cured at first by statute,[7] and eventually by the constructive extension of the clause directed against the compassing or imagining the king's death.[8] Thus, the wording of the clause against levying war, shows that its constructive extension was bound to follow a line very different from that followed in the case of the clause which has just been

[1] 24 S.T. at p. 256, cited Stephen, H.C.L. ii 276.

[2] Foster, Crown Law 197—"levying war is an overt act of compassing . . . and so is a treasonable correspondence with the enemy, though it falleth more naturally within the clause of adhering to the king's enemies."

[3] 24 S.T. 199 (Trial of Hardy); 25 S.T. 1 (Trial of Horne Tooke); Stephen, H.C.L. ii 274-277.

[4] H.C.L. ii 278-279.

[5] Ibid 277.

[6] 36 George III. c. 7.

[7] Vol. iv 496-497.

[8] Above 311 seqq.

considered. In fact it proceeded upon the line of giving a greatly extended meaning to the phrase "levying war."

It is probable that the extensive construction put upon this clause began at an earlier date than that put upon the clause as to the compassing of the king's death; and that it was suggested by the distinction, drawn in the statute itself, between levying war against the king, and a mere private war.[1] Coke tells us that "it was resolved by all the judges of England in the reign of king H. 8 that an insurrection against the statute of Labourers, for the inhansing of salaries and wages, was a levying of war against the king, because it was generally against the king's law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do."[2] This, Hale tells us, is the first instance that he had seen of "this interpretative levying of war."[3] But it is clear that the judges, who came to this resolution, had arrived at the principle upon which the constructive extension of this clause proceeded—the distinction between the use of force for a merely private end which was a mere riot, and the use of force for a public object which was treason; and it is clear that this distinction is directly suggested by the statute.[4]

This distinction was applied in many cases in the sixteenth and seventeenth centuries. Thus in 1597, in the case of *R. v Bradshaw and Others*, it was resolved that a rising to put down all enclosures was a levying of war within the statute;[5] and no doubt the judges were encouraged to give this wide construction to the statute by the Legislature, which had shown a readiness to extend it by making a conspiracy to levy war, and occasionally even a mere riot, treason.[6] But it is obvious that it was sometimes difficult to draw the line between a riot raised to gratify a merely private quarrel, and a riot raised to effect some public general object. Thus, in the case of a riot of weavers in 1675, for the purpose of destroying engine looms, the judges were equally divided as to whether it was treason or not. Those who held that it was treason emphasized the fact that the design was to destroy all engine looms. Those who held that it was not, regarded it as being "only a particular quarrel and grievance between men of the same trade against a particular engine that they thought a grievance to them."[7] And the manner in which the provisions of the statutes already referred to, had extended this clause, sometimes caused a difference of opinion. Thus, in 1668,

[1] Vol. iii 291; Coke cites these words of the statute, and then says, "whereby it appeareth that bearing of arms in war-like manner, for a private revenge or end, is no levying of war against the king within this statute. So that every gathering of force is not high treason," Third Instit. 10.

[2] Third Instit. 10. [3] P.C. i 132. [4] Above n. 1.

[5] Third Instit. 9, 10. [6] Vol. iv 497. [7] Hale, P.C. i 143*-146*.

in the case of *R. v Messenger, Basely and Others*, Hale refused to agree with the other judges that a riot to pull down bawdy houses, and to release prisoners, was treason, on the ground that a statute of Mary had enacted that such offences were felony.[1] It was, however, agreed on all hands that there must be clear evidence that the intention was to effect a purpose by warlike violence;[2] and that, if several persons had agreed to levy war, and some had proceeded with their warlike design, and others had not actually appeared in arms, the latter were equally guilty of treason, because there are no accessories in treason.[3]

As in the case of the constructive extension of the clause directed against the compassing or imagining the king's death, so in the case of this clause, the Revolution did not stop the development of the law. The law laid down by Coke and Hale was restated and applied in 1710 in the case of *Dammaree and Purchase*,[4] who were convicted of treason for raising a riot to destroy all dissenting meeting-houses. In Stephen's opinion, their conviction was a more severe application of the law than any of the previous decisions[5]—indeed he almost questions its correctness.[6] But it is difficult to see what other conclusion could have been reached, without disregarding established authority; and Foster does not question its correctness.[7] The provisions of the Riot Act of 1714[8] have generally prevented a recourse to the doctrine applied in that case. But it was always possible to have recourse to it; and in 1781 Lord George Gordon was indicted for treason for helping to excite the riots, which raged between June 2nd and June 6th in that year, in consequence of the passing of the Act which had mitigated the penalties to which Roman Catholics were liable.[9] In his charge to the jury Lord Mansfield laid down the law exactly as it had been laid down by Coke, Hale, and Foster.[10] Lord George Gordon was acquitted, partly because the jury took

[1] Kelyng 75; P.C. i 134-135. [2] Hale, P.C. i 150; below 328.
[3] Kelyng 19. [4] 15 S.T. 522. [5] H.C.L. ii 270.
[6] "If Dammaree's case is good law it seems difficult to say that any riot excited by any unpopular measure, whether executive or legislative, is not high treason," ibid ii 271.
[7] See his account of the case which he had heard when a student, Crown Law 213-216.
[8] 1 George I. st. 2 c. 5; below 328-329. [9] 21 S.T. 485.
[10] "There are two kinds of levying war:—one against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measures or remove counsellors—the other which is said to be levied against the majesty of the king, or, in other words against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the king; and most reasonably so held because it tends to dissolve all the bonds of society, to destroy property, and to overturn government; and by force of arms to restrain the king from reigning according to law. Insurrections by force and violence to raise the price of wages, to open all prisons, to destroy meeting-houses, nay to destroy all brothels, to resist the execution of militia laws, to throw down all inclosures . . . . have all been held levying war," ibid at p. 644.

the view, strongly urged upon them by Erskine,[1] his counsel, that he had had nothing to do with the riots; and partly perhaps because they disliked the doctrine of constructive treason.[2] This case, therefore, like the cases of Hardy and Horne Tooke,[3] effected no modification in the legal doctrine of constructive treason; but, like those cases, it showed that some change in the law was needed. But, though, as we shall now see, important changes have been made, these changes have not affected this part of the doctrine of constructive treason.

(3) *The later history.*

In 1795[4] a statute was passed which, in effect, gave statutory force to the constructions which had been put upon the clause of Edward III.'s statute relating to the compassing of the king's death. It provided that it should be treason to compass: (i) not only the death, but also the bodily harm, imprisonment, or restraint of the person of the king, or his deposition; (ii) the levying of war on him either in order to compel him to change his policy, or in order to overawe both or either of the houses of Parliament; (iii) the stirring up of any foreigner to invade any part of the king's dominions; such compassing being evidenced by printing, writing or other overt act. In 1848[5] it was in effect enacted that, such of the treasons set out in the last cited Act as related to the compassing the death or bodily harm, the imprisonment or restraint of the person of the king, should be treason; and that the other compassings specified in the Act should be felony.[6] But nothing in the Act was to affect the statute of Edward III.[7] That statute must of course be taken to bear the construction which the judges have put upon it; for there is nothing in this legislation to negative that construction.[8] The result is that the acts made felony by the statute of 1848 could, if the crown wished, be treated as constructive treason by virtue of the Act of Edward III. As Professor Kenny justly says,[9] it is "a singular juridical anomaly that

[1] 21 S.T. 587-621; see especially pp. 591-592, cited Stephen, H.C.L. ii 273, and the peroration at pp. 616-621.

[2] Dr. Johnson's saying (cited Stephen, H.C.L. ii 272 n.) that "he was glad Lord George Gordon had escaped rather than a precedent should be established of hanging a man for constructive treason," is well known.

[3] Above 318.

[4] 36 George III. c. 7 § 1; made perpetual by 57 George III. c. 6 § 1.

[5] 11, 12 Victoria c. 12 § 1; the object of the Act was, by diminishing the penalty, to render it easier "to prosecute these crimes with success," Kenny, Criminal Law 274.

[6] § 3.

[7] "Provided always . . . that nothing herein contained shall lessen the force of or in any manner affect anything enacted by the statute passed in the twenty-fifth year of king Edward III.," § 6.

[8] Stephen, H.C.L. ii 280.

[9] Criminal Law 274.

precisely the same action should thus occupy, simultaneously, two different grades in the sphere of crime."

This legislation did not touch the clause relating to the levying of war against the king. The result is that the constructive extension of this clause is in no way affected. Therefore, as Stephen says,[1] "a great riot for any public object" could still be treated as treason.

Offences Cognate to Treason

At the time when the statute of Edward III. was passed treason was regarded rather as an offence against the person of the king than as an offence against the state.[2] It has never ceased to be an offence against the person of the king. In fact, since the Act of 1848, it is only offences against the state which take the form of attempts against the person of the king, which must be treated as treason. But it is obvious that, as the conception of the state was more distinctly realized, and as the king came to be conceived as the head and representative of the state, treason must come to be regarded as essentially an offence, and the most heinous offence, against the state. We have seen that technical expression was given to this transformation in the conception of treason, partly by the Legislature, and partly by the growth of the doctrine of constructive treason. And, as the result of this transformation, we can see the growth of a group of offences cognate to treason. As compared with treason they are minor offences; but they all have this feature in common with treason that they are either (i) seditious in character or tendency, i.e. they aim directly at the diminution of the authority of the state; or (ii) if not seditious, they involve serious breaches of the peace, and an interference with the orderly government of the state. I have already dealt with such of these cognate offences as were created by statute during the sixteenth and seventeenth centuries.[3] At this point I propose to deal with such of these offences as were mainly shaped by the writings of the lawyers and the decisions of the courts.

The offences, directly seditious, which fall under the first of these heads, are, firstly, the publication of seditious words or writings, and, secondly, seditious conspiracies. Of these two matters I shall speak in the two following sections.[4] The offences, less directly seditious, which fall under the second of these heads, are misprision of treason, and unlawful assemblies routs and riots. It is with these topics that I shall now deal.

(1) *Misprision of treason.*

We have seen that the term "misprision" meant originally the offence committed by a person who, knowing that a treason or

[1] H.C.L. ii 280-281.
[2] Vol. iii 289-290.
[3] Vol. iv 497, 503; vol. vi 399-400.
[4] Below 337-346, 379-384.

felony had been committed, failed to disclose it;[1] but that in the sixteenth century it had got an extended meaning.[2] When we talk of misprision of treason or felony we are using the term in its original sense; and that its original sense was distinct from its secondary sense is clear from the fact that Coke deals with misprision of treason and felony, and with misprision generally, in separate chapters.[3]

When Coke wrote, the offence had, as a result of statutes of Edward VI. and Mary's reigns, been distinguished from treason; and, even before that time, its punishment had been definitely fixed.[4] Its punishment was imprisonment for life, forfeiture of goods, and forfeiture of the profits of land for life.[5] Misprision of felony bore the same relation to felony as misprision of treason bore to treason. It differed only in the fact that its punishment—fine and imprisonment[6]—was less severe. But, though by the middle of the sixteenth century misprision of treason had been distinguished from treason, it was not till the middle of the seventeenth century that the two offences were clearly differentiated, by the definition of the extent of the knowledge, the concealment of which would amount to misprision. Firstly, in 1662 it was resolved by the judges,[7] "that where a person knowing of the design does meet with them, and hear them discourse of their traitorous designs, and say or act nothing; this is high treason in that party, for it is more than a bare concealment, which is *misprision*, because it sheweth his liking and approving of their design; but if a person not knowing of their design before, come into their company, and hear their discourses, and say nothing, and never meet with them again at their consultations, that concealment is only misprision of high treason. But if he meet with them again, and hear their consultations, and then conceal it, this is high treason. For it sheweth a liking and an approving of their design." Secondly, in 1663 it was resolved[8] that "to make a misprision of treason, there must be a knowledge of the design, and of the persons or some of them; for a man cannot be said to conceal what he doth not know; and therefore if one tell J. S. in general, that there will be a rising without acquainting him with the persons

[1] Vol. iii 388-389. [2] Ibid 389 n. 1. [3] Third Instit. cap. iii and lxv.

[4] "Tho' some question was antiently, whether bare concealment of high treason were treason (vol. iii 389 n. 1), yet that is settled by the statute of 5, 6 E. 6 cap. 11, and 1, 2 P. and M. cap. 10, *viz.* that concealment or keeping secret of high treason shall be deemed and taken only misprision of treason, and the offender therein to suffer and forfeit, as in cases of misprision of treason, as hath heretofore been used," Hale, P.C. i 371.

[5] Coke, Third. Instit. 36; Hale, P.C. i 374. [6] Coke, Third Instit. 36.

[7] R. v. Tong, Kelyng 17; there was a similar resolution in the following year ibid 21.

[8] Kelyng 21, 22.

who are to rise or with the nature of the plot, if J. S. conceal this, this is no misprision of treason, because he hath no knowledge of the treason."

Certain statutes of Elizabeth's reign made misprision of treason "a kind of substantive offence, and not consequential upon the making of treason."[1] For instance those who counterfeited foreign gold coin,[2] or who failed to disclose any offer of reconciliation to the Roman Catholic religion,[3] or who aided or maintained any person who tried to pervert any of the queen's subjects from their allegiance to the church as by law established,[4] were declared to be guilty of this offence.

(2) *Unlawful assemblies routs and riots.*

It would seem that these three allied offences were beginning to acquire their modern characteristics during the latter part of the sixteenth century. A note in Brooke's Abridgment states in substance that the offence of unlawful assembly is committed, if there is an assembly for an illegal purpose against the peace, though nothing is done in pursuance of that purpose; that if the assembly proceed on their way to the execution of their purpose the unlawful assembly becomes a rout; that if they proceed to execute their illegal purpose the rout becomes a riot; and that the offence of riot, and therefore of rout and unlawful assembly, cannot be committed by less than three persons.[5] These definitions given by Brooke, and, as we have seen,[6] the treatment of these offences by the court of Star Chamber, are the foundation of the definitions of these offences recognized by our modern law.

Of the offence of "rout" it is not necessary to speak further. The two important offences are unlawful assembly and riot. We

[1] Hale, P.C. i 376. [2] 14 Elizabeth c. 3. [3] 13 Elizabeth c. 2.
[4] 23 Elizabeth c. 1. All these statutes are cited, Hale, P.C. i 376-377.

[5] "Nota quod intelligitur quod ryot nest nisi per 3 al meyns, et doyent faire illoyal acte, mes poet estre illoyal assemble, si le peuple eux assemble insimul pur male purpose contra pacem, coment que ils fesont rien, tamen videtur per rehearshals in statutes que si ils eurent assembles et puis procedunt ou chivauchent, ou allent avant, ou mouvent per instigacion dun ou plures que est conductor de eux, cest un route, eoque ils meuvent, et procede en route et nomber," Bro. ab. *Riots* pl. 4; Coke, on the other hand, adopted, from Marowe's Reading, Bro. loc. cit. pl. 5, Putman, Oxford Studies vol. vii 339, another definition of a rout—it signifieth, he says, "when three or more do any unlawful act for their own or the common quarrel etc. as when commoners break down hedges or pales, or cast down ditches, or inhabitants for a way claimed by them or the like," Third Instit. 176; but, as Brooke says, the first definition is the better, and it is that which is now recognized, Hawkins, P.C. Bk. i c. 65 § 8; Kenny, Criminal Law 283; Blackstone, Comm. iv 146, tries to combine the two.

[6] Vol. v 198-199; [*note* it should have been there pointed out that Hudson's definition of a rout is more correct than Coke's and Marowe's, and is probably based on Brooke's; at p. 198 line 9 for "both by Hudson and Coke" read "by Marowe, Brooke, Hudson and Coke," and line one from the bottom for "Coke" read "Brooke."]

have seen that certain kinds of acts, which are included in the definition of these two offences, had been the subject of important statutes of Edward VI., Mary and Elizabeth's reigns;[1] and, during the whole of this period, both offences were becoming the centres of important bodies of legal doctrine. I shall deal with the development of this body of legal doctrine under the following heads: (i) The definition of these offences; (ii) the relation between the repeal of the earlier legislation on the subject of riot to the distinction between riot and treason; and (iii) the liabilities of rioters, and the measures which may or ought to be taken for the suppression of riots, and the dispersal of unlawful assemblies.

(i) The definition of these offences.

The view recognized by the court of Star Chamber,[2] that it takes at least three persons to commit the offence of riot or unlawful assembly, was acted upon in the case of *R. v. Sudbury* in 1700.[3] In that case three persons having been indicted for an unlawful assembly a rout and a riot, one was acquitted and two found guilty; and judgment was arrested because two could not be guilty of these offences.[4] It is obvious that to constitute a riot the element of violence must be present; and as it is clear that the offence of unlawful assembly has, from the first, been regarded as an offence which is preparatory to or contemplates a riot,[5] it cannot be committed unless both the purpose of the assembly is illegal,[6] and there is an element of violence in the illegal purposes for which the assembly is gathered together. It follows that a definition of this offence, which makes it include an assembly which contemplates the commission of any illegal act, is not historically sound; and it is the better opinion that it is not good law.[7] Moreover, there must be an element of deliberate purpose; for if the members

[1] Vol. iv 497. [2] Vol. v 198. [3] 1 Ld. Raym. 484.

[4] It was pointed out that, "if the indictment had been that the defendant, with divers other disturbers of the peace etc., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment," ibid.

[5] "An unlawful assembly is when three or more assemble themselves together to commit a riot or rout, and do it not," Coke, Third Instit. 176; Hawkins, P.C. Bk. i c. 65 § 9; vol. v 198.

[6] Thus an assembly of a man's friends in his house merely for purposes of defence is an assembly for a legal purpose, Y.B. 21 Hy. VII. Mich. pl. 50; Semayne's Case (1605) 5 Co. Rep. at f. 91b; Hawkins, P.C. Bk. i c. 65 § 10; but the purpose of such an assembly must be strictly defensive—"si on fuit menace que si il vient a tel marche, ou in tiel lieu, il sera batte la; en ceo cas il ne puit assemble des gens de luy assister d'aller la in saufgard de sa personne, purceque il ne besoigne de aller la, et il puit avoir remedy per surete de paix," Y.B. 21 Hy. VII. Mich. pl. 50 *per* Fineux, C.J.; and other authorities cited lay down the same law.

[7] Vol. v 198; Y.B. 3 Hy. VII. Hil. pl. 1; Marowe's Reading, Putnam, Oxford Studies vol. vii. 340-341; Kenny, op. cit. 281; Dicey, Law of the Constitution (7th ed.) 500. The source of the error was perhaps Blackstone, who, adapting Coke's definition of a riot to an unlawful assembly, says that it is "when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, and the game therein; and part without doing it or making any motion towards it"; the qualification appears in the illustrations, but it is not explicitly stated.

of a lawful assembly suddenly fall out and come to blows, it was settled, as early as 1503, that those falling out are guilty of an affray, and that no guilt attaches to the other persons attending the assembly.[1]

Coke had limited somewhat narrowly the sort of violent wrong-doing which an assembly must contemplate in order to make it an unlawful assembly. He defines it simply as "when three or more assemble themselves together to commit a riot or rout and do it not";[2] and Blackstone simply repeats Coke.[3] But, before Blackstone's time, it was coming to be the general opinion that this definition was too narrow. It was coming to be thought that account must be taken, not only of the purpose of the meeting, but of its character; and that, if it was of a character which would inspire the average citizen with reasonable fear, it might be held to be an unlawful assembly. Marowe had put forward this view as early as 1503;[4] and it came into favour during the seventeenth century. There was some slight authority for it in precedents of 1566 and 1617 cited in a Star Chamber case of 1617;[5] it was more distinctly asserted by Holt, C.J., in 1708;[6] and was clearly stated by Hawkins a few years later.[7] The later history of the development of this offence is mainly concerned with working out the consequences of this aspect of the offence; and of establishing criteria to distinguish between the cases when a meeting can be held to inspire this fear, and so be an unlawful assembly, and the cases when the fear, being inspired only by the unlawful acts

[1] Marowe's Reading, Putnam, Oxford Studies vii 340; "if several are assembled lawfully without any evil intent, and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful, the act of one is imputable to all," R. v. Ellis (1708) 2 Salk. 595 *per* Holt, C.J.

[2] Third Instit. 176.

[3] Comm. iv 146.

[4] "Item le maner de le fesaunce de le assemble poet faire une Riott lou assemble fut loiall devant; sicome home que entende de aler al cessions ou merkett et vient en harnes et ceux servantes aussi ove luy en harnes, et uncore paraventur son entent ne fut de faire ascun Riott, mes le maner de luy face le Riott pur le presens del people," op. cit. 340.

[5] Howard v. Bell and Others, Hob. 91; in that case tenants, having a common interest, had assembled together to maintain their title; the court inclined to the view that this was lawful; but the Lord Chancellor cited a case of 1566 where, in a similar case, a riot had resulted; it was not proved that the defendants had been concerned in the riot; one Bell was fined for assembling the tenants, and "Hodson another tenant was also punished for being present at that assembly, and the event of such an assembly is in no man's power to moderate."

[6] R. v. Soley 2 Salk. 594; at p. 595 it is said that, "the Chief Justice thought an assembly might meet together with such circumstances of terror as to be a riot. He called it a kind of assault upon the people."

[7] "But this seems to be much too narrow a definition; for any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; for no one can foresee what may be the event of such an assembly," P.C. Bk i c. 65 § 9.

of strangers to the meeting, will not make the meeting an unlawful assembly.[1]

The suggestion that a meeting is an unlawful assembly, if it meets with intent to incite disaffection to the government as by law established, does not seem to have been made in England till nearly the middle of the nineteenth century.[2] Generally, it would seem, the members of such an assembly would be indictable for conspiracy; but, as Dicey suggests, they might be indicted for this offence "if the circumstances of the time were such that the seditious proceedings at the meeting would be likely to endanger the public peace."[3]

The growth of the law as to the offence of unlawful assembly has thus been a comparatively late development. We may perhaps find a reason for this in the history of that aspect of the law as to riot with which I am about to deal.

(ii) The relation between the repeal of the earlier legislation on the subject of riot to the distinction between riot and treason.

We have seen that a statute of 1549-50[4] provided that, if twelve or more persons assembled together to make a riot with the object of killing or imprisoning a Privy Councillor, or of unlawfully altering the laws established by Parliament; and if they remained together for one hour after a summons to disperse, all so remaining should be guilty of treason; and the same provision was made for assemblies of forty persons or more, who remained together for two hours and upwards, for purpose of committing certain other traitorous rebellious or felonious acts. It was also provided that those taking part in certain other riotous assemblies, and not dispersing after due notice, should be guilty of felony; and that those who summoned, procured, moved, or stirred any such assemblies should be guilty of the same offence. We have seen that in 1553[5] the offences which were made treason under this Act were reduced to felony; that this enactment was renewed in 1558;[6] and that it remained in force till the end of Elizabeth's reign, when it expired.[7]

It is clear that these Acts hit most cases of riot and unlawful assembly. While they were in force, therefore, there was not much need to invoke the assistance of the common law. Moroever, any other cases could be and generally were dealt with by the Star

[1] Dicey, Law of the Constitution (7th ed.) 500-504.

[2] "Any meeting of her Majesty's subjects which a party procures to assemble for the purpose of addressing a seditious speech . . . a meeting called for that purpose and used for that purpose is an unlawful meeting," R. v. Ernest Jones (1848) 6 S.T.N.S. at p. 816 *per* Wilde, C.J.; a similar ruling by the same judge was given in R. v. Fussell (1848) ibid at p. 764.

[3] Law of the Constitution (7th ed.) 501 n. 1.

[4] 3, 4 Edward VI. c. 5; vol. iv 497.

[5] 1 Mary Sess. 2 c. 12; vol. iv 497.

[6] 1 Elizabeth c. 16.

[7] Vol. iv 497 n. 9.

Chamber. When these Acts expired, political conditions made it very unlikely that Parliament would pass any Act giving to the crown powers which might easily be used against its political opponents; and the Star Chamber was fully competent to deal with any ordinary case of riot or unlawful assembly. But at the Restoration the courts were faced with a new set of political conditions. The Star Chamber had been abolished, and the courts were therefore obliged to use their common law powers. It was no doubt because their powers were inadequate, that we see in this period a development of the constructive extension of the clause of Edward III.'s statute of treasons, which made the levying of war against the king treason.[1] For if a riot could be brought within the sphere of treason, not only was the punishment much more severe, but also, as we shall see,[2] the common law powers of magistrates soldiers and others to suppress it were greater. But the consideration of these cases necessarily involved a closer definition of the essential features of the offence of riot. And it is therefore, in this period, that the modern definition of this offence is ascertained. In the first place, the object of the riot must be merely a private object. "A recovers possession against B of a house etc. in a real action or in an ejectione firmæ, and a writ of seisin or possession goes to the sheriff. B holds his house against the sheriff, with force, and assembles persons with weapons for that purpose, who keep the house with a strong hand against the sheriff, tho' assisted with the posse comitatus. This is no treason either in B or his accomplices, but only a great riot and misdemeanour."[3] In the second place, if the aspect of the assembly was not warlike, it could only be a riotous assembly, and its acts of violence could only amount to a riot. To make the acts of a riotous assembly treasonable, "it must be such an assembly as carries with it speciem belli, as if they ride or march vexilis explicatis, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons. . . . and are so circumstanced that it may reasonably be concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly."[4]

It is clear from this passage that the line between a mere riot and a constructive levying of war was fine. As we have seen, it caused differences of judicial opinion;[5] and as, in many cases, the penalty was out of all proportion to the offence with which individual rioters were charged, it shocked the public conscience. It was for this reason that in 1714[6] the present Riot Act was passed, which re-enacted in a modified form the provisions of the

[1] Above 319-320. [2] Below 330-331. [3] Hale, P.C. i 146. [4] Ibid 150.
[5] Above 319-320. [6] 1 George I. st. 2 c. 5; Bl. Comm. iv 143.

Acts which had been in force during Mary and Elizabeth's reigns; and we have seen that it was due to this enactment that the government generally avoided recourse to this species of constructive treason.[1] This statute in effect provides that, if twelve or more persons are unlawfully assembled to the disturbance of the peace, and a mayor, sheriff, or justice of the peace command them to disperse, and they continue together for one hour after such command, all so continuing are guilty of felony; and those who afterwards disperse the assembly are indemnified for the consequences of any violence which they may employ.

This Act has generally been found sufficient to deal with unlawful assemblies, the demeanour of which is obviously threatening, and with actual riots. It was the large increase in meetings held to advocate public objects, which occurred at the end of the eighteenth and the beginning of the nineteenth centuries, which has led to the development of the law as to unlawful assembly, which I have already noticed.[2] Their demeanour was generally not obviously threatening; and they were not assembled with the direct object of committing a riot. In many cases, however, it was fairly clear that a riot might easily result from their meeting. But to them the provisions of the Riot Act were not immediately applicable; and therefore they have caused not only a development of the law relating to unlawful assemblies, but also some reconsideration of the law as to powers of the authorities in dealing with these assemblies.[3]

(iii) The liabilities of rioters, and the measures which may or ought to be taken for the suppression of riots, or the dispersal of unlawful assemblies.

The law as to the liability of rioters who, in the course of their riotous conduct, committed a felony, was strict and satisfactory. It was established, as early as Edward III.'s reign, that all were equally liable for the felony.[4] "Note also," says Dalton,[5] "that if divers persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them thereof kill a man, this shall be adjudged murder in them all, that are present of that party abetting him, and consenting to the act, or ready to aid him, altho' they did but look on." Hale quotes this passage from Dalton with approval, and cites a case of 1675 in which this rule of law was restated.[6] But, if no felony was committed, the law was not equally

[1] Above 320. [2] Above 326.
[3] Dicey, Law of the Constitution (7th ed) 504-512.
[4] Fitz. Ab. *Corone* pl. 350 (3 Ed. III.).
[5] Cited Hale, P.C. i 441.
[6] Ibid 462-463; cp. Mackalley's Case (1612) 9 Co. Rep. at f. 67b.

satisfactory. Each individual rioter was only liable for a misdemeanour, whatever damage he did; and thus the technical distinction between felony and misdemeanour tended sometimes to lighten unduly the liability of the rioters.

The same cause tended also to hamper the authorities in suppressing riots, or in dispersing unlawful assemblies; and to render the position of the ordinary citizen, who helped to suppress or disperse them, somewhat dubious. It was largely for this reason that the provisions of the Riot Act[1] were needed. This will be clear if we look at the rules on this matter, some of which, though elaborated and extended in this period, originated in the Middle Ages.

In the sixteenth century every citizen was justified in taking all reasonable means to put a stop to breaches of the peace committed in his presence.[2] He was therefore justified in intervening to help to suppress a riot or to disperse an unlawful assembly. But, if no felony had been committed, he could only use reasonable force for this purpose; and to-day[3] as in the thirteenth century,[4] he must at his peril hit the mean between excess and defect.[5] On the other hand, if a felony has been committed, all the rioters are, as we have seen,[6] guilty of felony; and it is the duty of every citizen to apprehend the felon.[7] If, therefore, in such a case a rioter is killed in resisting apprehension, the homicide is justifiable.[8] A fortiori, the same rule applies if some duly constituted officer of the law has raised the posse comitatus, or has called for assistance to suppress a riot or to disperse an unlawful assembly, and a private person goes to his help, and kills

[1] 1 George I. st. 2 c. 5.

[2] Marowe, Oxford Studies vii 336; Coke, Third Instit. 158; R. v. Pinney (1832) 3 S.T.N.S. at p. 4. Coke cites no authority, though in fact his statement is justified by the resolution of the judges in the Case of Armes (1597) Pop. 121; the rule may well be a sixteenth-century extension of the duty to arrest felons, vol. iii 599-601; Maitland says, "we may strongly suspect that in general the only persons whom it is safe to arrest are felons, and that one leaves oneself open to an action, or even an appeal, of false imprisonment if one takes as a felon a man who has done no felony," P. and M. ii 580-581; this is justified by Marowe's statement, loc. cit., that though a man could stop an affray, he had no action if he were hurt, but that those guilty of the affray had an action if he hurt them; and see Stephen, H.C.L. i 193; in fact the right to arrest felons merely on suspicion seems to be denied in 42 Ass. pl. 5; however, it seems to be admitted in Y.B. 11 Ed. IV. Trin. pl. 8 that a private person may arrest another whom he suspects of felony; and in Y.B. 10 Hy. VII. Pasch. pl. 8 it was said that if A had wounded B, A could be arrested, till it could be known whether B died of the stroke; this implies a power to arrest for an act which was not ascertained to be felony; and the rule stated by Coke may well be a further stage in the extension of these precedents.

[3] Kenny, Criminal Law 283.

[4] "The ordinary man seems to have been expected to be very active in the pursuit of malefactors, and yet to act at his peril," P. and M. ii 581.

[5] In R. v. Pinney (1832) 3 S.T.N.S. at p. 510 Littledale, J., speaking of the duty of a magistrate called on to suppress a riot, said, "he is bound to hit the exact line between an excess and doing what is sufficient."

[6] Above 329. [7] Vol. iii 599-600. [8] Hale, P.C. i 405.

a rioter who resists the attempt to apprehend him.[1] And in this case it would seem that the homicide of those resisting dispersal or arrest would, prima facie at any rate, be justifiable, even though no felony had been committed.[2]

Since an ordinary citizen might be made liable if he did not help to suppress a riot or disperse an unlawful assembly when called upon to do so, a fortiori an official could be made liable if he neglected this duty. And just as statutes had added to the powers of officials to take measures to arrest rioters,[3] so other statutes had rendered them liable to special penalties if they failed in their duties.[4] But these statutes only rendered more explicit the common law principles; and it is these principles upon which the modern common law rests.[5] The erroneous idea that the Riot Act had somehow modified these principles, led to the failure of the authorities to check the Lord George Gordon riots in their initial stage, and to the authoritative correction of this error.[6]

The development of the law of treason during this period, and of offences cognate thereto, represents the contribution made by the common law to the maintenance of the authority of the state and its law. Professor Kenny has said that the severity of the law on these matters was largely due to the inadequacy of its powers for the prevention of crime—an inadequacy which was due to the absence of efficient police. "The law felt its parish constabulary to be comparatively powerless to prevent any offence that involved the presence of a plurality of offenders. It consequently attempted to supply the defect by very comprehensive prohibitions of all such crimes."[7] This is true, but not I think the whole truth. It explains, I think, the rules which have just been discussed as to the measures which may or ought to be taken by officials and others for the suppression of riots; and, to

[1] Hale, P.C. i 495.

[2] "And it seems, as to this manner of killing rioters, that resist the ministers of justice in their apprehending, it is no other but what the common law allows, or at least what the statute of 13 H. 4 cap. 7 implicitly allows to two justices of the peace with the sheriff or undersheriff of the county, by giving them power to raise the posse comitatus, if need be, and to arrest the rioters. . . . And it seems the same law is for the constable of a vill in case a riot happen within the vill," Hale, P.C. i 495; according to Marowe, Putnam, Oxford Studies, vii 338-339 the sheriff had, apart from this and other statutes, no power to call for assistance—"Quar per le comen ley null puit commaunder les homez del conte de aler ove luy en cest cas forsque le Roie tantum; quar cest commaundement fut entendue une sequestracion de loure liberte."

[3] 34 Edward III. c. 1; 17 Richard II. c. 8; 13 Henry IV. c. 7; Hawkins, P.C. Bk. i c. 65 §§ 15-29.

[4] 13 Henry IV. c. 7; 2 Henry V. c. 8; 19 Henry VII. c. 13.

[5] See Tindal C.J.'s charge to the grand jury at the opening of the special commission to try the Bristol rioters in 1832, 3 S.T.N.S. 4-6.

[6] Kenny, Criminal Law 285. [7] Ibid 280.

some small extent, it perhaps explains the severity of the rules as to these and other offences cognate to treason. But, it seems to me, the severity of these rules admits not merely of explanation, but of a justification, which is as much applicable to the present age as to the age in which they were evolved.

However efficient the police system may be, a neglect to deal severely with these and the like offences of a seditious kind will speedily undermine the authority of the state and the law; and, as the history of the criminal law in this period shows, firm measures of suppression will, even in the absence of an adequate police system, vastly diminish their power for evil. More really depends on the spirit which animates the rulers of the state than upon the material means of coercion at their disposal. If a state allows its subjects too large a freedom to express opinions directly hostile to its authority, and too large a power to combine; and, if, in addition, it puts the most formidable of these combinations above the law; it will soon sink back to the condition in which the English state found itself at the time of the Wars of the Roses. It will soon find that its authority is small in comparison with that of its over mighty subjects, and that the duty of allegiance to it is held to be of small account, when it conflicts with the allegiance exacted by these usurpers of its authority.

In fact, the history of the law of treason and of the offences cognate thereto, shows that the creation and preservation of a law-abiding instinct is as difficult to maintain as it is easy to undermine. This work can only be successfully accomplished by a firm, a far seeing, and an intelligent administration of the rules designed to safeguard the state against those who attempt, from whatever motives, to set up rivals to its authority,—an administration of these rules which, on adequate grounds, is not afraid to be cruel. As I have already pointed out,[1] the more firmly the law is administered on these lines, the less need there will be for cruelty; for the state will cease to fear its criminals, and will consequently feel itself able to be generous. It was largely due to the fact that the criminal law was administered on these lines during these two centuries, that, at the end of this period, the state and its law had emerged supreme. It is true that all through this period lawlessness was rampant. But the measure of the success which had been achieved in dealing with this lawlessness, and especially with lawlessness of the seditious variety, can be best measured by the contrast between the state of England in 1500 with its state in 1700. At the latter date life and property were far more secure, and the foundations of the future commercial prosperity of the country had been laid.

[1] Vol. v 106.

That this result had been attained was also due to the fact that the common law had been careful to guard against many other offences, which were almost as much cognate to treason as those which have just been described. We shall see in the ensuing sections that its rules as to the treatment of seditious speeches and writings, as to conspiracy, and, to some extent, the rules which imposed legal disabilities upon religious nonconformists, all helped towards the attainment of this result; for they all helped to form a consistent public opinion upon such fundamental matters as the sanctity of the law, the protection of property, and the sacredness of contract. Both the experience of the Commonwealth period, and the experience of our own days, prove that the unlimited tolerance of all opinions tends to undermine all these fundamental principles upon which the stability of the state, and, therefore, of civilization itself, depend.

§ 2. DEFAMATION

The wrong of defamation is sometimes a crime pure and simple, sometimes a tort pure and simple, and sometimes it can be treated either as a crime or a tort at the option of the injured person. Defamation is a crime when it consists of the publication seditious obscene or blasphemous speeches, or the publication of of seditious obscene or blasphemous writings, or the utterance of writings or the utterance of speeches which directly incite to a breach of the peace. Defamation is a tort when it consists of the publication of writings, or the utterance of speeches, which hold another person up to hatred contempt or ridicule, provided, in the case of speeches, special damage can be proved or is presumed. Defamation can be treated either as a crime or tort at the option of the injured person, if it consists of the publication of writings which hold him up to hatred contempt or ridicule.[1]

There is nothing anomalous in the fact that defamation is thus treated sometimes as a crime, sometimes as a tort, and sometimes as either a crime or a tort; for it is obvious that defamatory writings or speeches may, according to their contents, either (i) affect the stability or the peace of the state or the morals of its subjects, or (ii) cause loss of reputation or pecuniary loss to an individual, or (iii) be both dangerous to the peace of the state and harmful to an individual. In Roman law some forms of defamation could be regarded either as delicts or as crimes;[2] and, if no

[1] Kenny, Criminal Law 305-314.

[2] Girard, Droit Romain 393—" Le droit impérial continua le mouvement commencé par la loi Cornelia et donna, finalement dans tous les cas, à la victime de l'injure, le droit de choisir entre l'action d'injures et une punition physique infligée au coupable *extra ordinem* par le magistrat que le jurisconsult récent Hermogénien représente comme choisie d'ordinaire de son temps."

specific person was defamed, the defamation could only be criminally prosecuted.[1] Nor is there anything anomalous in the manner in which English law treats seditious obscene or blasphemous writings or speeches, or writings or speeches which directly incite to breaches of the peace. What is anomalous is the manner in which it treats defamation, when it consists of writings or speeches which hold up another person to hatred contempt or ridicule. In this part of the law a sharp line is drawn between written and spoken defamation, which puts them into two very different categories. Other systems of law sometimes provide that the penalty shall be increased if the defamation is written.[2] No other system treats what is essentially the same offence in two essentially different ways.

In English law the written defamation of another is a libel which is actionable per se, and can be treated at the option of the injured person as either a crime or a tort. On the other hand, spoken defamation of another can only be a tort, and will only be a tort if the words fall into a limited class of cases in which words are actionable per se, or if they cause temporal loss. The result is, as it has been well said, "absurd in theory, and very often mischievous in its practical operation."[3] It is only partially remedied by the growth of the specific tort of slander of title,[4] and of the analogous tort of maliciously uttering falsehoods which damage a plaintiff's business.[5] It is clear that this anomalous state of the law can only be explained by the history of the way in which the law on this, and other branches of the law of defamation, has grown up.

Some of the leading principles and characteristics of the modern law of defamation began to take shape during the last half of the seventeenth century. The shape which they took is the product of the earlier development of this branch of the law. Of that earlier development I have already said something.[6] But in order to understand its modern development, a brief recapitulation is necessary.

The primitive codes of the Anglo-Saxons[7] and other Teutonic

[1] "Quod senatus-consultum necessarium est, cum nomen adjectum non est ejus, in quem factum est: tunc ei, quia difficilis probatio est, voluit senatus publica quaestione rem vindicari. Ceterum si nomen adjectum est, et jure communi injuriarum agi poterit: nec enim prohibendus est privato agere judicio, quod publico judicio praejudicatur, quia ad privatam causam pertinet," Dig. 47. 10. 5; cp. Code 9. 36.

[2] See e.g. the provisions of the German law cited L.Q.R. x 160; and the Scotch law follows the same rule, ibid 161.

[3] Veeder, The History of Defamation, Essays, A.A.L.H. iii 446.

[4] Below 351-352.

[5] Below 352.

[6] Vol. ii 366, 382-383; vol. iii 409-411; vol. v 205-212.

[7] Vol. ii 382 n. 11.

races,[1] like the primitive code of the Twelve Tables,[2] punished defamatory words; and in later days the manorial and other local courts gave remedies for this offence.[3] But the provisions of the Anglo-Saxon laws on this matter have no continuous history; and the jurisdiction of the manorial and other local courts decayed. Unless the defamation was of a sort which came within the statutes which created the offence of scandalum magnatum,[4] the mediæval common law gave no remedy. For all other defamation the suitor was obliged to go to the ecclesiastical courts. It was not till the beginning of the sixteenth century that the common law courts began to compete with the ecclesiastical courts in this field of jurisdiction, by allowing an action on the case for defamation.[5] As usually happened when the common law courts and the ecclesiastical courts came into conflict, the common law courts soon deprived the ecclesiastical courts of the greater part of their jurisdiction. This was due partly to the fact that the common law courts prohibited the ecclesiastical courts from entertaining any suit for defamation, unless the defamatory words had charged the plaintiff with some offence of exclusively ecclesiastical cognisance; and partly to the popularity of the common law remedy of damages, as compared with the merely ecclesiastical penalty which the ecclesiastical courts could inflict.[6] In fact, so popular was the common law remedy, that the common law courts found themselves obliged to take measures to diminish the flood of litigation which threatened to overwhelm them.[7]

Since the common law remedy was an action on the case, damage was the gist of the action. And damage was construed in a narrow proprietary sense. As Sir F. Pollock has said,[8] "the law went wrong from the beginning in making the damage and not the insult the cause of the action." But this defect was inherent in the form of action by which alone redress could be given; and there is no doubt that the inherent defect of this way of looking at this wrong was aggravated by the measures which the courts took to stem this tide of litigation. We shall see that, in order to discourage litigants, they insisted on construing words, whenever possible, as innocent; and that, in their endeavours to give them a "mitior sensus," they construed them with the same

[1] "Even the rude Lex Salica decrees that if one calls a man 'wolf' or 'hare' one must pay him three shillings, while if one calls a woman 'harlot,' and cannot prove the truth of the charge, one must pay her forty-five shillings. . . . In the Norman custumal it is written that the man who has falsely called another 'thief' or 'man-slayer' must pay damages, and, holding his nose with his fingers, must publicly confess himself a liar," P. and M. ii 536.

[2] "Nostrae contra xii tab. cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri," Cicero De Rep. iv 10, 12.

[3] Vol. ii 382-383. [4] Vol. iii 409-410. [5] Ibid 411; vol. v 205-208.

[6] Ibid 206. [7] Ibid; below 353 seqq. [8] Torts (12th ed.) 324.

strictness as they were accustomed to construe writs or pleadings, with results which were often absurd and sometimes unjust.[1]

But, while the development of the tort of defamation was thus being warped by the action of the common law courts, a wholly new conception of this offence was being developed in the court of Star Chamber. We have seen that the Council and the Star Chamber had, in the interests of the peace and security of the state, assumed a strict control over the press.[2] Naturally the Star Chamber assumed jurisdiction in all cases in which its rules on this matter had been infringed; and this led it to regard defamation as a crime. Borrowing perhaps from the Roman law as to Libella Famosa,[3] it treated libels both upon officials and private persons as crimes. The former were seditious libels, and directly affected the security of the state. The latter obviously led to breaches of the peace. On the same principle it dealt with seditious words.[4] But we have seen that in this case its practice was not always consistent; for, at any rate in the case of words which were not seditious, their truth was allowed to be pleaded as a defence—a defence which is, as we have seen, wholly out of place if defamation is regarded as a crime.[5]

When the Star Chamber was abolished, the law of defamation thus consisted of two very divergent parts. In the first place, there was the body of law developed in the Star Chamber, which regarded defamation as a crime; and, in the second place, there was the body of law developed round the common law action on the case, which regarded defamation as a tort. The common law judges after the Restoration took over the law as developed by the Star Chamber, and further developed it on similar lines. They also further developed the conception of the tort of defamation. Naturally these cognate bodies of law, being developed by the same tribunals, exercised a reciprocal influence on one another; and our modern law is the result. The history of its construction during this period I shall trace under the two heads of Defamation as a Crime, and Defamation as a Tort.

Defamation as a Crime

The two main varieties of the crime of defamation were distinguished by Coke in the case *De Libellis Famosis*.[6] It can be committed either against a private person, or against a magistrate or other public person; and the latter is the much more serious offence, "for it concerns not only the breach of the peace but the scandal of Government." The first variety can be quickly

[1] Below 355-356; vol. v 206.
[2] Vol. vi 367-370.
[3] Vol. v 208.
[4] Ibid 211.
[5] Ibid 211-212.
[6] (1606) 5 Co. Rep. 125a; vol. v 208.

disposed of. It was defined by the common law courts and punished, just as the Star Chamber had defined and punished it.[1] The chief addition made by the common law courts to the earlier law was the definite settlement of the rule, foreshadowed in the earlier law,[2] that mere spoken words defamatory to a private person cannot be treated as a crime.[3] We shall see that this decision is important in the history of defamation as a tort; for it probably had a good deal to do with creating the unfortunate distinction between the torts of libel and slander.[4] It is the second variety of libels which is the most important, and it is the law as to these libels which was the most developed during this period. Naturally, as we shall see, some of the principles thus developed helped to elucidate some of the incidents of the first variety of the crime of libel.

The crime of publishing defamatory statements against the government falls under several heads. It may be committed by publishing seditious writings, or by speaking seditious words, or by publishing blasphemous or obscene writings, or by speaking blasphemous or obscene words, or by uttering words which incite directly to a breach of the peace.[5]

With the history of the law as to blasphemous writings and speeches I shall deal later.[6] With regard to obscene writings and speeches, Holt, C.J., seemed to think that this was matter for the ecclesiastical courts, and was not remediable by indictment;[7] but a few years later this opinion was reversed, and the law was placed on its modern basis by the decision in *R. v. Curl.*[8] With regard to words which tend to a breach of the peace, Holt, C.J., ruled in *R. v. Langley*[9] that "words that directly tend to breach of the peace may be indictable; but otherwise to encourage indictments for words would make them as uncertain as actions for words are."[10] It is the history of the law as to seditious writings and words which is the most important. The history of the manner in which it was shaped by the common law courts, after they had taken over this jurisdiction from the Star Chamber, I must now relate.

Stephen has pointed out[11] that the view which the law takes

[1] See R. v. Beare (1699) 1 Ld. Raym. 414; S.C. 2 Salk. 417.
[2] Vol. v 211-212. [3] R. v. Penny (1697) 1 Ld. Raym. 153.
[4] Below 364. [5] Kenny, Criminal Law 313. [6] Below 407 seqq.
[7] R. v. Read (1708) Fortescue 98; in that case Powell, J., said, "this is for printing bawdry stuff, but reflects on no person, and a libel must be against some particular person or persons, or against the Government. It is stuff not fit to be mentioned publicly; if there should be no remedy in the Spiritual Court, it does not follow there must be a remedy here. There is no law to punish it, I wish there were, but we cannot make law."
[8] (1727) 2 Stra. 788; cp. R. v. Hicklin (1868) L.R. 3 Q.B. 360.
[9] (1704) 6 Mod. 124. [10] Ibid at p. 125. [11] H.C.L. ii 299-300.

of the offence of publishing seditious writings or uttering seditious words, will depend upon the view held as to the relation of rulers to their subjects. "Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good . . . it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. If, on the other hand, the ruler is regarded as the agent and servant, and the subject as the wise and good master, who is obliged to delegate his power to the so-called ruler . . . it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with a servant. . . . To those who hold this view fully, and carry it out to all its consequences, there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life limb or property, and there may be incitements to such offences. But no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." The first of these two views was the accepted view in the seventeenth century. The second was gathering strength during the latter part of the eighteenth century, and is now the accepted view.[1] It is the history of the development of the law under the influence of the first of these views that I must here describe. The modifications effected by the growth of the second will be dealt with in a subsequent Book of this History.

We have seen that both the rules relating to the censorship of the press,[2] and the manner in which the Star Chamber administered the law of defamation,[3] show that, during this period, the first of these two views was that taken by the law. After the Restoration the principles upon which the Star Chamber had acted were taken over by the common law courts; and it was inevitable that this should be so. We have seen that statutory force had been given to a set of rules for the regulation of the press, which were in substance not dissimilar to those which had been made by the Star Chamber.[4] The principles applied by the Star Chamber to seditious writings had been embodied by

[1] R. v. Lovett (1839) 9 C. and P. at p. 466 *per* Littledale, J.; R. v. Sullivan (1868) 11 Cox C.C. at p. 58.

[2] Vol. vi 367-370. [3] Vol. v 208-212. [4] Vol. vi 372-3.

Coke in the case *De Libellis Famosis*;[1] and he had affirmed that these offences could be punished either by indictment at common law or by proceedings in the Star Chamber.[2] The view held by the king and the judges as to the relation between rulers and their subjects, were the same as those held by the king and his judges in the earlier part of the century. Hence we find that the judges accepted the rules that truth was no defence to an indictment,[3] that publication was not necessary,[4] and that the death of the person libelled was not necessarily a bar to a prosecution.[5] They also accepted the rules that the contriver the procurer and the publisher were all equally guilty;[6] and Holt, C.J. made it quite clear that both the writing and the copying of a libel, without just cause or excuse, amounted to the contriving of a libel.[7] Similarly, the common law courts had shown, in the earlier part of the seventeenth century, that they were prepared to follow the lead of the Star Chamber,[8] and treat seditious words in substantially the same manner as seditious writings. Part of the charge against Eliot Holles and Valentine was the uttering of seditious words;[9] and other cases show that the common law courts treated as criminal seditious words not only against the king,[10] but also against his government,[11] the judges,[12] or the established church.[13]

[1] (1606) 5 Co. Rep. 125a. [2] At ff. 125a, 125b.

[3] Vol. v 210; Anon (1707) 11 Mod. 99; Bl. Comm. iv 150.

[4] Vol. v 210; Bl. Comm. iv 150.

[5] Vol. v 211; R. v. Topham (1791) 4 T.R. 126; cp. R. v. Critchley (1734) cited ibid 129 *note* 4; Hawkins, P.C. Bk. 1 cap. 73 § 3.

[6] Lamb's Case (1611) 9 Co. Rep. 59b; vol. v. 210.

[7] R. v. Beare (1699) 1 Ld. Raym. at p. 417—"the writing of a copy of a libel is the writing of a libel. And if the law were otherwise it might be very dangerous, for then men might take copies of them with impunity; and for the same reason the printing of them would be no offence; and then farewell to all government."

[8] Vol. v 211.

[9] Stephen, H.C.L. ii 307.

[10] It is clear from Pine's Case (1629) Cro. Car. 117, 126, that the judges considered that an offence had been committed, though it was not treason, above 312; R. v. Harrison (1678) 3 Keble 841.

[11] R. v. Harrison (1678) 3 Keble 841; R. v. Frost (1793) 22 S.T. at p. 517; cp. R. v. Winterbotham (1792) 22 S.T. 823, 875; R. v. Briellat (1793) 22 S.T. 909. Stephen points out, H.C.L. ii 377, that no prosecution for this offence has taken place for many years; but that "seditious language has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, of which violent speeches have been regarded as overt acts."

[12] Justice Hutton's Case (1639) Hutton 131; R. v. Gordon (1787) 22 S.T. 175; in later law, when the jurisdiction to punish for contempt was extended, such libels could be treated as contempts, and dealt with by the summary process of attachment, vol. iii. 394. Judges of inferior courts can only fine or attach for contempt if the words are spoken in court, Earl of Lincoln v. Fysher (1595) Cro. Eliza. 581; Bathhurst v. Cox (1662) Th. Raym. 68; for contemptuous words spoken out of court only surety for the peace can be required, R. v. Langley (1704) 2 Salk. 697.

[13] R. v. Taylor (1676) 1 Vent. 293; cp. Atwood's Case (1618) Cro. Jac. 421; Hawkins, P.C. Bk. i cap. 5 § 6; Atwood's Case perhaps shows that the influence of the jurisdiction of the court of High Commission may have helped to produce this particular development; however that may be, it was quite in harmony with the prevalent views to the relation between Church and State, below 406-410.

That this view of the criminality of seditious words was comparatively new law, derived from the practice of the Star Chamber, is probable from a case of 1558, in which it was held that slander spoken of the queen was punishable under Edward I.'s statute of scandalum magnatum.[1] However that may be, it is clear that the offence of uttering seditious words was definitely recognised to be a misdemeanour, punishable by the common law courts, in the earlier part of the seventeenth century; and it is fairly clear that, as in the case of publishing seditious writings, this broad rule was derived from the practice of the Star Chamber.

It follows, therefore, that the offence was defined as widely by the common law courts as by the court of Star Chamber. This is abundantly clear, both from the resolutions of the judges, and from the numerous cases of seditious libel which came before the courts in the latter part of the seventeenth century. Thus in 1663 it was resolved[2] that "tho' printing be a trade, and selling of books also, they must use their trade according to law, and not abuse it, by printing and selling of books scandalous to the Government or tending to sedition." Later in the reign the judges made use of the Licensing Acts[3] to sharpen the edge of the law. They resolved that it was illegal to publish anything whatever without authority, even though it was not scandalous to the government. It was therefore doubly illegal if that which was published was scandalous. The law was laid down in this way by Scroggs, C.J., in *R. v. Carr*,[4] and *R. v. Harris*[5]; and Stephen points out that, though the House of Commons impeached Scroggs for many illegal and arbitrary acts, it did not allege that this statement of the law was wrong.[6] This view of the law was applied in the case of *R. v. Barnardiston*,[7] who was sentenced "to a monstrous fine of £10,000 for the mere expression of political opinions to a private friend in a private letter";[8] in the case of *R. v. Baxter*,[9] who was thought in his paraphrase of the New Testament to have reflected upon the bishops of the church of England; in the case of *R. v. Johnson*,[10] who issued an address to the Protestants in the army not

[1] Oldnoll's Case, Dyer 155a; for this offence see vol. iii 409-410.
[2] Kelyng 23. [3] Vol. vi 372.
[4] Dealing with the word "illicite" in the indictment he said, "I must recite what Mr. Recorder told you of at first, what all the judges of England have declared under their hands. The words I remember are these: When, by the king's command, we were to give in our opinion what was to be done in point of regulation of the press; we did all subscribe, that to print or publish any news books or pamphlets of news whatsoever, is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. Suppose now that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite*, and the author ought to be convicted for it," (1680) 7 S.T. at p. 1127.
[5] (1680) 7 S.T. at pp. 929-930. [6] H.C.L. ii 313. [7] (1684) 9 S.T. 1333.
[8] Stephen, H.C.L. ii 314. [9] (1685) 11 S.T. 403. [10] (1686) 11 S.T. 1330.

to assist Papists illegally enlisted and commissioned; and in the case of *The Seven Bishops*,[1] who were put on their trial for asserting that the king's declaration of indulgence was illegal, because it was based on a prerogative to suspend laws which did not exist. These cases are a few illustrations,[2] and some are very extreme illustrations, of the prevailing theory that a person who questioned the legality or the policy of any act of the government, even in a respectful manner, committed the offence of seditious libel. The law was severely and brutally applied, especially by Jeffreys, but it is difficult to say, in the then state of the law, that these decisions were wrong.[3]

The expiration of the Licensing Act in 1694[4] made it impossible to say that the mere publication of a writing without authority was illegal. But neither the expiration of that Act, nor the Revolution, materially altered the law as to what constituted a seditious libel. This is clear from the ruling of Holt, C.J., in *R. v. Tutchin*:[5] "they say nothing is a libel but what reflects upon some particular person. But this is a very strange doctrine to say it is not a libel reflecting on the government, endeavouring to possess the people that the government is maladministered by corrupt persons, that are employed in such or such stations either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it."

It would seem to follow from this view of the nature of seditious libel that the crime of seditious libel was the intentional publication of a writing which reflected on the government; and, similarly, that the crime of libel committed against a private person was the intentional publication of a writing which held him up to hatred contempt or ridicule. But when criminal proceedings were taken for libel, it was always alleged that the accused had published the libel with a whole series of the worst intentions. He was said to have acted falsely, seditiously, maliciously, and factiously. As Stephen has said, "round full mouthed abuse of people who gave

[1] (1688) 12 S.T. 183.

[2] "The great frequency of prosecutions for political libels and seditious words at this time appears . . . from a passage in Luttrell's Diary for the year 1684, which enumerates sixteen trials for those offences between April 30 and November 28 in that year," Stephen, H.C.L. ii 313.

[3] Ibid ii 313-315. [4] Vol. vi 375. [5] (1704) 14 S.T. at p. 1128.

offence to the government was thought natural and proper";[1] and, as we can see from the indictments for other offences, and even from the declarations in civil actions, it was customary, wherever an accusation of any sort of wrong was made, to exhibit the defendant's conduct in the worst possible light. Naturally the use of these common forms tended to give rise to the view that the crime was, not so much the intentional publication of matter bearing the seditious or defamatory meaning alleged by the prosecution, as its publication with a seditious or malicious intent. This view of the nature of libel regarded as a criminal offence begins to appear in the eighteenth century; and it has had a large influence on its history. We shall see later, that it has reacted on the views held as to the nature of libel considered as a tort; and that the idea that a malicious intent is a necessary ingredient, both in the crime and in the tort of defamation, has not been finally got rid of till the nineteenth century.[2] The reasons for its appearance we must now consider.

In the earlier part of the seventeenth century, when the crime of libel, and especially of seditious libel, was chiefly dealt with by the court of Star Chamber, the question whether the offence consisted of intentionally publishing a seditious or a defamatory writing, or whether it consisted of intentionally publishing such writings with a seditious or a malicious intent, was academic. It was academic because the court decided all questions both of fact and of law. If the offence consisted of intentionally publishing a writing with the seditious or defamatory meaning alleged by the prosecution, it decided the questions whether the writing had been intentionally published and whether it meant what the prosecution alleged that it meant, which were questions of fact; and it decided whether what was so published was seditious, defamatory or otherwise malicious, and so a libel, which was a question of law. Similarly, if the offence consisted of intentionally publishing such a writing with a seditious or a malicious intent, it decided as questions of fact both whether such a writing had been intentionally published with this seditious or malicious intent, and whether it meant what the prosecution alleged that it meant; and, as a question of law, whether such a writing published with that intent was in law a libel.

But when the jurisdiction over these libels was taken over by the courts of common law, the question ceased to be academic. The courts of common law worked with a jury; and that involved an accurate delimitation of the spheres of fact and law. If the essence of libel was the publication with a seditious defamatory or otherwise malicious intent, the finding of that intent was matter of

[1] H.C.L. ii 354. [2] Below 373-375.

fact for the jury. If, on the other hand, its essence was the intentional publication of the document set out in the indictment, all that the jury was concerned with was the fact of such publication, and the question whether it bore the seditious or defamatory meaning alleged by the prosecution.[1] Now it is obvious that if the malicious intent was an essential ingredient in the offence, and if, therefore, this was a question for the jury, the jury would have far larger powers than if they were required to decide only the question of intentional publication of a document with the meaning alleged in the indictment. As all these cases of seditious libels were regarded as matters nearly affecting the state, and as, after the decision in *Bushell's Case*,[2] the control of the government over the judges[3] was far closer than its control over juries, it is not surprising that the courts should have laid it down that the malicious intent was not an essential ingredient in the offence, but that the offence consisted of the intentional publication of a document with the seditious or defamatory meaning alleged by the prosecution. It followed that the function of the jury was limited to finding these two sets of facts; and that it was for the court to say as a matter of law whether a writing published with this seditious or defamatory meaning was a libel.

Thus in the case of *R. v. Carr*[4] Scroggs, C.J., directed the jury that, if they found that the accused had published the book, they must find him guilty. "If you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or not. Sir Francis Winnington hath told you there are some things that do necessarily imply malice in them. If this thing doth not imply it, then the judges will go according; to sentence, if it doth;[5] so that it concerns not you one farthing, whether malicious or not malicious—that is plain."[6] The same ruling was given, even more plainly, in the case of *R. v. Barnardiston*. It was argued that, as there was no evidence of malice in the publication of the writing, the accused was entitled to be acquitted. To that the reply was given that malice cannot be proved by direct evidence; but that, just as a killing without provocation proved that the killing was with malice afore thought, so the publication of a seditious writing proved the malicious intent. "In case any person doth write libels, or publish any expressions which in themselves carry sedition and faction and ill will towards the government, I cannot tell well how to express it otherwise in his accusation than by such words that he did it seditiously factiously and maliciously. And the proof of the thing itself proves the evil mind it was done

[1] Stephen, H.C.L. ii 350 seqq.
[2] (1670) Vaughan 135; vol. i 345-347.
[3] Vol. vi 503-511.
[4] (1680) 7 S.T. 1111.
[5] The punctuation has been amended.
[6] At p. 1123.

with. If then, gentlemen, you believe the defendant, Sir Samuel Barnardiston, did write and publish these letters, that is proof enough of the words maliciously, seditiously and factiously laid in the information."[1] No doubt in the *Case of the Seven Bishops* the malicious and seditious intent of the writing was left to the jury. But we have seen that in that case all the legal talent of the day was enlisted on the side of the bishops. The bar was altogether too much for a bench of judges approved by James II.;[2] so that, as Stephen says, "it is impossible to appeal to that case as a precedent for any legal proposition whatever."[3] It is true also that in the case of *R. v. Tutchin*[4] some expressions used by Holt, C.J., may be taken to mean that the intention with which the writing was composed was to be left to the jury.[5] But probably Stephen and Lord Mansfield, C.J., are right in thinking that his words do not bear this construction, and that he meant to lay down the law substantially as it had been laid down in the seventeenth century.[6] At any rate this was the the sense in which the law was understood by Raymond, C.J. In the case of *R. v. Francklin*[7] he said, "in this information for libel there are three things to be considered, whereof two by you the jury, and one by the court. The first thing under your consideration is whether the defendant Mr. Francklin is guilty of the publication of this Craftsman or not? The second is, whether the expressions in that letter refer to his present majesty and his principal officers and ministers of state, and are applicable to them or not? . . . But then there is a third thing, to wit, whether these defamatory expressions amount to a libel or not? This does not belong to the office of the jury, but to the office of the Court; because it is a matter of law, and not of fact; . . . and there is redress to be had at another place if

[1] (1684) 9 S.T. at p. 1352; ibid at p. 1349 Jeffreys said, "The law supplies the proof if the thing itself speaks malice and sedition. As it is in murder, we say always in the indictment, he did it by the instigation of the devil: can the jury if they find the fact, find he did it not by such instigation? No, that does necessarily attend the very nature of such an action or thing. So, in informations for offences of this nature, we say, he did it falsely maliciously and seditiously, which are the formal words; but if the nature of the thing necessarily imports malice reproach and scandal to the government, then needs no proof but of the fact done, the law supplies the rest"; it was for this reason, no doubt, that the jury were directed that, if they found the publication of a document with the meaning alleged by the prosecution, they were directed to give a general verdict of guilty, as to this see below 345 and n. 1.

[2] Vol. vi 511.

[3] H.C.L. ii 315-316—"The question whether or not the king had a dispensing power was clearly a question of law and not of fact, nevertheless the records were allowed to go to the jury as evidence that the law was as the bishops said it was. This carries the powers of the jury even further than they would be carried at the present day." Stephen should have said *suspending* power.

[4] (1704) 14 S.T. 1095.

[5] "Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government," at p. 1128.

[6] H.C.L. ii 317-319.

[7] (1731) 17 S.T. at pp. 671-672.

either of the parties are not satisfied; for we are not to invade one another's province, as is now of late a notion among some people who ought to know better."

Down to the beginning of the eighteenth century, therefore, the essence of a libel was the intentional publication of a document, bearing the seditious or defamatory meaning alleged by the prosecution. It followed that all the jury had to do was to find the fact of publication of a document bearing the meaning alleged by the prosecution; and that it was for the court to say, as a matter of law, whether what was published was seditious, defamatory, or otherwise malicious, and so a libel. This state of the law harmonised admirably with the current views as to the relations of rulers to their subjects. But, when those views changed, it gradually came to be wholly out of touch with current public opinion. The law as to what amounted to a seditious libel, having been formed in the period when the ruler was regarded as the superior of his subjects, assorted badly with the new view that he was their agent or servant. Therefore the desire for greater freedom of speech than the existing law allowed, took the technical form of the contention that the seditious, defamatory or otherwise malicious intention with which a libel was published, was the essence of the offence, and so a matter of fact for the jury. In support of this contention much was made of the fact that the jury were told to find a general verdict of guilty, when, according to the then received view of the nature of a libel, their finding amounted merely to a special verdict that a certain writing with a certain meaning had been published by the accused, which might be ruled to be perfectly innocent.[1] The concluding sentence from the passage in Raymond, C.J.'s, summing up in *R. v. Francklin* cited above, shows that at that date this contention was beginning to be advanced. The eloquence and ability with which Erskine advocated it later in the century, produced a statutory change in the law,[2] which has had great effects on the law of libel whether considered as a crime or as a tort.[3] But these developments and their effects upon the modern law belong, as I have said, to the legal history of the eighteenth century.

[1] Stephen, H.C.L. ii 358—"They (the judges) tried to make the verdict of guilty in trials for libel an imperfect special verdict, which would have the effect of convicting the defendant, even if he was innocent in the opinion of the judge who tried him, subject to his getting the court to quash his conviction upon a motion in arrest of judgment"; note that in R. v. Harris (1680) 7 S.T. at p. 931, Scroggs, C. J., refused to accept a verdict of guilty of selling only, compelled the jury to give a general verdict of guilty, and then reprimanded them for trying to qualify their verdict contrary to the direction of the Court.

[2] 32 George III. c. 60 (Fox's Libel Act); below 374.

[3] Stephen, H.C.L. ii 321 seqq.

On other questions connected with libel considered as a crime there is as yet but little authority. We hear little, for instance, of the defence of privilege. That is a topic which will, as we shall see,[1] be developed mainly in connection with defamation considered as a tort. Similarly, though it was quite clear that the words or writing complained of must be set out in the indictment or information, together with any innuendoes necessary to explain their meaning, it was chiefly in connection with the tort that the learning as to the function of the innuendo was developed.[2] On both these matters rules were evolved which were later applied to some or all forms of the criminal offence. On the other hand, some of the rules evolved in the criminal cases have had an equally great influence on the development of the tort. But the reciprocal influence of defamation regarded as a crime, and defamation regarded as a tort, we shall be better able to appreciate when we have examined the history of this latter aspect.

Defamation as a Tort

Two sets of influences have gone to the making of our modern torts of written defamation (libel), and spoken defamation (slander). Firstly, the rules evolved by the working of the common law action on the case for defamatory words and writings; and secondly, the rules applied by the judges, after the Restoration, to written as distinct from spoken defamation. To the first of these influences we can trace a large number of the principal rules common to both libel and slander: to the second, the original elaboration of the unfortunate distinction between these two closely allied torts. In tracing their history I shall deal with (1) the early history of the common law action for defamation; (2) the origin of the difference between libel and slander; and (3) the origin of some of the essential characteristics of the torts of libel and slander.

(1) The early history of the common law action for defamation.

I shall consider this subject under the two following heads:— (i) the nature and scope of the action; and (ii) the methods used by the common law judges in the seventeenth century to discourage this action, and their effects.

(i) *The nature and scope of the action.*

Of this I have already said something. We have seen that, because the action was an action on the case, the damage not the

[1] Below 375-377. [2] Below 368-369.

insult was its gist; and that it followed from this conception of the action, that, firstly, publication to some third person was essential, that, secondly, truth was a defence to the action, and that, thirdly, like other actions for tort, it died with the person.[1] We have seen, too, that the action was applicable both to written and spoken defamation.[2] We shall see that it was not till after the Restoration, and under the influence of ideas derived from the criminal offence of libel, that the modern distinction between libel and slander was introduced.[3]

The nature of the action, which made it necessary to regard the resulting damage rather than the insult as the cause of action, was, as we have seen,[4] a cause which helped to prevent the common law from reaching an adequate conception of the tort of defamation. But it was not the only cause. If the courts had placed a liberal interpretation upon the character of the reflections which they would account as defamatory, and had taken a rational view as to the kind of damage which could be regarded as the natural and probable result of defamatory words or writings, the law might have been placed upon a satisfactory basis. This fact will, I think, be made clear by the development of the rules as to the kinds of defamation from which damage could be presumed—that is, to use the modern expression, as to the words which are actionable per se; by the rule that words or writings, though not actionable per se, were actionable if they caused damage; and by the development of the tort of slander of title and torts analogous thereto.

The rules as to the kinds of defamation which are actionable per se.

In the developed common law words are actionable per se if they impute the commission of a criminal offence punishable by imprisonment, or a contagious disease which would exclude a person from society, or unfitness for a profession trade or calling, or misconduct in an office of profit which would lead to dismissal.[5] It is clear from March's book that these categories had been substantially reached by 1647.[6]

The first of these categories is probably the oldest. It dates

[1] Vol. v 206-207. [2] Ibid 207.
[3] Below 364-365. [4] Above 335.
[5] Pollock, Torts (12th ed.) 238; Clerk and Lindsell, Torts (4th ed.) 555; Halsbury, Laws of England xviii 607-608.
[6] "That all scandalous words which touch or concern a man in his life liberty or member, or any corporal punishment; or which scandal a man in his office or place of trust; or in his calling or function by which he gains his living; or which tend to the slandering of his title or his disinheritance; or to the loss of his advancement or preferment, or any other particular damage; or lastly which charge a man to have any dangerous infectious disease by reason of which he ought to separate himself, or to be separated by the law, from the society of men," Actions for Slaunder 10-11.

from the period when the action on the case for words was being admitted into the common law; and it seems to have originated in the days when the courts were trying to distinguish the defamatory words which would be actionable in the common law courts, from those which were actionable only in the ecclesiastical courts. The test hit upon was contained in the question whether the offence charged was punishable in the common law courts or in the ecclesiastical courts. If one called another thief or traitor, the offence charged was punishable in the common law courts, and therefore an action for such defamation lay in those courts. If, on the other hand, one called another "heretic and one of the new learning," or adulterer, the offence charged was "merely spiritual," and no action lay at common law. But if the offence charged was punishable by both laws, the plaintiff could bring his action in either jurisdiction.[1] This case presupposes that words imputing a criminal offence are actionable; and it seems to me that, though the court was then merely trying to distinguish spheres of jurisdiction, and not the qualities which would make words actionable per se, it was probably the foundation of the long line of cases which decided that such words were thus actionable. Conversely, it was the origin of the rule that words imputing gross acts of immorality were not thus actionable, because such acts were only cognizable by the ecclesiastical courts—an injustice[2] which has only partially been remedied by the Slander of Women Act of 1891.[3]

The other categories seem to have been developed later, and are probably based upon the obvious tendency of the imputation to cause damage. The imputation of a contagious disease seems to have been confined to statements that the person defamed was

[1] Y.B. 27 Hy. VIII. Mich. pl. 4—see the passage cited vol. iii 411 n. 2. The principle can, as is pointed out in American Law Rev. vi 593, be traced back to the rule, which is as old as Bracton, that the *accessorium* must come under the same jurisdiction as the *principale*, see a summary of this argument in Essays, A.A.L.H. iii 460 n.; it should be noted that the modern rule that the criminal offence imputed must be one punishable corporally and not merely by fine (see Webb v. Beavan (1883) 11 Q.B.D. 609) is of later growth; no such distinction is drawn in the Y.B.—indeed it is not really consistent with the principle there laid down; and apparently it was held, in the sixteenth and early seventeenth centuries, that the mere fact that the offence charged was enquirable in the Leet was sufficient to make it actionable per se, Rolle, Ab. i 44 *Action sur Case* H. pl. 8; but in 1642 Bramston, C.J., and Mallet, J., Heath, J., dissenting, laid down the modern rule, March, Actions for Slaunder 59; the reason assigned for this limitation was that if the law were otherwise, "it would be a great occasion to increase and multiply actions for words."

[2] "He (Lord Campbell) laments the unsatisfactory state of our law according to which the imputation of words, however gross, on an occasion however public, upon the chastity of a modest matron or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her. The only difference of opinion which I have with my noble and learned friend is that instead of the word 'unsatisfactory,' I should substitute the word 'barbarous,'" Lynch v. Knight (1861) 9 H.L.C. at p. 594 *per* Lord Brougham.

[3] 54, 55 Victoria c. 51.

suffering from leprosy, the plague,[1] or syphilis—the accusation of having contracted the last mentioned disease being much the most common in the reports. It has been suggested that the inclusion in this category of the first two diseases, may have originated in the old rules which required the removal of a leper or a person suffering from the plague.[2] Whether this be so or not, it is clear that the imputation of having contracted syphilis was actionable, partly by reason of the nature of the disease, and partly by reason of the obvious inference as to the sufferer's moral character.[3] Imputation of unfitness for a profession trade or calling is obviously calculated to cause temporal loss. There are long lists of cases in the reports of the sort of opprobrious words which, if used of clergymen,[4] attorneys,[5] barristers,[6] justices of the peace,[7] stewards of courts,[8] doctors,[9] traders,[10] and artificers,[11] were actionable per se. On these only two remarks need be made. Firstly, it was very early held that the imputation that a trader was insolvent or bankrupt was actionable;[12] and this perhaps illustrates the larger importance which commercial considerations were assuming. Secondly, it must be a definite calling recognized by the law, and not merely a temporary employment, or an employment of a menial nature, such as a carrier of post letters[13] —a limitation in which we can perhaps trace the mediæval idea of the distinctness of the status of persons professing different callings.[14] An imputation of misconduct in an office of profit, which would lead to dismissal, is obviously an imputation closely

[1] Though there is one case turning on an imputation of leprosy (next note) there seems to be none turning on an imputation of the plague; and though March, Actions for Slaunder 105, thinks that such an imputation would be actionable, he cites no authority

[2] This suggestion was made in an article in the American Law Rev. vi 593; for a summary of the argument see Essays, A.A.L.H. iii 461; but it may be doubted whether the mediæval rules had much influence on the minds of the sixteenth and seventeenth-century judges; though there is one case turning on the imputation of leprosy, Taylor v. Perkins (1607) Cro. Jac. 144, the reason assigned for holding the words actionable is that such a disease renders the sufferer unfit for society, Rolle, Ab. i 44 pl. 4; but this reason was not applied to other infectious diseases, e.g. smallpox, see James v. Rutlech (1599) 4 Co. Rep. 17a.

[3] "Si home dit al auter que il ad le grand Poxe, action sur le case gist, pur ceo que ceo est un grand slander et disgrace entant que ceo vient per fornication, et nul home poet converser ove luy," Rolle, Ab. i 43, H. pl. 3; though in another case there cited, Crittal v. Horner (1619) Hob. 219, it was said that "the slander was not in the wicked means of getting the disease, but in the odiousness of the infection as a leper."

[4] Doctor Sibthorp's Case (1636) W. Jones 366.

[5] Rolle, Ab. i 52-54, S. pl. 1-3, 4-9.

[6] Ibid 54-55, S. pl 14, 16, 22.

[7] Ibid 57, S. pl. 31-34.

[8] Ibid 56, S. pl. 28.

[9] Ibid 54, S. pl. 10-12.

[10] Ibid 58-63.

[11] Ibid 62, V. pl. 27.

[12] Ibid 61, V. pl. 16, citing a case of 1597.

[13] Bell v. Thatcher (1675) 1 Vent. 275—a doctrine now obsolete as far as applicable to the menial character of the calling, and perhaps also so far as applicable to its temporary character, see Clerk and Lindsell, Torts (4th ed.) 557-558 and the cases there cited.

[14] Vol. iii 385-386; vol. iv 402-407.

analogous to those just discussed. On this ground it was said that, "if I have a bailiff, to whom I commit the buying and selling of my corn and grain, and give him greater wages in respect of that trust and employment, and then a man will charge him to have deceived me in his office by buying and selling by false measure, to my loss and damage, this will bear an action, for this discredits him in his means of living: and this kind of offence may not only be cause to put him out of that service but to be refused of all others." [1] On the same ground it was held that a charge of unchastity made against a duke's chaplain, whereby he lost his office, was actionable.[2] If, on the other hand, the office was an honorary office, such as a justice of the peace, though a charge of corruption, or of opinions showing that he ought not to be trusted, is actionable, a charge of want only of ability is not.

The last mentioned case savours somewhat of the fine distinctions introduced by the judges who wished to discourage this action. But it is clear that the broad principles, upon which the courts adjudged imputations to be actionable per se, were not in themselves unreasonable. If they had been supplemented by a somewhat greater latitude in allowing actions where damage could be proved, the law thus developed would not have been wholly unsatisfactory.

The rule that words or writings, though not actionable per se, were actionable if they caused damage.

Though the words spoken amounted to a slander punishable only in the ecclesiastical courts, yet if it could be proved that temporal loss had been occasioned by them, an action lay. Thus, if one accused a woman of incontinency, whereby she lost a marriage which was being arranged, she had a right of action. "For in this case the ground of the action is temporal, *sc.* that she was to be advanced in marriage, and that she was defeated of it, and the means by which she was defeated was the same slander, which means tending to such end, shall be tried by the common law. So if a divine is to be presented to a benefice, and one to defeat him of it says to the patron 'that he is an heretic, or a bastard, or that he is excommunicated,' by which the patron refuses to present him . . . and he loses his preferment, he shall have his action on the case for these slanders tending to such end. . . . And Popham Chief Justice said that if one says of a woman that keeps an inn that she has a great infectious disease by which

[1] Bray v. Hayne (1615) Hob. 76.

[2] Payne v. Beuwmorris (1668) 1 Lev. 248; cp. Gallway v. Marshall (1853) 9 Exch. 294.

[3] How v. Prinn (1702) 2 Salk. at p. 695—in that case it was held actionable to say of a justice of the peace and a deputy lieutenant that he was a Jacobite, and for bringing in the Prince of Wales and popery to destroy our nation; cp. Alexander v. Jenkins [1892] 1 Q.B. 797; Booth v. Arnold [1805] 1 Q.B. 571.

she loses her guests, she shall have an action on the case."[1] Similarly, if it was affirmed that a person was a bastard, whereby his title or possibility of a title to land was negatived, and he lost a chance of selling his title or possibility of title, he had a right of action.[2] This last illustration comes very near to slander of title which, as we shall now see, became a separate tort in the course of the seventeenth century.

The development of the tort of slander of title and torts analogous thereto.

Cases of the latter part of the sixteenth century established the principle that, if an owner of land was negotiating for its sale or other disposition to another person, and a third person made false statements as to the vendor's title, which prevented the sale or disposition, the vendor could bring an action on the case and get damages for the slander.[3] This action on the case is clearly analogous to the ordinary action on the case for defamation; and in the fact that it makes no difference whether the slander is oral or written,[4] it preserves the memory of a characteristic which this ordinary action then possessed.[5] Both sprang from the same root; but, from an early period, differences between the conditions under which the action for slander of title and the ordinary action lay began to be developed. The action for slander of title did not lie if the third person claimed that he was entitled, though his claim were false;[6] and the statement must be made with knowledge of its falsity.[7] As early as 1629 it was recognized that the form and incidents of the action were different from those of the ordinary action for defamation[8]—though it was probably not till the latter half of the century that these differences were universally recognized.[9] In substance it was an action for malicious statements as to

[1] Davis v. Gardiner (1593) 4 Co. Rep. at f. 17a; Mathew v. Crass (1614) Cro. Jac. 323.

[2] Vaughan v. Ellis (1609) Cro. Jac. 213; Elborow v. Allen (1623) ibid 642.

[3] Mildmay v. Standish (1585) Cro. Eliza. 34; Gerrard v. Dickenson (1591) ibid 196; Tasburgh v. Day (1619) Cro. Jac. 484; that it should hinder a pending sale was essential, see March, Actions for Slaunder 91, citing a dictum of Popham.

[4] Ratcliffe v. Evans [1892] 2 Q.B. at p. 527 *per* Bowen, L.J.

[5] Above 347; vol. v 207; below 364.

[6] "If the defendant had affirmed and published that the plaintif had no right to the castle and manor of H, but that she herself had right to them, in that case, because the defendant herself pretends right to them, although in truth she had none, yet no action lies," Gerrard v. Dickenson (1585) 4 Co. Rep. at f. 18a.

[7] Ibid at f. 18b.

[8] "The action is out of the statute 21 Jac. I. c. 16 as well for the time of limitation as for the costs, for that extends to actions for slanderous words which are intended to the persons of men, and are common actions, and rather begin of spleen than otherwise; but not to this action, which is rare, and not brought without special damage," Law v. Harwood (1629) Cro. Car. at p. 141.

[9] That the differentiation was not always clearly perceived in the earlier half of the seventeenth century is clear from the passage from March, Actions for Slaunder 10-11, cited above 347 n. 6; in fact the rule laid down in Law v. Harwood as to the application of the statute applied to any action on the case for words, in which special

the title to property, oral or written, made with knowledge of their falsity, which had caused damage to the plaintiff.[1] In the seventeenth century the action was extended to other cases in which damage had been thus caused. Thus in 1662, in the case of *Shepeard v. Wakeman*,[2] it was held, after much debate, that a statement made falsely and maliciously of a plaintiff, whereby she lost a marriage for which she was in treaty, was actionable; and this extension is the origin of the general rule that a tort is committed, if damage is caused by the making of oral or written statements falsely and maliciously.[3] The action given for this tort "is not," said Bowen, L.J.,[4] "one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title." This sentence not only accurately describes the nature of the action, but also indicates the manner in which it had been developed. It is not an action for libel or slander for, historically, the action for slander of title and the action on the case for defamation became distinct at a comparatively early date; and this action is simply an extension of the action for slander of title.

All these rules seem to me to show that there were possibilities in this common law action on the case for defamation, which might have been developed. The different categories of the sorts of defamation actionable per se were both wide and sensible. The rule that any other kind of defamation causing temporal loss was actionable might, if liberally construed, have been made to cover other kinds of loss besides mere pecuniary loss; and occasionally some of the judges seemed inclined to adopt this more liberal view.[5] The development of the tort of slander of title and torts analogous thereto, showed that this common law action on the case was a vigorous root, which was capable of putting forth various branches.

damage was alleged (Browne v. Gibbons (1702) 1 Salk. 206), so that the criterion there laid down was not wholly conclusive, which may account for the fact that it was not recognized by March as an independent cause of action.

[1] Law v. Harwood (1629) Cro. Car. at p. 141—"slandering of one's title doth not import in itself loss, without showing particularly the cause of loss by reason of the speaking of the words, as that he could not sell or let the said lands"; and see above 351 n. 6.

[2] (1662) 1 Sid. 79.

[3] Clerk and Lindsell, Torts (4th ed.) chap. xviii.

[4] Ratcliffe v. Evans [1892] 2 Q.B. at pp. 527-528. For another line of cases where damage is caused by words spoken to the plaintiff, which, therefore, is analogous neither to slander nor to slander of title, see Wilkinson v. Downton [1897] 2 Q.B. 57; Janvier v. Sweeney [1919] 2 K.B. 316.

[5] "Williams, Justice. This rule is to be observed, as touching words which are actionable, that is to say, where the words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable, and this rule was affirmed by the Court," Smale v. Hammon (1611) 1 Buls. 40; "And Holt, Chief Justice, said . . . that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, because so doing would contribute much to the preservation of the peace," Baker v. Pierce (1704) 6 Mod. at p. 24.

But, as we shall now see, these possibilities were never realized, owing to the methods used by the common law judges in the seventeenth century to discourage this action.

(ii) *The methods used by the common law judges in the seventeenth century to discourage this action, and their effects.*

We have seen that, at the beginning of the seventeenth century, the flood of these actions of defamation was so overwhelming that the judges thought it necessary to do all that they could to discourage them.[1] The reasons why the action was so popular are fairly obvious. In the first place, the Star Chamber was doing all that it could to suppress duelling,[2] and therefore those who thought that their honour had been stained were driven to the law courts. In the second place, we have seen that litigation of all kinds is always encouraged when, in a naturally turbulent age, the law courts are sufficiently strong, and the law which they administer is sufficiently developed, to provide a remedy for real or fancied wrongs.[3] No doubt some cautious discouragement of these actions was needed; but the methods of discouragement devised by the common law judges, being somewhat hasty and ill advised, did permanent harm to the development of this common law action, and therefore to the development of the tort of defamation. These methods of discouragement can be grouped under two main heads. (*a*) A very restrictive interpretation was placed on the categories of words which the courts allowed to be defamatory per se; and (*b*) equally restrictive rules were laid down as to the persons liable for the repetition of a slander, as to the kinds of damage for which the action lay, and as to the kinds of damage which the courts allowed to be the natural and probable consequence of the defamation.

(*a*) Let us take one or two instances of the restrictive interpretation placed on the categories of words which the courts allowed to be defamatory per se.

In the case of words which imported the commission of a criminal offence punishable by imprisonment, the words were strictly construed to see if they charged the plaintiff with acts which legally amounted to such an offence. Thus, if A said of B, "B seeks my life," the words were not actionable, firstly

[1] Vol. v 206; March, Actions for Slaunder at pp. 2-3, writing in 1647, represents the current professional opinion when, after remarking on the frequency of these actions, he says, "and it were to be wished . . . that the greatest part of them were suppressed, that words only of brangle heat and choler might not be so much as mentioned in those high and honourable courts of justice. For I profess for my part that I judge of them as a great dishonour to the law, and the professors thereof; especially when I consider that they are used only as instruments to promote the malices and vent the spleen of private jars and discontents among men."

[2] Ibid 199-201.

[3] Vol. i 506 and n. 6.

because, "he may seek his life lawfully upon just cause," and secondly, "seeking of his life is too general and for seeking *tantum* no punishment is inflicted by the law."[1] To say that a man was detected for perjury in the Star Chamber was not actionable, "for an honest man may be detected but not convicted; and every one who has a bill of perjury exhibited against him there is detected."[2] To accuse a man of having burnt a barn was held not to be actionable, as this was no felony if the barn was neither parcel of a mansion house nor full of corn.[3] To impute a mere intention to commit a crime was held not to be actionable, "for the purpose and intent of a man without act, is not punishable by law"; and that was so even though the act charged might be punished in the Star Chamber, "for that is by the absolute power of the Court and not by the ordinary course of the law."[4] Similarly, to accuse a man of an impossible crime, as in the well-known case where A said of B, that B, while churchwarden, had stolen the bell-rope, was not actionable.[5] Fine distinctions were drawn between cases where subsequent words explained a criminal charge, so as to make it impossible, and cases when they merely added an immaterial detail, so as to leave it possible. To say "thou art a thief and hast stolen my trees," was actionable, for the last words were merely an addition;[6] but to say "thou art a thief for thou hast stolen my trees," was not actionable, for the last words, being explanatory, showed that no crime had been committed.[7] The absurdity of applying such distinctions to angry words spoken in heat was pointed out by Holt, C.J.,[8] and is obvious. As Sir F. Pollock has said,[9] it followed that "minute and copious vituperation was safer than terms of general reproach, such as 'thief,' inasmuch as a layman who enters on details will probably make some impossible combination."

The same principles were applied to the other categories of words actionable per se. Thus to say of a man that he was full of the pox was not actionable, because that might mean merely

[1] Hext v. Yeomans (1585) 4 Co. Rep. 15b.
[2] Weaver v. Cariden (1595) 4 Co. Rep. 16a.
[3] Barham v. Nethersal (1602) 4 Co. Rep. 20a.
[4] Eaton v. Allen (1598) 4 Co. Rep. 16b.
[5] Jackson v. Adams (1835) 2 Bing. N.C. 402.
[6] Rolle, Ab. i 51, R. pl. 1. [7] Ibid R. pl. 2.
[8] "The opinions of later times have been in many instances different from those of former days in relation to words, for formerly there has been a difference taken between saying, 'thou art a thief *and* hast stolen my wood,' and 'thou art a thief *for* thou hast stolen my wood'; and judgments have gone both ways; but later opinions make no difference, if the words be spoke at the same time. And these are scrambling things that have gone backwards and forwards," Baker v. Pierce (1704) 6 Mod. at pp. 23-24.
[9] Torts (12th ed.) 242.

smallpox.[1] More liberality was shown in the case of words which imputed dishonesty or incapacity in a trade or profession; but even here the distinctions ran very fine. Thus to call an attorney corrupt was actionable,[2] but to call him usurer, or to say that, being an executor, he would not perform the will, was not actionable.[3] To call a trader bankrupt was actionable;[4] but, according to some, to say that he was a bankruptly knave was not, as the words did not mean that he was a bankrupt, but only that he was like a bankrupt.[5] As the words must cast an imputation on the plaintiff of unfitness for his particular trade, words which would be defamatory of one person might not be defamatory of another. Thus to call an attorney or a justice of the peace a common barrator was actionable;[6] but it was not actionable to apply the same term to a common carrier.[7] Obviously a man who knew the trade or profession of the person whom he wished to abuse, could, if he chose his words with care, indulge with impunity in a considerable latitude of vituperation.

The application of these principles was partly the cause, and partly the effect, of the general doctrine that in these actions the words complained of must be construed, not in their natural sense, but, whenever possible, in "mitiore sensu." That is, they must be held not to be defamatory if a non-defamatory sense could be twisted out of them. This principle is taken for granted by Coke;[8] and, if it had been limited to the case where the words were really of doubtful meaning, it would have been unobjectionable. The rule was, it is true, stated in this way by Coke,[9] Rolle,[10] and March,[11] in the first half of the seventeenth century. But the judges, in their desire to discourage these actions, did not so limit it. They examined the words in the same manner as

[1] James v. Rutledge (1599) Moore 573; S.C. 4 Co. Rep. 17a.

[2] Birchley's Case (1585) 4 Co. Rep. 16a. [3] Ibid.

[4] Kempe's Case (1553) Dyer 72b; 4 Co. Rep. 19a.

[5] Rolle, Ab. i 47 I. pl. 3, citing a case of 1608; Selby v. Carrier (1615) Cro. Jac. 345; *sed contra* 4 Co. Rep. 19a, if the words imply an act done and not merely an inclination to do an act, and with this view the Court agreed in Booth v. Scale (1663) 1 Sid. 103.

[6] Rolle, Ab. i 54, S. pl. 15. [7] Ibid i 59, V. pl. 3.

[8] "And it was said quod sensus verborum est duplex, scil. mitis et asper; et verba semper accipienda sunt in mitiori sensu," Cromwell's Case (1578-81) 4 Co. Rep. at f. 13a; ibid at ff. 15b, 17b, 20a.

[9] "We will not give more favour unto actions upon the case for words than of necessity we ought to do, *where the words are not apparently scandalous*," Crofts v. Brown (1617) 3 Buls. 167.

[10] "Lou les parols sont dubious et poient receiver un double interpretacion lun voie que ils serront actionable et l'autre nemy, ils serront prise en mitiori sensu," Rolle, Ab. i 71, Z. pl. 1.

[11] "We have a rule that words, if they admit of a double construction, shall always be taken in the best sense for him that speaks them. . . . This I say the law doth when the words are amphibolus, but if the words are clearly actionable, in such case the law will never aid a man," Actions for Slaunder 5.

they were accustomed to examine a writ or a pleading, in order to discover, if possible, a non-defamatory sense; and, as they were experts in this art of critically examining words, it was not difficult to find a non-defamatory sense in the most insulting words. Indeed, it would seem that the result of an action often depended on the comparative ingenuity of the counsel in suggesting interpretations of the words used. Two instances will suffice. "If one man says of another, 'Thou art a prigging pilfering merchant and hast pilfered away my corn and my goods from my wife and my servants and this I will prove,' no action lies for that (as it seems), nor does it appear that he intended that he had taken these goods feloniously, and therefore the words shall be taken in mitori sensu."[1] "If a man says of A, 'he was a pick-pocket, and had picked my pocket, and took 12s. of money out of my pocket,'[2] no action lies for these words, because it might be done merely as a trespass or in jest and not feloniously."[3] A long line of similar cases are reported in the books; and in spite of attempts in the latter part of the seventeenth and in the eighteenth centuries to restrict this vicious system of interpretation,[4] and to put the law upon a more sensible basis, it still continued. "It is only in comparatively recent times that the perverse subtlety of special pleading, by which this branch of the law was specially encumbered, has altogether disappeared";[5] for, as we shall see,[6] it is not till comparatively recent times that the Courts have ceased to look at the cases in order to come to a conclusion as to whether the words used are or are not defamatory.

We shall now see that the effect of these principles was aggravated by equally restrictive rules as to the persons liable for the repetition of a slander, as to the kinds of damage for which the action lay, and as to the kinds of damage which the courts allowed to be the natural and probable consequence of the defamation.

[1] Rolle, Ab. i 73, Z. pl. 14.

[2] Ibid Z. pl. 20; and see also below 360.

[3] Ibid.

[4] "And tho' in the old books the rule was to take the words in mitiori sensu, yet by Holt, C.J., they would give no favour to words, and should give satisfaction to them whose reputation is hurt; and would take words in a common sense according to the vulgar intendment of the bystanders. The rule de mitiori sensu is to be understood when the words in their natural import are doubtful; and equally to be understood in the one sense as in the other," Somers v. House (1694) Holt 39; "I have heard my Lord Hale and Justice Twisden say that they knew no set rule for actions for words, but that all words stood upon their own feet," Baker v. Pierce (1704) 6 Mod. at p. 24 *per* Holt, C.J.; "men's tongues growing more virulent, and irreparable damage arising from words, it has been by experience found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule therefore that has now prevailed is, that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them," Harrison v. Thornborough (1714) 10 Mod. at p. 198; cp. Carpenter v. Tarrent (1737) Cas. t. Hardwicke *per* Lord Hardwicke, C.J.

[5] Clerk and Lindsell, Torts (4th ed.) 563.

[6] Below 358-359.

(*b*) One effect of the line of cases, which has just been discussed, was to make it unnecessary, in many instances, to consider whether or not the plaintiff had suffered damage. The words were held not to be defamatory, and that was the end of the case.[1] But even if the plaintiff could prove that he had been defamed and had suffered damage, his difficulties were not at an end. Firstly, it was laid down by Coke in the *Earl of Northampton's Case*[2] that, "if J.S. publish that he hath heard J.N. say that J.G. was a traitor or thief, in an action of the case, if the truth be such, he may justify. But if J.S. publish that he hath heard generally without a certain author, that J.G. was a traitor or thief, there an action *sur le case* lieth against J.S. for this, that he hath not given to the party grieved any cause of action against any, but against himself who published the words, although that in truth he might hear them." This was long regarded as settled law,[3] and was not overruled till the beginning of the nineteenth century.[4] It is not till then that we begin to get the development of the modern rules as to when a person is liable for slander, when damage has been caused by its repetition by other persons.[5] Secondly, the damage must be ascertainable temporal damage. Thus it was held in 1669[6] that to say of a virgin of good fame, "she was with child by Simons," whereby she lost her parent's favour, was not actionable. This rule was no doubt due in part to the rule that defamation, which alleged offences cognizable only in the ecclesiastical courts, and unaccompanied by temporal damage, was not actionable at common law.[7] But, as the case of *Lynch v. Knight*[8] in 1861 shows, the rule long worked hardship; and it has only partially been remedied by the Slander of Women Act 1891,[9] in the case of the one particular class of slander in which the rule worked the greatest hardship. Moreover, the existence of the damage must be strictly proved—"when the speaking of the words might be a damage to the plaintiff, yet if the ground of that damnification do not sufficiently appear by the record, the action

[1] Bramston, C.J., once went so far as to say that, if the words did not import a scandal in themselves, the averment of a particular damage could not make them actionable; but no one else seems to have taken this extreme view, March, Actions for Slaunder 102.

[2] (1613) 12 Co. Rep. at p. 134.

[3] See Davis v. Lewis (1796) 7 T.R. 17.

[4] McPherson v. Daniels (1829) 10 B. and C. 263.

[5] See Ratcliffe v. Evans [1892] 2 Q.B. at p. 530, where Bowen, L.J., lays it down that, "Verbal defamatory statements may be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorised repetition."

[6] Barnes v. Bruddel 1 Lev. 261.

[7] Above 348.

[8] 9 H.L.C. 577.

[9] 54, 55 Victoria c. 51.

will not lie."[1] Thirdly, we have seen that, though the defamation imputed only an offence cognizable in the ecclesiastical courts, yet if it was followed by damage, an action lay—e.g. the imputation of unchastity to a woman whereby she lost her marriage.[2] Similarly it was held that, where the plaintiff's shepherd falsely and maliciously told the bailiff of the manor that one of the plaintiff's sheep was an estray, whereupon the bailiff seized it, this damage was attributable to these words, and made them actionable.[3] But it was laid down in *Vicar's v. Wilcocks*[4] that, if in consequence of the words spoken, another does an act which would be illegal, even assuming that the words were true, no action lay. It is probable that this decision was based on somewhat the same ground as the decision in the *Earl of Northampton's Case*.[5] Just as in that case the person slandered was only allowed to recover against the originator of the slander, and not against the person who had repeated it, so, according to this decision, he was only allowed to recover against the man who had done the illegal act which had damaged him, and not against the person who had uttered the slander, which had caused the illegal act to be done. The law in the one case allowed an action against the originator of the slander, and in the other case against the person who had done the illegal act. It refused to allow any other action, and so the slanderer went free. But it is probable that this hard and fast rule is as obsolete as the rule laid down in the *Earl of Northampton's Case*.[6] The true test is, as Sir F. Pollock has pointed out,[7] not whether the act done was legal or illegal, but whether the act, whether legal or illegal, was the natural and probable consequence of the slander.

All these evil results, which flowed from the attempts of the judges to discourage these actions for defamation, were aggravated by the accumulation of cases in the reports, in which the courts had construed this or that specimen of abuse to be or not to be defamatory. We have seen that the practice of reporting cases, which turned on the construction of particular documents, tended

[1] March, Actions for Slaunder 49; a fortiori if it appeared by the record that there was no damage—"if one say of a woman that 'she hath murdered her husband'; and she and her husband bring the action, it will not lie, because it doth appear by the record that the slander is not prejudicial," ibid., citing a case of 1608.

[2] Above 350. [3] Newman v. Zachary (1647) Aleyn 3.

[4] (1806) 8 East 1—"the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression," *per* Lord Ellenborough, C.J.

[5] (1613) 12 Co. Rep. 132.

[6] See the remarks of Lord Wensleydale in Lynch v. Knight (1861) 9 H.L.C. at p. 600.

[7] Torts (12th ed.) 240.

to create all sorts of arbitrary rules for the interpretation of these documents; that the status of these rules was often uncertain—it was not clear whether they were rules of law, or rules of construction, or merely inferences of fact as to the interpretation of the particular document before the court; and that the application of these rules often tended to frustrate the intentions of the parties to these documents.[1] Similar evil effects followed these numerous reports of actions for defamatory words. A very cursory glance at Rolle's and the later Abridgments, will show that this practice of piling up cases, which turned on the construction of particular words, had a disastrous effect on this branch of the law. Rolle tried to reduce them to some sort of order by grouping them under general headings. Thus he has a long list of cases turning on the imputation of perjury; on more general words of abuse; on words which do not impute felony but only minor offences; on adjective interrogative conditional and disjunctive words, and words in the past tense; on words which are not directly affirmative; on words imputing a criminal intention; on cases in which later words will explain and modify the effect of former words; on words imputing disgraceful conduct in one's profession office or trade; on words which will support an action in spite of their uncertainty; on cases where the words will be taken in mitiore sensu; on cases where the action lies though the words are repugnant, though the person slandered is not directly described, or though the charge is not quite precisely made; on cases in which an averment would, and cases in which it would not, render words actionable. A study of those cases makes it quite obvious that so many and such fine distinctions were drawn by the judges as to the actionable quality of words, that it was a mere lottery whether or no any particular words would be held to be defamatory; and although, as we have seen, protests were made in the late seventeenth and the eighteenth centuries against this vicious system of citing cases to prove that this or that set of words were or were not defamatory,[2] it was not till modern times that it was eliminated, by the application to words and writings, which were the subjects of actions for defamation, of the rule that the meaning of all words and documents is a question of fact to be deduced from the words and the documents themselves.[3]

The best proof of the absurd results of this practice is the cases themselves; and as illustrations I will take one or two cases from Croke's reports of James I.'s reign.

In the following cases the words were held to be defamatory:—Words spoken of a justice of the peace, stating that he had

[1] Vol. vii. 392-394.
[2] Above 356 n. 4.
[3] Above 356; see Lord Halsbury's Laws of England xviii 639 n. (t).

instigated others to attempt to murder the speaker, were held to be actionable by three judges against two.[1] Words spoken of a commissioner to examine witnesses, imputing that he had taken bribes to favour one of the parties, were held actionable by four judges against one.[2] The statement that a justice of the peace was "a partial justice" was held actionable by the two judges who tried the case.[3] To accuse a man of having robbed the church, and stolen lead from it, was held actionable by three judges against two; but no action would have lain if the words had been "thou hast robbed the church *for* thou hast stolen lead," because there could be no larceny of the lead which was fixed to the freehold.[4]

In the following cases the words were held not to be defamatory:—It was held by three judges to two that, to say of a magistrate that "he is a rascally villain, and keeps a company of thieves and traitors to do mischief," was not actionable;[5] and again by three judges to two that it was not actionable to say "thou art a thievish knave and hath stolen my wood," as "stealing of wood may be intended growing wood, and then it is not any felony, and so no cause of action."[6] On the same principle it was held not actionable to charge a man with having stolen iron bars from windows, or corn from a field.[7] But, perhaps, the most absurd of all these cases is the following:[8] the words were, "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder and the other on the other"—as clear an accusation of homicide, one could think, as could be desired. But "it was moved in arrest of judgment that these words were not actionable, for it is not averred that the cook was killed, but *argumentative*. The Court was of that opinion, Fleming, Chief Justice, and Williams *absentibus*; for slander ought to be direct, against which there may not be any intendment: but here notwithstanding such wounding the party may yet be living; and it is then but trespass."

It is clear that an action which had given rise to such a body of law as this, gave no adequate remedy for defamation. No doubt in the early part of the seventeenth century its inadequacy was mitigated by the fact that proceedings might be taken in the court of Star Chamber.[9] But, when the Star Chamber was abolished, a new and better remedy was imperatively needed. We shall now see that it was mainly for this reason that, after the Restoration, the courts began to treat the tort of libel in a different way from the tort of slander. The old unsatisfactory law

[1] Harper v. Beamond (1605) Cro. Jac. 56.
[2] Moor v. Foster (1606) ibid 65.
[3] Kemp v. Housgoe (1606) ibid 90.
[4] Benson v. Morley (1606) ibid 153.
[5] Hollis v. Briscow (1605) ibid. 58.
[6] Robins v. Hildredon (1608) ibid 65.
[7] Powell v. Hutchins (1609) ibid 204.
[8] Holt v. Astgrigg (1608) ibid 184.
[9] Vol. v. 208-212.

was still applied to spoken defamation; but some very different rules were applied to defamation which was written. These rules eventually reacted on the tort of slander, and effected some improvement in the law; but the unfortunate distinction between written and spoken defamation, due ultimately to the treatment of the action on the case by the judges of the early years of the seventeenth century, and immediately to the remedy for that treatment adopted by the judges of the latter part of that century, still remains to trouble the law.

(2) The origin of the difference between libel and slander.

The abolition of the jurisdiction of the court of Star Chamber, and the absorption of some parts of it by the common law courts after the Restoration, created a difficult problem in connection with several wrongs or offences which hover on the border line between crime and tort. This problem can be stated as follows: There were several of these wrongs or offences, notably defamation conspiracy and maintenance, as to which the common law, because it had provided a civil or a criminal remedy, had, in the mediæval period and later, acquired a certain number of rules.[1] But, during the sixteenth and seventeenth centuries, the law as to these wrongs or offences had been further developed by the court of Star Chamber; and this development had been concerned mainly with their criminal aspect.[2] It followed that, when the common law courts took over these parts of the jurisdiction of the Star Chamber, it took over the law relating to the wrongs or offences which had been there developed. They became common law misdemeanours; and the definition of these misdemeanours owed something both to the common law rules and to the rules of the Star Chamber. How much they owed to these two sets of influences varied in each case. In the case of the criminal aspect of defamation[3] and conspiracy[4] the debt owed to the Star Chamber was large, and that owed to the common law was comparatively small. In the case of the civil aspect of defamation, and of the civil and criminal aspect of maintenance,[5] the influence of common law rules was more prominent; and we shall see that, for a considerable period, the same thing can be said of the civil aspect of conspiracy.[6] Now, when all these three wrongs or offences came to be recognized as common law misdemeanours, two questions naturally arose. Firstly, could all these criminal offences be regarded as torts? and, if so, were the incidents of these offences, regarded as

[1] For the mediæval rules as to conspiracy and maintenance see vol. iii 395-399, 401-407; for the rules as to defamation see vol. iii 409-411, above 335.
[2] Vol. v. 201-205, 208-212.
[3] Above 336, 338 seqq.
[4] Below 379-384.
[5] Below 397-400.
[6] Below 392-393.

torts, in all respects the same as the incidents of these offences regarded as crimes? Secondly, were they torts like trespass, which would give rise to an action for nominal damages? or were they torts like negligence, which would only give rise to an action if the plaintiff could show that he had suffered damage? In other words, was the act *per se* tortious, or was it only tortious if accompanied by damage?

These problems were raised by the historical development of the law on these subjects. But there is no reason to think that the judges realized their precise nature; and it is certain that they did not try to solve them on any general or theoretical grounds. As must necessarily happen under a system of case law, they decided the cases as they arose in the manner which seemed to them most expedient, and for reasons which seemed sufficient to dispose of the case in hand. The result has been that they have left undecided many points which, in later years, have given rise to much difference of professional and judicial opinion. Controversy upon these points has often not been illuminating, and the decisions arrived at have not always been convincing, mainly because the historical causes, and therefore the real nature of the problem, have not been clearly realized—a fact of which the conflicting decisions in the case of *Neville v. London Express Newspaper Ltd.*,[1] and the long unsettled question of the nature of the tort of conspiracy,[2] are leading illustrations. But, even if the judges of the seventeenth century had realized the true nature of the problem, and had approached it from its theoretical side, it would have been found difficult to solve, because many good reasons could be given for opposite solutions.

(i) Could all those criminal offences be regarded as torts? and, if so, were the incidents of these offences, regarded as torts, in all respects the same as the incidents of these offences regarded as crimes?

In favour of the view that all these offences should be regarded as torts, it could be argued that they were all treated by the law as criminal offences; and that, if an act so treated caused damage to another, that other ought to have an action for damages. Moreover, it could be argued that this was the right solution on historical grounds, because, firstly, the common and statute law had recognized, in the case of conspiracy and maintenance, that these offences could give rise to proceedings in the nature of trespass, which, like trespass, were as much civil in their nature as criminal;[3] and, secondly, because the court of Star Chamber sometimes gave damages to the person injured by all

[1] [1919] A.C. 368. [2] Below 394-397.
[3] Vol. iii 397-398, 404-407.

these offences.[1] On the other hand, it might be said that the mere fact that the law chose, from motives of public policy, to treat a given course of conduct as a criminal offence, did not necessarily prove that the law would regard it as a tort; and that, even admitting that these wrongful acts should be regarded as torts if they caused damage to another, it did not follow that the tort would necessarily have the same incidents as the criminal offence which had been developed by the court of Star Chamber. This truth was realized in the case of defamation, as the differences between the tort and the crime of libel testify.[2] The failure to realize it in the case of maintenance is at the bottom of the inconsistent opinions in the case of *Neville v. London Express Newspaper Ltd.*;[3] and, as we shall see, it has something to do with the obscurity which long hung about the question whether there is such a thing as the tort of conspiracy.[4]

(ii) Were these torts torts like trespass, which would give rise to an action for nominal damages? or were they torts like negligence, which would only give rise to an action if the plaintiff could show that he had suffered damage?

If these wrongs could be regarded as torts, there was something to be said in favour of the view that they should be so regarded, whether damage resulted or not, so that they would give rise to a right of action for nominal damages, because from them general damage could be presumed. They were obvious abuses of so serious a kind that the state had deemed it expedient to treat them as crimes. Why should they not be regarded as involving a tort of this character? It might be argued that they should be regarded as involving a tort of this character, just as larceny involves a trespass. On the other hand, it might be said that the form of action by which these torts were remedied was Case; and that that necessarily involved the conclusion that they were only torts if the plaintiff could show that he had suffered damage. No doubt this is a technical reason; but, in support of it, it might be argued that, though it might be expedient to treat these wrongs as crimes, there was no reason to treat them as torts unless a plaintiff could show that he had suffered damage—a line of reasoning which is fully admitted in the rule, laid down at the end of this period, that a public nuisance will not give rise to an action in tort in the absence of special damage.[5] We shall see that this line of reasoning has been followed in the case of the torts of conspiracy[6] and maintenance.[7] On the other hand, in the

[1] Vol. v 211-212.
[2] Above 339.
[3] [1919] A.C. 368; below 400-402.
[4] Below 392-397.
[5] Iveson v. Moore (1700) 1 Ld. Raym. 486.
[6] Below 394, 396-397.
[7] Below 400.

case of written as opposed to spoken defamation, the first line of reasoning was followed. We shall see that in the case of libel, as distinct from slander, the courts, after the Restoration, held that no special damage need be shown to ground the action[1]—that libel was a wrongful act from which damage could be presumed.

If we took a narrow historical view of the development of these torts, we might wonder at the conclusion thus reached. It might be said that the early common law remedies, both in the case of conspiracy and maintenance, showed that, being wrongs in the nature of trespass, they should have been regarded as torts of the nature of trespass, that is as violations of absolute rights; while defamation, spoken or written, being redressible at common law only by an action on the case, should not have been regarded as giving rise to an action in tort in the absence of special damage. But to reason in this way would be to ignore, both the manner in which the Star Chamber had developed all these wrongs in the sixteenth century, and the new conditions which the problem had, in consequence, assumed after the Restoration. The judges, as I have already said, were not fully conscious of the problem in all its bearings; but, when faced with the question whether, in any particular case, written defamation, or conspiracy, or maintenance should give rise to an action in tort, they answered it in a manner seemed to them to be most expedient.

Now in considering the question whether written defamation should give rise to an action in tort without proof of special damage, the judges had before them the following three facts: firstly, such defamation was a crime; secondly, the development of the action on the case had made this action a wholly unsatisfactory remedy for the tort of defamation; thirdly, if the prevalent habit of duelling was to be suppressed, some better remedy must be provided. We know that the last two considerations had induced them to try to improve the conditions under which the action on the case lay;[2] and, though there is no direct evidence as to their reasons for deciding that written, unlike spoken defamation, would give rise to an action without proof of special damage, I cannot help thinking that it was the combined weight of all these three reasons which induced them to reform the law by drawing this distinction. However that may be, the cases make it quite clear that this distinction was drawn in the latter half of the seventeenth century.

The earliest decision is the case of *King v. Lake* in 1670.[3] Hale, C.B., held that, "although general words spoken once without writing or publishing them would not be actionable; yet

[1] Below 365.

[2] Above 356 n. 4.

[3] Hardres 470.

here, they being writ and published, which contains more malice, than if they had been once spoken, they are actionable"; and this decision was affirmed on a writ of error.[1] It was followed in 1683 in the case of *Austin v. Culpepper*.[2] In the eighteenth century these decisions were followed in the cases of *Harman v. Delany*,[3] and *Villers v. Monsley*,[4] though one of the judges in the latter case seemed to think that the authority for the distinction between written and spoken defamation was somewhat slender.[5] The rule was finally settled in 1812, after a full consideration of the cases, by the decision of the Exchequer Chamber in the case of *Thorley v. Kerry*.[6] Mansfield, C.J., held with regret that the distinction between spoken and written defamation, though indefensible in principle,[7] was too well established to be repudiated.

It cannot be doubted that this decision of the judges of the latter part of the seventeenth century to treat libel as an independent tort, for which a plaintiff could recover damages without the need for proving special damage, had the results which were intended. In the first place, though the damage and not the insult was still the gist of the action, the fact that the publication of written defamation was regarded as a wrong to reputation from which damage could be presumed, naturally tended to make the insult a more prominent element in the tort than the damage; and so tended to put the tort upon a more satisfactory footing.[8] In the second place, once the libel was proved, the defendant was shown to be a wrongdoer, and the plaintiff could recover damages because the commission of such a wrong implies damage. There was no need, as in the case of slander, to allege the special damage suffered with particularity, and prove that it had been suffered. This difference between an act which was in itself wrongful, and an act which was only wrongful if it caused damage, was recognized in the case of *Iveson v. Moore* in 1700;[9] and it gave rise to one of the most beneficial effects of thus treating libel as a wrong in itself —the emancipation of the court from that long series of cases, in which the question whether or not temporal damage could be said to have flowed from the words spoken, had been discussed with so much misplaced subtlety. In the third place, it followed also that

[1] Skinner at p. 124.

[2] "And t'was said that to say of any body that he is a dishonest man is not actionable, but to publish so, or to put it up upon posts is actionable," Skin. at p. 124; S.C. 2 Show. 313.

[3] (1731) Fitz-Gibbon at p. 254. [4] (1769) 2 Wils. 403.

[5] "I repeat it that I wish there was some more solemn determination that the writing and publishing anything which tends to make a man ridiculous or infamous ought to be punished," ibid at p. 404 *per* Bathurst, J.

[6] 4 Taunt. 355. [7] Below 366. [8] Above 335.

[9] 1 Ld. Raym. 486 at p. 490 *per* Gould, J.; cp. Ratcliffe v. Evans [1892] 2 Q.B. at pp. 528-532 *per* Bowen, L.J.

the courts were also relieved from considering whether the case fell within one of the categories of words actionable *per se*. This meant that another of the longest and most unsatisfactory series of these older decisions on the action on the case could be disregarded. For these three reasons, therefore, the invention of the separate tort of libel for the first time put the most important branch of the law of defamation on a satisfactory footing; and it cannot be doubted that the principles applied to this tort helped the judges to improve the tort of slander, by enabling them to disregard many of those unprofitable rules, such as the doctrine of the mitior sensus,[1] which their predecessors had laid down in order to discourage the action on the case.

At the same time this improvement had been effected at the expense of imposing upon the law the unfortunate distinction between the torts of libel and slander. At the latter part of the seventeenth century this may well have seemed not too high a price to pay for the rescue of the tort of defamation from the wholly unsatisfactory condition to which it had sunk. But, when the law had been reformed, and some of the more rational rules of libel were being applied to slander; when the real reasons for the decision of the judges to treat libel as an independent tort had been forgotten, and unsatisfying a priori reasons were being invented;[2] the absurdity of the distinction began to appear. How completely the original reason for the establishment of the distinction had been forgotton appears from Mansfield, C.J.'s judgment in *Thorley v. Kerry*.[3] He would have liked to assimilate libel to slander, by ruling that "no action could be maintained for written scandal which could not be maintained for words if they had been spoken."[4] This would no doubt have got rid of the separation of the two torts; but it would have got rid of it at the expense of undoing most of the good effects of the recognition of libel as a separate tort, and of throwing the law back into the state in which it was before that recognition had taken place. The converse solution would have been infinitely preferable. Fortunately the current of authority was too strong to be overruled in this way;[5] and so it may be said that the case affords a striking

[1] Above 355.

[2] See Thorley v. Kerry (1812) 4 Taunt. at p. 365 where some of these arguments are exposed by Mansfield, C.J.

[3] (1812) 4 Taunt. 355. [4] Ibid at p. 365.

[5] "These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe, Holt, C.J., and others . . . I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day, that no action can be maintained for any words written, for which an action could not be maintained if they were spoken," 4 Taunt. at p. 365.

illustration of the salutary principle that settled rules should not be lightly overruled on a priori grounds.

In fact, the modern torts of slander and libel represent two different strata of legal development. Slander represents the tort developed in the sixteenth and early seventeenth centuries in and through the action on the case. Libel represents the tort created by the judges of the latter part of the seventeenth century, in order to remedy those defects of the tort developed in the earlier period, which had been caused largely by the efforts of the judges to discourage the action on the case. Their action put the tort of libel on the right lines; and if ever an assimilation between the two torts is effected by the Legislature, it will be taken as the model. At the same time, the tort developed in and through the action on the case in the earlier period has influenced in many ways the later development of the law. We shall now see that some of the rules, which originated in the action on the case for defamation, were applied to the tort of libel; and, similarly, that some of the rules applicable to libel as a crime have both influenced, and been influenced by, the development of the torts of libel and slander.

(3) The origin of some of the essential characteristics of the torts of libel and slander.

During the sixteenth and seventeenth centuries we can see the origins of some of the essential characteristics of the tort of defamation. Many of them originated in the rules applied by the common law courts to the action on the case, and were applied both to slander and libel. Some of them, notably the rules as to the innuendo and privilege, were applied both to the crime and to the tort of defamation, and illustrate the manner in which the tort influenced the crime. On the other hand, in the rule, which long prevailed, that the statement must have been made maliciously we can trace one way in which the crime influenced the tort. I shall deal with these rules under the following heads:—(i) the words or writing must be defamatory, and they must be proved to have been spoken or written in the manner alleged by the plaintiff; (ii) they must be proved to have been spoken or written of and concerning the plaintiff; (iii) they must have been published to some third person; (iv) they must have been published maliciously; and (v) they must not admit of justification nor have been written or spoken on a privileged occasion.

(i) *The words or writing must be defamatory, and they must be proved to have been spoken or written in the manner alleged by the plaintiff.*

So soon as the courts allowed an action on the case for defamation, the question, what statements could be regarded as defamatory,

arose. It soon became clear that though, as to some statements, there could be no question, as to others the context and circumstances made all the difference. It was necessary, therefore, to lay down rules as to the manner in which a plaintiff, who complained of one of these ambiguous statements, must frame his pleading. Partly by reason of the growing elaboration of the rules of pleading, and partly by reason of the desire of the judges to discourage these actions, the rules on this matter were strict. They are contained in the mass of pleading rules which grew up round the "innuendo" and the "colloquium."

If words were obviously defamatory of the plaintiff, no innuendo was needed; and if they were obviously not defamatory, an innuendo could not make them actionable. An innuendo, therefore, could only be of use where the statement was apparently defamatory, but where the person or thing alluded to in it was not described with sufficient clearness. It could not add to the statement any additional fact needed to remedy an uncertainty in the person defamed, or in the charge made against that person. It could only indicate with greater clearness a person already mentioned, or a charge already made. These rules are clearly illustrated in a case reported by Coke.[1] Dealing with the rule that an innuendo could only indicate with greater clearness a person already mentioned, he says, "If one says without any precedent communication that one of the servants of J. S. (he having many) is a notorious felon or traitor, here, for the uncertainty of the person, no action lies; and an innuendo cannot make it certain. . . . But when a person is once named in certain, as if two speaking together of J. S. one says, 'he is a notorious thief,' then J. S. in his declaration may show that there was speech of him between the two, and that one said of him, 'he (innuendo prædictum J. S.) is a notorious thief.' For the office of an innuendo is to contain and design the same person who was named in certain before, and in effect stands in lieu of a prædict', but an innuendo cannot make a person certain who was uncertain before." Dealing with the rule that it could only indicate with greater clearness a charge already made, he says, "An innuendo cannot alter the matter or sense of the words themselves; and therefore when the defendant in the case at bar said of the plaintiff, 'that he was full of the pox (innuendo the French pox),' this innuendo doth not do its proper office, for it endeavours to

[1] James v. Rutlech (1599) 4 Co. Rep. 17 b; cp. Barham v. Nethersal (1602) ibid 20a; R. v. Griepe (1698) 1 Ld. Raym. at p. 259, S.C. 2 Salk. 513; cp. March, Actions for Slaunder (ed. 1647) 141—"the office of an innuendo is only to containe and design the same person which was named in certain before . . . or else to declare the matter or sense of the words themselves which was certainly expressed before."

extend the general words, the pox, to the French pox, by imagination of an intent which is not apparent by any precedent words, to which the innuendo should refer."

These illustrations indicate the function of the colloquium. As the innuendo could only clear up doubts as to persons or matters already referred to, it was necessary to set out all these persons and matters very carefully in the introductory averments.[1] These introductory averments were known as the colloquium, and this colloquium must contain a careful narrative of all the circumstances which were necessary to be stated, in order to prove that the words, with the appropriate innuendoes, were defamatory. Unless these circumstances were stated with the utmost care, it would be possible to arrest judgment, on the ground that the statement and the innuendoes gave no cause of action.[2] It was not till the Common Law Procedure Act of 1852[3] that the need for this colloquium was removed, and that plaintiffs, in actions for libel or slander, were allowed "to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense."

It was at first necessary for the plaintiff to prove that the words had been spoken exactly as he alleged them.[4] During the eighteenth century this strictness was somewhat relaxed,[5] but not wholly removed.[6] And, wherever a colloquium was necessary to ground the action, the averments in the colloquium must also be strictly proved. Thus, if words were only actionable if spoken of the plaintiff in his trade, there must be a colloquium alleging this, and the facts there set out must be proved.[7]

[1] "That in all cases for words, where there is anything that is the cause or ground of the action, or tends necessarily to the maintenance of it, in such case the action will not lie, without that thing be expressly averred to be, or not to be, as the case requireth," March, Actions for Slaunder (ed. 1647) 142.

[2] Johnson v. Aylmer (1606) Cro. Jac. 126; Scutt v. Hawkins (1623) 2 Rolle Rep. 243; cp. Dacy v. Clinch (1661) 1 Sid. 52 for a case in which a motion to arrest judgment on this ground failed.

[3] 15, 16 Victoria c. 76 § 61; cp. Watkin v. Hall (1868) L.R. 3 Q.B. at pp. 401-402; Clerk and Lindsell, Torts (4th ed.) 567.

[4] "Action for these words: 'Thou (innuendo) the plaintiff art a villainous and a murderous quean; for thou didst murder my last wife.' The defendant pleaded not guilty. The jury found that the defendant spake these words of the plaintiff to one Spinkfoot: 'she is a villainous and a murderous quean; for she did murder my last wife.' Popham and Fenner held that this verdict is against the plaintiff; for they are not the same words mentioned in the declaration," Blisset v. Johnson (1597) Cro. Eliza. 503; cp. Sydenham v. May (1616) Hob. 180, and the cases cited by Rolle, Ab. ii 718; Hilsden v. Mercer (1624) Cro. Jac. 677.

[5] See Compagnon v. Martin (1772) 2 W. Bl. 790.

[6] See Barnes v. Holloway (1799) 8 T.R. 150.

[7] Savage v. Robery (1699) 2 Salk. 694.

(ii) *The words or writing must be proved to have been spoken or written of and concerning the plaintiff.*

Just as the law required strict proof that the statement was defamatory, and that it had been written or spoken as alleged, so it required strict proof that it was written or spoken of and concerning the plaintiff. Unless it was alleged in the plaintiff's declaration that the statement was made of and concerning him, the declaration was bad. Thus, in the case of *Johnson v. Aylmer*,[1] the plaintiff declared that the defendant spoke and published the following false and scandalous words: "Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson, innuendo the plaintiff, for a felon, and seize his goods; for he, innuendo the plaintiff, hath stolen a sheep from Wright of Rirsly, innuendo John Wright." After verdict for the plaintiff, it was successfully moved in arrest of judgment, "that the words are too generally laid to maintain the action; for they are not alleged to be spoken of the plaintiff in the writ or count; but only in reciting the words he saith, innuendo the plaintiff; and the innuendo, without expressly alleging the words to be spoken of the plaintiff, will not maintain the action." This principle was rigidly applied in later law both to actions and to indictments, as is made abundantly clear by the luminous judgment of Fletcher-Moulton, L.J., in *Jones v. Hulton*.[2] But the decision of the majority of the court of Appeal and the House of Lords[3] in that case, has, in effect, placed a new[4] and important limitation on the generality of this rule. If a person publishes a libellous statement of a fictitious person, whom he christens by a name of his own choosing, and neither knows nor cares whether or not his statement can be taken as referring to an existing person of that name; and if in fact the jury is satisfied that it has been taken to refer to an existing person; that person can recover damages.

Recent developments in modern journalism make this modification of the strictness of the old principle clearly necessary; and the technical reasoning by which the law has been thus modified in the interests of substantial justice, is a good instance of the flexibility which our system of case law imparts to our legal system. In effect, it is based on an analysis of the nature of the intention to libel the plaintiff which the law requires.[5] The

[1] (1606) Cro. Jac. 126.

[2] [1909] 2 K.B. at pp. 459-465; cp. L.Q.R. xxv 341-342.

[3] [1910] A.C. 20.

[4] That this limitation is new is I think clear; on this I agree with what is said L.Q.R. xxvi 103-104. "All the learning and subtlety of the Lord Justice (Farwell, L.J.), backed by the agreement of the noble and learned Lords, still fail to convince us that this is not very new law. It may be said, however, and no doubt will be, that the law is new only because the question had never risen in such a form."

[5] [1909] 2 K.B. at pp. 480-482 *per* Farwell, L.J.

law will impute intention to do an act, not only if the defendant actually meant to do it, but also if he acts recklessly, that is without any care whether he does it or not. Just as an intention to deceive can be imputed, both where a person makes a false statement of fact with knowledge of its falsity, and also where he makes such a statement recklessly, that is neither knowing nor caring whether it be true or false; so an intention to libel the plaintiff can be imputed from either of these two states of mind. "The element of intention, which is as essential to an action for defamation as to an action for deceit, can be proved in the same way in both actions."[1]

(iii) *The words or writings must have been published to some third person.*

We have seen that this rule was always applied to the action on the case, because it followed from the fact that the damage to the person, arising from the defamatory statement, was the gist of the action.[2] Therefore the plaintiff must always allege such publication in his declaration;[3] and, if the words were in a foreign language, he must further allege that they were understood by those who heard them.[4] This rule as to the necessity of publication to a third person was naturally followed in the case of libel; but in the case of a libel written in a foreign language, and published to the world at large, though the words must be set out, both in the original and in a translated form in the plaintiff's declaration,[5] the allegation that they were understood would be obviously unnecessary.

(iv) *The words or writings must have been published maliciously.*

At the present day it would hardly be correct, and it would certainly be misleading, to state the rule in this form. When it is said that the words or writings must have been published maliciously, all that is meant is that they must have been published without just cause or excuse.[6] We shall see that this was all that the earlier cases upon the tort of defamation meant; and we have seen that the same thing is true of the crime of defamation.[7] But, when it became customary to allege malice both in declarations in civil cases and in indictments in criminal cases, it naturally came to be thought that malice was an essential

[1] [1909] 2 K.B. at p. 481.
[2] Vol. v 207; above 335.
[3] As to what would be held to be a sufficient allegation of publication, see Taylor v. How (1602) Cro. Eliza. 861; Mors v. Thacker (1677) 2 Lev. 193.
[4] Price v. Jenkings (1602) Cro. Eliza. 865; cp. the declaration in Jones v. Davers (1597) ibid. 496.
[5] Zenobio v. Axtell (1795) 6 T.R. 162; 1 Wms. Saunders 242 n.
[6] Below 374-375.
[7] Above 341-345.

ingredient both of the tort and crime. Defamatory statements, it was said, must have been published maliciously. It was however admitted that, from the fact that a false and defamatory statement had been published without just cause or excuse, the law implied malice. But when it is said that the law 'implies' anything, it is generally the case that the thing implied is not really present. Hence, in modern times, the law as to this part of the subject has been considerably clarified, by the recognition of the principle that malice is not a necessary ingredient either in the crime or in the tort of defamation; and that it is only important in those cases in which the defence of qualified privilege is set up. Thus the history of this rule is the history of its gradual introduction into, and final elimination from, the law.

It is clear from the conditions under which the action on the case lay that malice was not the gist of the action; and this was recognized in some of the cases decided in the sixteenth and early seventeenth centuries. It was held in 1597 that it was not necessary in an action on the case to allege that the words were spoken "malitiose."[1] But, in the earlier case of *Mercer v. Sparks*,[2] we can see a hint of the manner in which the idea that malice is a necessary ingredient in the tort will be introduced. In that case it was held that it was no error not to allege that the words were spoken maliciously, "because the words themselves were malicious and slanderous." Clearly this comes very near to the rule that malice is implied. It is not therefore surprising to find that in other cases it is laid down that the malice or intention to slander was of the essence of the cause of action.[3] Moreover, no very clear distinction was as yet drawn between the malice which the law implies from the speaking of slanderous words, and the express malice which will rebut a defence of qualified privilege, because, as we shall see, the conception of qualified privilege had not as yet been attained.[4]

In 1652 Rolle, C.J., restated the rule that, in an action for slander, there was no need to allege that scandalous words were spoken malitiose; but he added that, in an indictment, such an allegation must be made, because that was the usual form.[5] In this statement we can see an indication of the manner in which the idea that malice was an essential ingredient in the tort of defamation was introduced into the law. We have seen that, when the

[1] Anon. Moore 459—"Auter error assigne quia ne fuit alledge que les parols fuerunt parles malitiose, et uncore auxi bone en action sur le cas pour parols."

[2] (1586) Owen 51.

[3] This point comes out clearly enough in Brook v. Montague (1606) Cro. Jac. 90, and in the ruling of Wray, C.J., in the case cited ibid at p. 91.

[4] Below 377.

[5] "And he said that in an endictment a thing must be expressed to be done falso et malitiose, because that is the usual form, but in a declaration those words are not necessary," Anon. Style 392.

criminal jurisdiction formerly exercised by the Star Chamber in libel cases was taken over by the courts of common law, the allegation that the statement was made maliciously was always made.[1] It is true that the judges tried to neutralize the effect of this conception of the crime, by holding that the legal effect of the words published, and therefore their malice, were matters of law for the court, and not matters of fact for the jury.[2] But they obviously thought that malice must be regarded as a necessary ingredient of the crime. As we have seen, they would have greatly strengthened their position at the expense of the jury, if they could have ruled that malice was not a necessary ingredient; for in that case it would have been quite clear that all the jury had to find was the publication of a writing bearing the meaning alleged by the prosecution. No room would have been left for the contention that, as malice was the gist of the offence, the jury must be convinced that the publication was malicious, before they found the accused guilty of libel, just as they must be convinced that a homicide was malicious, before they found the accused guilty of murder.[3] It is not surprising that it became more and more usual for plaintiffs who were suing in tort for libel or slander, to allege malice; and that, in spite of the earlier precedents to the contrary, it gradually came to be thought that malice was as essential an element of the tort as of the crime. In a case of 1632, reported by March, the plaintiff had alleged that the words were spoken "falso et malitiose," and the jury found that they were spoken "falso et injuriose." Judgment was given against the plaintiff, because the jury did not find malice—"for if the words were not spoken maliciously, no action will lie."[4] This statement of the law no doubt confirmed the existing practice of always alleging malice. Thus in 1737 it was said "that words are always laid to be spoken falso et malitiose, and that therefore any evidence proving them not to be so ought to be admitted." To this proposition the court seems to have assented, for, "it was agreed that malice is the gist of this action and that therefore evidence proving the manner and occasion of speaking the words to show that they were not spoken with malice has always been admitted."[5] And the law was stated in the same way by Comyns[6] and Blackstone.[7]

[1] Above 341-342. [2] Above 343-345. [3] Above 342-343.

[4] Actions for Slaunder (ed. 1647) 122—he concluded from this case that if the declaration did not state "that the words were spoken *malitiose* as well as *falso* the action will not lie."

[5] Smith v. Richardson, Willes at p. 24.

[6] "The declaration must show a malicious intent in the defendant," Digest, *Action on the Case for Defamation* G. 5; note however that, having made this general statement, Comyns at once qualifies it by the admission that "it is sufficient to say *falso dixit* without *malitiose*."

[7] "Words of heat and passion, as to call a man rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not

But, in the first quarter of the nineteenth century, it began to be perceived that malice was not an essential ingredient in either the crime or the tort of defamation. This new view of the law rested in substance on a distinction between what was called "legal" malice or malice implied by law, and "actual" malice. As long ago as 1713 this distinction had been recognized by Parker, C.J., who had pointed out that the former variety of malice meant nothing more than that the thing, said to be maliciously done, was done without just cause or excuse.[1] But it was not till the beginning of the nineteenth century that this doctrine was applied to defamation, because it was not till then that the disturbing effects of the controversy, as to the rights of juries in cases of libel, had been quieted by Fox's Libel Act.[2] As the result of that Act, it was possible to approach the question as a pure matter of law; for, however libel was defined, the jury could now return a general verdict on the whole question. The manner in which this new view of the law was put forward and reconciled with the older view, will appear from the following cases: In 1823, in the case of *R. v. Harvey*, Holroyd, J., said that, "It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable. . . . If the matter published was in itself mischievous to the public, the very act of publishing is prima facie evidence to show that it was done malo animo; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of law is that a party must always be taken to intend those things and those effects which naturally grow out of the thing done."[3] In 1825, in the case of *Bromage v. Prosser*,[4] this rule was applied to actions for tort; and it was

actionable: neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill will; for in both these cases they are not *maliciously* spoken, which is part of the definition of slander. . . . What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon," Bl. Comm. iii 125-126; dealing with the criminal law, he defines libels as "malicious defamations of any person, and especially a magistrate, made public by either printing writing signs or pictures in order to provoke him to wrath, or expose him to public hatred contempt and ridicule," ibid iv 150.

[1] "Malice in common acceptation is a desire of revenge, or a settled anger against a particular person. . . . This is by the vulgar use of the words in English. But (it) is not the legal sense taking them as law terms. . . . In short malice and maliciously I take to be terms of law which in the legal sense always exclude a just cause. So in case of murder, the statutes take away clergy in case of wilful murder of malice prepense, when wilful stands in opposition to accidental, and of malice to cases of reasonable provocation, such as might move an honest and good man; and the Court and not the jury have ever determined of malice. And the question has always been with or without cause or excuse, and therefore that which is only malice implied by law, perhaps would be expressed more intelligibly, at least more familiarly, if it were called malice in a legal sense," Jones v. Givin (1713) Gilb. Cas. at pp. 190-193.

[2] Above 345. [3] 2 B. and C. at pp. 266-267. [4] 4 B. and C. 247.

clearly laid down that, except as an answer to the defence of privilege, the allegation of malice was unnecessary. "Malice," it was said, "in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."[1] Except when malice is alleged as an answer to the defence of privilege, the term is used in its legal sense. Hence it is not necessary to aver it, as the law implies it from the fact that a defamatory statement has been made.[2] But, in the course of the nineteenth century, it was admitted that the general rules of pleading were the same in criminal and in civil cases.[3] These two cases were therefore held, in *R. v. Munslow*[4] in 1895, to show that malice was not an essential ingredient, either in the crime or the tort of defamation.

We have seen that, in the seventeenth century, the influence of the criminal law had helped to establish the view that malice was an essential ingredient in the tort of defamation.[5] The judgment in *R. v. Munslow* shows that, in the nineteenth century, the influence of the law of tort helped to overthrow this view, and to establish the rule that malice is not an essential ingredient in either the crime or the tort of defamation, and that it only becomes important when a plea of privilege is set up. To the origins of the conception of privilege we must now turn.

(v) *The words or writing must not admit of justification nor have been spoken or written on a privileged occasion.*

We have seen that to an action for the tort of defamation a plea of truth was always a defence.[6] This plea is known as a plea of justification; and the same strict principles were applied to the construction of such a plea as were applied to the plaintiff's declaration. Thus, in the case of *Johns v. Gittings*,[7] the plea was held bad, partly upon the ground that the defendant had not fully justified the words which he was alleged to have used; and it is still the law that a plea of justification is bad, unless it establishes

[1] At p. 255 *per* Bayley, J.

[2] "If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely. . . . But in actions for such slander as is prima facie excusable on account of the cause of speaking or writing it, as in the case of servants' characters . . . malice in fact must be proved by the plaintiff," 4 B. and C. at p. 255.

[3] Heymann v. R. (1873) L.R. 8 Q.B. at p. 105 *per* Blackburn, J.

[4] [1895] 1 Q.B. 758. [5] Above 373. [6] Vol. v 207.

[7] (1590) Cro. Eliza. 239; cp. Hilsden v. Mercer (1624) Cro. Jac. 677; 1 Wms. Sanders, 244 n.

that the statement "was true as a whole and in every material part thereof."[1] In addition to this narrower sense of the term justification, it is sometimes used in a larger sense to mean a defence which otherwise justifies, i.e. renders legal, the making of a defamatory statement. In other words, it covers the defence of privilege; for privilege, like truth, is a defence to an action for libel or slander; and, unlike truth, it is also a defence to a criminal prosecution.[2]

During this period the law as to privilege was meagre, and the modern distinction between absolute and qualified privilege had not arisen. Most of the cases are cases of what we should now call absolute privilege. The earlier cases all turn upon documents written with a view to, or in the course of, judicial proceedings, or upon words spoken by persons concerned in litigation. Thus, it was held in 1569, that to sue out a writ for forgery of deeds could not be made the basis of an action for scandalum magnatum;[3] and the same rule was applied in 1585 to matter alleged in articles of the peace, exhibited to the justices.[4] It was settled, by the first quarter of the seventeenth century, that no action lay against judges, witnesses, or counsel for defamatory statements made in the conduct of litigation;[5] and it was settled by the case of *Lake v. King* in 1668,[6] after considerable debate and conflict of judicial opinion, that a similar rule must be applied to documents, circulated to the members of a committee of the House of Commons, and dealing with the matters which that committee was appointed to consider.[7] This case settled, in substance, that documents connected with Parliamentary proceedings, and published to members of Parliament, had the same privilege as had already been accorded to judicial proceedings. A little later it was settled there was no privilege for those who published documents connected with these proceedings to the world at large.[8]

[1] Pollock, Torts (12th ed.) 261. [2] Kenny, Criminal Law, 309-310.

[3] Lord Beauchamp v. Croft Dyer 285a.

[4] Cutler v. Dixon 4 Co. Rep. 14b—"If actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation."

[5] Brook v. Montague (1606) Cro. Jac. 90; Weston v. Dobniet (1618) ibid 432; Harding v. Bodman (1618) Hutton 11; Ram v. Lamley (1633) ibid 113; cp. Floyd v. Barker (1608) 12 Co. Rep. 23 where the judicial immunity from all actions arising out of things done in a judicial capacity is laid down in very wide terms; for the history of these rules see vol. vi 234-240.

[6] 1 Wms. Sanders 131.

[7] Kelyng, C.J., held that, though the exhibiting of the petition was lawful, "the printing of it was a publication to all the world, which is not lawful," ibid at p. 132; but, "after this case had depended twelve terms, now this term judgment was given for the defendant by Hale, Chief Justice, Twysden, and Rainsford, upon this point, namely, that it was the order and course of proceedings in Parliament to print and deliver copies etc., whereof they ought to take judicial notice," ibid at p. 133.

[8] R. v. Salisbury (1699) 1 Ld. Raym. 341.

The idea that there could be any privilege for those who published true reports of judicial or Parliamentry proceedings had not as yet arisen.[1] In fact it could not arise, till the courts had arrived at the modern distinction between absolute and qualified privilege, and had ascertained the true meaning of the latter kind of privilege; for the privilege accorded to these reports at the present day is essentially qualified privilege, in as much as it can be rebutted, if the report can be shown to be garbled or unfair.[2] During this period, we can only see faint traces of the ideas which underlie the conception of qualified privilege; and the notion that privilege could be divided into these two classes had not as yet arisen. In a case of the year 1597, it was ruled that defamatory words spoken by the defendant of the plaintiff, in order to advise a third person upon a matter in which he had an interest, were not actionable.[3] We can see here the germ of the idea which will cover most of the cases of qualified privilege in later law; and it would seem that the law had not advanced very far beyond this stage when Blackstone wrote.[4] In a case of the year 1606, we can see the germ of the idea that a statement, prima facie privileged, will lose its privilege if spoken with malice.[5] But this was said of a statement which would, at the present day, be absolutely privileged, so that it is clear that the courts had as yet no idea of the modern distinction. No doubt the very wide terms in which the privilege accorded to judicial and Parliamentary proceedings was being laid down by the courts, helped to give rise to the modern conception of absolute privilege. But probably the uncertainty which, as we have seen,[6] long prevailed as to the part played by malice in the tort and crime of defamation, helped to retard the recognition of the conception of qualified privilege.

[1] See Wason v. Walter (1868) L.R. 4 Q.B. at pp. 93-94 *per* Cockburn, C.J.; and ep. Curry v. Walter (1796) 1 B. and P. 525.

[2] "It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection," Wason v. Walter at p. 94.

[3] The plaintiff alleged that he was a merchant, and that the defendant, to discredit him, said to D, "Doth Vanspike (the plaintiff) owe you any money"? and that on D saying that he did, the defendant said, "you had best call for it; take heed how you trust him"; judgment was given for the defendant, "for it is not any slander to the plaintiff, but good counsel to D," Vanspike v. Cleyson, Cro. Eliza. 541.

[4] Bl. Comm. iii 125, cited above 373 n. 7; but it was just about this period that the modern law was beginning to be developed by Lord Mansfield, see Weatherston v. Hawkins (1786) 1 T.R. 110.

[5] Brook v. Montague Cro. Jac. 90—"if he (counsel) give in evidence anything not material to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously and without cause"; and the law so stated by March, Actions for Slaunder (ed. 1647) 119-120.

[6] Above 345, 372-375.

In the law of defamation, as in many other branches of the common law, the outlines of the modern law emerged during the sixteenth and seventeenth centuries. But, owing principally to the great changes effected by the introduction of printing, and to some extent to the desire of the common law courts to expand their jurisdiction, this branch of the law is, perhaps, more distinctly than any other, the creation of these two centuries. At the beginning of the period the ecclesiastical courts still retained the lion's share of this jurisdiction; and it was only in cases involving the exercise of the statutory jurisdiction over the defamation of magnates, that the common law regularly interfered. At the end of this period the criminal law of defamation, which had been created by the Star Chamber, had been taken over by the common law; and the torts of libel and slander had been established on substantially their modern basis. The law as thus settled has not been found to be wholly satisfactory in later periods in the history of the law. In the eighteenth century, political developments necessitated important changes in the criminal law; and the division of the tort of defamation into libel and slander—a division due historically to the need for finding some remedy for the mistakes made by the common law in the initial stages of the development of the tort—still disfigures the law. But the definition of the tort of libel was on the whole satisfactory; and it has formed a good starting point for the development of, and a sufficient framework, for the many detailed rules which the modern expansion of literature and journalism has necessitated. If the rules applicable to libel were applied to all kinds of defamation, and the fact that the defamation was oral, was only allowed to weigh in considering the measure of damages, no serious complaint could be made against our modern law.

§ 3. Conspiracy, Malicious Prosecution, and Maintenance

Conspiracy and Malicious Prosecution

We have seen that two divergent streams of doctrine have gone to the making of the law of conspiracy. (i) Statutes of the thirteenth century had provided a writ of conspiracy, which lay against two or more persons who had combined to indict or appeal another of felony, if that other had been acquitted by verdict of the jury.[1] In addition, the mediæval common law had developed an action on the case in the nature of conspiracy, which was generally brought for a combination to defraud the plaintiff by the

[1] Vol. iii 402-405.

fraudulent use of the machinery of the courts; and the damage, and not the conspiracy, being the gist of this, as of other actions on the case, it differed from the statutory writ in that it lay against one defendant only.[1] (ii) The court of Star Chamber had enlarged the scope of the offence of conspiracy. It punished criminally, not only conspiracies to abuse the process of the courts, but also conspiracies to commit any wrongful act;[2] and we have seen that the jurisdiction which it assumed in these cases, tended to shade off into the very salutary jurisdiction which it exercised over attempts to commit crimes.[3] Moreover, though it treated these conspiracies as criminal offences, it adopted, somewhat illogically, the rule applied by the common law to the action on the case, and punished a single person who had made a false accusation.[4]

When the common law courts took over the jurisdiction of the Star Chamber, they found it necessary to construct a law of conspiracy on these foundations. The result of their efforts can be summed up as follows: Firstly, they adopted the wide definition of conspiracy which had grown up in the court of Star Chamber, and so created the modern crime of conspiracy; but, as the gist of the crime was the conspiracy, they held that it could not be committed by a single person. Secondly, from the statutory writ of conspiracy and the action on the case, they developed the tort of malicious prosecution. Thirdly, at a later date it came to be thought that acts which would amount to the crime of conspiracy, would also give rise to an action in tort for conspiracy at the suit of an individual damaged thereby; and, as the gist of this action was not the conspiracy, but the resulting damage, it followed that it would lie against a single defendant. But whether in such a case the cause of action is the conspiracy, or whether it is not rather the unlawful acts done in pursuance thereof—whether, in other words, there is any such thing as a separate tort of conspiracy, is a controverted question which has given rise to much difference of opinion.

With the history of these developments I propose to deal under the following heads: (1) The modern crime of conspiracy; (2) Malicious prosecution; and (3) The modern tort of conspiracy.

(1) *The modern crime of conspiracy.*

The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber. Almost the only idea which it has borrowed from the common law is the rule, taken from the statutory writ of conspiracy, that the crime (like the crime of riot) cannot be committed by one person, though the other persons need not be specified,

[1] Vol. iii 405-407. [2] Vol. v 204-205.
[3] Ibid 201, 203, 204. [4] Ibid 204.

and may indeed be unknown.[1] The other two essential features of the crime—(i) the fact that the gist of the offence is the conspiracy and not acts done in pursuance thereof, and (ii) the fact that the crime is committed if persons conspire to commit any unlawful act, or any lawful act by unlawful means—are derived ultimately from the practice of the Star Chamber.[2] But these two essential features were developed by the common law courts after the Restoration; and it is of the beginnings of this development that I must speak at this point.

(i) When it is said that the gist of the offence is the conspiracy, what is meant is that the offence consists, not in the illegal acts done in pursuance thereof, but in the act of agreement or combination for these purposes. But there must always have been an overt act of agreement or combination, so that a mere uncommunicated intention to conspire is not a conspiracy. Just as in the case of high treason, where the offence is the intention to kill the king, so in conspiracy, where the offence is the fact of agreement[3] —in neither case can the offence be committed unless an overt act manifesting an intention to kill, or an agreement to do the unlawful act, be proved. It is clear from Coke's statement in *The Poulterers' Case*[4] that the common law has always required proof of a "coadunation, confederacy or false alliance";[5] and there is no reason to think that the law of the Star Chamber was otherwise. This is assumed in the later cases; and that this assumption was correct was laid down by Willes, J., and assented to by the House of Lords in 1868, in a statement which was noteworthy, not for its novelty, but for the clearness with which it defined the meaning of both of the two essential features of the crime.[6] Of the second

[1] R. v. Starling (1664) 1 Sid. 174, cited below n. 3; R. v. Kinnersley (1719) 1 Str. 193; Kenny, op. cit. 288; Winfield, Hist. of Conspiracy 59-65; for the rule applicable to the statutory writ see vol. iii 405; and for the rule applicable to riot see above 324.

[2] Vol. v 204-205.

[3] "Ne poit estre conspiracy sans ascun overt act de plusors," R. v. Starling (1664) 1 Sid. at p. 174; cp. R. v. Best (1705) 1 Salk. 174; R. v. Kinnersley (1719) 1 Str. at p. 195.

[4] (1611) 9 Co. Rep. 55b.

[5] "The usual commission of oyer and terminer gives power to the commissioners to enquire, etc., *de omnibus coadunationibus confœderationibus et falsis alligantiis*; and *coadunatio* is a uniting of themselves together, *confœderatio* a combination amongst them, and *falsa alligantia* is a false binding each to the other, by bond or promise, to execute some unlawful act: in these cases before the unlawful act executed the law punishes the coadunation, confederacy, or false alliance to the end to prevent the unlawful act," ibid at ff. 56b, 57a.

[6] "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means," Mulcahy v. R. (1868) L.R. 3 H. of L. at p. 317.

of these essential features, emphasized in the statement of Willes J., I must now say a few words.

(ii) It is well established law at the present day that the crime is committed by an agreement to do an unlawful act, or to do a lawful act by unlawful means. If the act agreed to be done is a crime or a tort—at any rate a malicious tort,[1] or if means are to be adopted to secure a lawful object, which involve the commission of a crime or a tort, there is no difficulty. The chief difficulty, to which the definition of the crime has given rise, consists in the fact that an act may be sufficiently unlawful to render an agreement to do it a criminal conspiracy, though it cannot be brought under any of the recognized categories of crime or tort. That this was so, was clearly recognized by the common law courts after the Restoration. In addition to conspiracies to indict maliciously, which fell under the statutory writ of conspiracy,[2] and to do acts which amounted to a crime or a tort,[3] conspiracies to do acts, which were neither crimes nor torts, were held to be indictable. Thus, the brewers of London were held to be guilty of conspiracy, because they had conspired to carry on their trade in such a way that the revenue was defrauded;[4] and the journeyman tailors of Cambridge were likewise held to have committed this offence, because they had conspired to raise their wages.[5] In the last mentioned case the court expressly laid it down that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them or any of them to do, if they had not conspired to do it, as appears in the case of *The Tubwomen v. The Brewers of London.*"[6] These cases were followed in later law;[7] and, as Professor Kenny has pointed out, they have made it possible "for judges to treat all combinations to effect any purpose which happens to be distasteful to them as indictable crimes, by declaring this purpose to be 'unlawful.'"[8]

[1] Kenny, op. cit. 289.

[2] R. v. Kimberty (1662) 1 Lev. 62; R. v. Best (1705) 1 Salk. (174).

[3] R. v. Twisleton and others (1668) 1 Sid. 387—taking a daughter and marrying her without the father's assent; R. v. Grey and others (1682) 9 S.T. 127—conspiracy to debauch a woman; R. v. Thorp (1697) 5 Mod. 221—taking a son and heir and seducing him to contract a disgraceful marriage; R. v. Orbell (1704) 6 Mod. 42, 12 Mod. 499—conspiracy to cheat by running slackly in a race; see also Winfield, op. cit. 112-115.

[4] R. v. Starling (1664) 1 Sid. 174.

[5] R. v. Journeymen Taylors of Cambridge (1721) 8 Mod. 11.

[6] 8 Mod. at pp. 11-12; cp. the argument in R. v. Thorp (1697) 5 Mod. at p. 224—"that which is lawful for one man to do may be made unlawful to be done by conspiracies: for instance, it is lawful for any brewer to brew small beer, but if several shall conspire together to brew no strong, but all small beer, on purpose to defraud the king of his duties, such conspiracy is unlawful. And so it was held in *Sir Samuel Sterling's case*, who, because he could not farm the excise, did confederate with several brewers to brew small beer only."

[7] Kenny, op. cit. 289-290.

[8] Ibid 291.

There can be little doubt that this wide definition of the crime of conspiracy originates in the criminal equity administered in the Star Chamber. We have seen that Hudson says that the Court acted as "the curious eye of the state and the king's Council, prying into the inconveniences and mischiefs which abound in the Commonwealth,"[1] and that, "by the arm of sovereignty it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or it giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea, although no positive law or continued custom of the common law giveth warrant to it."[2] Clearly, it is these ideas which the common law adopted, when they held that conspiracies to do acts, which were neither crimes nor torts, were indictable. These acts were contrary to public policy, and therefore a conspiracy to effect them must be treated as a crime. This idea came naturally to the court of Star Chamber, because it was intimately allied to the Council—the governing body in the state in the sixteenth and early seventeenth centuries. It came equally naturally to the common law courts, when the Star Chamber had been abolished, and when the common law had made good its claim to be the supreme law in the state.

It was inevitable that it should be through the law of conspiracy that the common law should apply these ideas. In the first place, it was a far more elastic crime than the older and more precisely defined offences known to the earlier common law. In the second place, the law as to the punishment of attempts to commit crimes was still rudimentary, till it was put on a more satisfactory basis by the adoption of the Star Chamber doctrines on this matter.[3] A criminal conspiracy, as defined by the Star Chamber, and an attempt to commit a crime, are closely allied;[4] and an alternative method of dealing with such offences was as valuable to the common law courts as to the Star Chamber. In the third place, a combination of any kind, unless it is very carefully regulated by the state, must always (in spite of the a priori views of political speculators) be dangerous to the authority of the state, and the regular administration of its law;[5] and a fortiori a combination formed to effect illegal or questionable purposes. "Leagues of the subjects of one and the same Commonwealth," says Hobbes, "where every one may obtain his right by means of the Sovereign Power, are unnecessary to the maintaining of peace and justice, and (in case the designe of them be evill or unknown

[1] Star Chamber 126, cited vol. i 504.
[2] Star Chamber 107, cited vol. i 504.
[3] Vol. v 201.
[4] Ibid 203, 204.
[5] Vol. iii 478-479.

to the Commonwealth) unlawfull. For all uniting of strength by private men, is if for evill intent unjust; if for intent unknown, dangerous to the Publique, and unjustly concealed."[1] And Burke agreed with him—"liberty," he said, "when men act in bodies is power."[2] This danger, inherent in combinations, was increased by the inadequacy of the police system of the seventeenth and eighteenth centuries;[3] and, as we can see more clearly than the politicians of the latter half of the nineteenth century, it is not removed by a police system sufficient to guard the state against ordinary criminals.[4] This is, in fact, the true reason why such a crime as conspiracy is as essential a part of the criminal law in the twentieth as in the sixteenth century.

In fact, just as in the law of contract the courts used the doctrine of public policy to control certain of the activities of the citizen,[5] so in the criminal law it used this wide conception of conspiracy for the same purpose. And just as in the law of contract there is a legitimate use for this doctrine, so there is a legitimate use for it in the criminal law. In both cases it is used legitimately to strike at practices and courses of conduct which are contrary to the established principles of the common law, and are obviously dangerous to the state. In both cases, because it is an elastic doctrine, it gives the law a power of so developing its principles that they are kept in touch with the needs and ideas of the age. But, in the criminal law, just as in the law of contract, it may be used illegitimately, and may become merely another name for political expediency; and there is obviously a greater danger that it will be thus used illegitimately in the criminal law; for in this branch of the law its action is more direct, and can be made to cover a much wider ground. There is therefore more danger that it will be used to give effect to the political prejudices of the judges; and, as we can see from the legal history of the seventeenth century,[6] and from our own experience, to put judges in a position in which they can hardly avoid adjudicating upon political questions, is detrimental, both to the impartial consideration of questions of legal principle, and to their own authority.

Just as it is in relation to contracts in restraint of trade that the doctrine of public policy in contract law has received its most

[1] Leviathan Pt. ii c. 22 p. 122.

[2] French Revolution, 9.

[3] "In days when our police system was ineffective, the law felt itself dangerously threatened by any concert among evil doers; and consequently, in the seventeenth and eighteenth centuries, indictments against conspirators were held good very readily," Kenny, op. cit. 290-291.

[4] "It is not a set number that makes the Assembly unlawfull, but such a number as the present officers are not able to suppresse and bring to justice," Hobbes, Leviathan Pt. ii c. 22 p. 123.

[5] Above 54-56.

[6] Vol. v 350-352, 421-422.

important application,[1] so it is in relation to the freedom of employers and workmen to use their capital and labour as they please, that, in our own times, the criminal law of conspiracy has received its most striking applications. The repeal of the combination laws, and of nearly all the other laws which regulated commerce and industry, under the influence of the doctrine of laissez-faire, gave both to employers and workmen a large liberty, which they used or attempted to use in a manner destructive of liberty. And just as the large powers allowed by law to landowners, and other owners of property, necessitated the creation of a rule against perpetuities, to prevent that liberty being used to its own destruction,[2] so the large liberty allowed to employers and workmen, necessitated large developments in the law of conspiracy, to guard against attempted infractions of individual liberty thereby rendered possible. But the history of the manner in which the common law attempted, by the application of the law of conspiracy, to safeguard this liberty, and of the very different solutions of the problem from time to time enforced by the Legislature, belongs to the legal history of the nineteenth and twentieth centuries. Here we need only note that, though the technical weapon was different, the policy pursued by the common law was the same as that which has resulted in the rules as to the invalidity of contracts in restraint of trade, and in the rules against perpetuities. In all these cases the policy aimed at was the removal of the danger of arbitrary restraints on freedom—on the freedom of contract, on the freedom of alienation, and on the freedom to dispose of one's capital or labour at one's will. In all, except the last and the most important of these aims, the ideas of the common law have triumphed, to the manifest advantage of the community. Whether or not it would not have been equally to the advantage of the community, if, in this last case also, the common law had triumphed, will be one of the most interesting problems awaiting the students of the political, economic, and legal history of our own times.

The growth of this crime of conspiracy naturally gave rise to the problem whether or not a person injured by an indictable conspiracy had a right of action in tort, and, if so, what was the nature of that right of action. We shall see that this problem did not become acute in this period; but, as some of the considerations relevant to its discussion do emerge, I must say a few words about it. But, before it can be profitably discussed, I must deal with the later history of the statutory writ of conspiracy, and the supplementary action on the case, and show how, from these two remedies, the modern torts of malicious prosecution, and malicious abuse of the process of the courts, have emerged.

[1] Above 56-62. [2] Vol. vii 193-194.

(2) *Malicious prosecution.*

It was during the sixteenth and seventeenth centuries that the definition of the competence of the statutory writ of conspiracy, and the development of the action on the case founded upon it, gave rise to the torts of malicious prosecution, and malicious abuse of the process of the courts. Though, as we have seen, there are a few hints in the mediæval period that the action on the case might have been used to redress conspiracies other than those connected with the malicious use of legal process,[1] this line of development was not pursued. For remedies against other kinds of conspiracies litigants applied to the court of Star Chamber,[2] with the result that the common law remedies never developed in this direction. They did however develop, during this period, in a manner which is closely parallel to other developments of common law remedies. In the first place, the criminal element in the statutory writ of conspiracy was tending to evaporate during the mediæval period; and this, as we have seen, is precisely what was happening in the case of the writ of trespass.[3] It disappeared entirely during this period, because its place was taken by the much wider conception of conspiracy, which was being developed from the principles applied in the court of Star Chamber. In the second place, the action on the case, which, even in the mediæval period, had begun to be used to supplement the defects of the statutory writ, practically superseded it during this period; and this, as we have seen, is precisely what was happening in the case of such writs as debt and detinue.[4] The history of these developments, and of the modern torts which resulted from them, I must now trace.

In one respect the statutory writ of conspiracy, and the action on the case, resembled one another—it is fairly certain that the plaintiff must prove that the proceedings taken against him were both false and malicious, and that they terminated in his favour.[5] But we

[1] Vol. iii 406. [2] Vol. v 205.
[3] Vol. iii 318, 370. [4] Ibid 351, 428 seqq.; vol. vii 402, 413-414.
[5] Vol. iii 403, 405; Staunford, P.C. Bk. iii c. 11; Payne v. Porter (1619) Cro. Jac. 490; March, Actions for Slaunder (ed. 1647) 130-131, citing a ruling of Tanfield, J., in 1606, thus sums up the law of his time: "A conspiracy nor an action in nature of a conspiracy will not lie if the plaintiff be not legitimo modo acquietatus; but if one procure another to be indicted arrested and imprisoned falso et malitiose, he shall have an action on the case for the slander and vexation though that he be never acquitted (i.e. acquitted by verdict); and he said that the like action upon the case had been adjudged to lie well, though that the plaintiff were never acquitted; and the justices relied much upon the words falso et malitiose; and after, judgment was given for the plaintiff. Thus you may see that when a man is falsely and maliciously procured to be indicted, if he be acquitted, a writ of conspiracy or action on the case in nature of a conspiracy, as the case shall be, will lie, and though he be not acquitted, yet an action upon the case will lie for the slander and vexation"; for a full discussion of this point see Winfield, op. cit. 83 seqq.

have seen that in other respects they were very different.[1] The main points of difference can be summarized as follows: Firstly, the statutory writ applied only to a conspiracy to indict or appeal a man of felony; but the action on the case applied to conspiracies to accuse a man of other offences, or to harass him by the malicious abuse of the process of the courts. Secondly, a plaintiff could only use the statutory writ if he had been acquitted by verdict. If he had escaped in any other way, e.g. by reason of a defective indictment, he could not make use of the writ. But the action on the case was not fenced about by any such restrictions. Thirdly, as the gist of the offence covered by the statutory writ was the conspiracy, it could not be brought against one person only; but, as the gist of the action on the case was the resulting damage, it could be brought against one person only. We shall now see that it was the development of these three characteristics of the action on the case which eliminated the element of conspiracy, and created, from these common law remedies for conspiracy, the tort of malicious prosecution, and other torts analogous thereto.

(i) The extension of the action on the case to cover all kinds of malicious conspiracies to injure another by an abuse of the process of the courts, involved (*a*) its extension to a conspiracy to accuse another of the more serious offence of treason; (*b*) its extension to a conspiracy to accuse another of some less serious misdemeanour; and (*c*) its extension to a conspiracy to injure another by other abuses of process.

(*a*) The question whether the statutory writ lay against persons who had maliciously conspired to indict another of treason, had not, as we have seen, been raised in the Middle Ages.[2] It seems to have been raised for the first time in 1614, in the case of *Lovet v. Faulkner*.[3] In that case Coke, C.J., and the whole court were of opinion that no such action would lie. Coke pointed out that there was no precedent for such an action—"all the precedents are pro felonia";[4] and both Coke and the court evidently considered that it would be dangerous to the safety of the state to make a precedent, as it might discourage persons from giving information of treasonable plots.[5] No actual

[1] Vol. iii 406-407.

[2] On this matter see generally Winfield, op. cit. 58-59; cp. vol. iii 405.

[3] 2 Bulstr. 270.

[4] "I never yet did know in case of high treason, and for the prosecution thereof against one, any writ of conspiracy ever brought. There is no case in the law for this, but all the presidents are pro felonia; high treason concerns the person of the king; and there is no book in law to warrant the bringing of such an action for a prosecution pro proditione," ibid at p. 271.

[5] "Haughton and Dodderidge et tota Curia, every one by his oath of allegiance is bound to discover treason, and to have one punished for this, by an action upon the case in the nature of a writ of conspiracy, to be brought against him; this should be very hard," ibid.

decision was given. But it is clear that this opinion was based mainly on political grounds; and in 1623, the court, after a long argument, held, in the case of *Smith v. Cranshaw*,[1] that an action would lie. The court pointed out that, though a person might be obliged to reveal treason, he was certainly not bound to accuse others of treason falsely and maliciously; that it would be most unreasonable if a person falsely and maliciously accused had no remedy; and that there was no warrant in Edward I.'s statute for confining even the statutory writ to false and malicious accusations of felony. Dodderidge, J., cited a case in which such an action had been successfully brought;[2] and, as Dr. Winfield has pointed out, the Star Chamber punished persons who made such accusations falsely and maliciously.[3]

(*b*) We have seen that the rule that the action on the case could be used to remedy a conspiracy to accuse another of trespass, or other offence under the degree of felony, had been recognized in the Middle Ages.[4] It was accepted as well-established law in this period. Thus, in the case of *Marham v. Pescod*,[5] an allegation that the plaintiff was "legitime acquietatus," without saying "de felonia," was held to be sufficient in an action on the case, though it would not have been sufficient in proceedings on the statutory writ; and it was held in *Carlion v. Mill*[6] that the action lay for a malicious citation before the ecclesiastical courts. But it would seem that, at the latter part of the seventeenth century, the courts were beginning to think that some limitation should be put on the scope of the action. It was suggested in one case that it should be limited to cases where the indictment "contains matter of imputation and slander as well as crime";[7] and it would seem that this had given rise to the opinion that the action would not lie for the malicious preferment of any indictment for trespass[8]—an opinion clearly contrary to the older cases.

[1] W. Jones, 93; S.C. 2 Rolle Rep. 258.

[2] "Come fuit a ore in un case de Cambridgeshire, lou un conspire ove auter pur indicter J.S. de treason, que ils font, apres l'un confesse que le auter ad suborne luy, et que ils font sur ceo malice, sur que il auxi confesse ceo, et conspiracy port sur ceo vers eux, et l'un est a cest jour imprison pur ceo," 2 Rolle Rep. at p. 260.

[3] Op. cit. 59 n. 7. [4] Vol. iii 406.

[5] (1603) Cro. Jac. 130; cp. Bell v. Fox and Gamble (1610) Cro. Jac. 270—a case on the statutory writ.

[6] (1633) Cro. Car. 291.

[7] Thus in Henley v. Burstal (1669) Th. Raym. 180 Serjt. Maynard argued that, "when the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; then the action lies; but otherwise when the indictment contains crime without slander, as forcible entry etc. . . . and of that opinion was all the court"; see also Low v. Beardmore (1665) ibid 135, and Chamberlain v. Prescot (1639) there cited, where this view was apparently upheld by the Exchequer Chamber.

[8] "The opinion of all the judges in the case of *Sir Andrew Henley* and *Dr. Burstall* Th. Raym. 180 was, that no action will lie for falsely and maliciously

(*c*) There are several cases in which the action on the case was brought for miscellaneous abuses of legal proceedings. Thus, it was held that the malicious suing out of a writ of fieri facias,[1] or capias ad satisfaciandum,[2] was a good ground for an action on the case; and, in the case in which the former point was decided, it was laid down generally that, "if a man sue me in a proper court, yet if his suit be utterly without ground of truth, and certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice, though the suit itself be legal, and I cannot complain of it as it is a suit." [3] It is thus clear that the action was being used to cover many miscellaneous cases of malicious abuse of process. But it would seem that the nature of the wrongs thus redressed was as yet not nicely distinguished. In particular, the case of *Steer v. Scoble*[4] shows that no clear line was as yet drawn between the acts which will constitute the tort of malicious prosecution, and those which will constitute the tort of false imprisonment.

(ii) These extensions of the sphere of the action on the case necessarily helped to emphasize the rule that it was not confined to cases where the plaintiff had been acquitted by verdict; because, obviously, in many of these cases in which the action was held to lie such acquittal was not possible. There are many cases illustrating the application and the extension of this rule in this period. In *Sydenham v. Keilaway*[5] in 1574 it was held that, where the jury had ignored the indictment, though the statutory writ would not lie, the action on the case would; and in 1619 the court of Exchequer Chamber decided the same point in the same way.[6] In *Francis Throgmorton's Case* in 1597[7] the court held that the action did not lie, if the plaintiff escaped, because the court, before which the indictment was tried, had no jurisdiction; but in *Atwood v. Monger*[8] in 1653 it was held that the action would lie

procuring a man to be indicted of a trespass. He said that he remembered that they were of such opinion, and denied the case of 7 Hen. 4. 31 (7 Hy. IV. Mich. pl. 15, vol. iii 405 and n. 3). But to that he answered, that though he had a great regard to what the judges then said, for the Court was then composed of very knowing men, yet that opinion was not judicial, for such matter was not then in question," Savile v. Roberts (1698) 1 Ld. Raym. at p. 379 *per* Holt, C.J.; and at p. 380 he said that Bridgman, C.J., "was against all such actions."

[1] Waterer v. Freeman (1618) Hob. 205, 266.

[2] Steer v. Scoble (1624) Cro. Jac. 667; Daw v. Swaine (1669) 1 Sid. 424.

[3] Hob. at p. 267.

[4] (1624) Cro. Jac. 667; cp. Barker v. Braham (1779) 2 W. Bl. 867, where, in a case similar to Steer v. Scoble, the action was brought for false imprisonment; the modern distinction is most clearly explained by Willes, J., in Austin v. Dowling (1870) L.R. 5 C.P. at pp. 538-541.

[5] Cro. Jac. 7—there reported *ex relatione* Popham, C.J.; see generally on this topic Winfield, Present Law of Abuse of Legal Procedure 181-187.

[6] Payne v. Porter, Cro. Jac. 490.

[7] Cro. Eliza 563.

[8] Style 378; Rolle, C.J., at p. 379 said, "an action upon the case lies for bringing an appeal against one in the Common Pleas, though it be coram non judice, by reason

in these circumstances. In two cases, one of Charles I.'s[1] and the other of Charles II.'s reigns,[2] a distinction was drawn between the rule laid down in the last cited case, and cases where the indictment was bad on the face of it. In the latter class of cases it was held an action on the case would not lie, so that in these cases the rule applicable to the statutory writ and to the action on the case was the same. Possibly this distinction was drawn with a view of discouraging these actions; but it was clearly a distinction without a difference, and we shall see that it was overruled[3] both by Holt, C.J., in *Savile v. Roberts*[4] and by Parker, C.J., in *Jones v. Givin*.[5] Thus the rule that the action on the case both for malicious indictment and for malicious abuse of legal process would lie, if the proceedings had in any way terminated in the plaintiff's favour, was established. The necessity for showing an acquittal by verdict was confined to the statutory writ, and, like that writ, became in practice absolete.

(iii) We have seen that, in the mediæval period, it had been settled that, as the gist of the action on the case was not the conspiracy but the damage, it could be brought against one defendant only.[6] Does it not follow, therefore, that the action lay, even if the malicious indictment had been preferred by one defendant only? In other words, is not the conspiracy merely a circumstance of aggravation, and not a necessary part of the cause of action? This question caused much division of judicial opinion in Elizabeth's reign. In 1588, in the case of *Knight v. German*,[7] Wray, C.J., held that the action lay, though the indictment had been preferred by one defendant only; but Schute and Gawdy, J.J., held that it would not, "for then every felon that is acquitted will sue an action against the party." Later, however, Gawdy, J., seems to have changed his opinion.[8] Nevertheless in 1597 Anderson, C.J., and Beaumont, J., expressed the opinion that, though an action lay if two or more had conspired to prefer an indictment, no action lay where one only had preferred it—which opinion Walmsley, J., doubted.[9] But though, as Parker, C.J., said in *Jones*

of the vexation of the party, and so it is all one whether here were any jurisdiction or no, for the plaintiff is prejudiced by the vexation."

[1] Hunt v. Line (1633), cited Jones v. Givin (1713) Gilbert Cases at p. 212.

[2] Chamberlain v. Prescot, as reported by Holt, C.J., in Savile v. Roberts (1698) 1 Ld. Raym. at p. 380.

[3] Below 391.

[4] (1698) 1 Ld. Raym. 374.

[5] (1713) Gilbert Cases 185.

[6] Vol. iii 406-407; Skinner v. Gunton (1669) 1 Wms. Saunders at pp. 229, 230.

[7] Cro. Eliza. 70.

[8] Ibid, 134.

[9] "Where two or more conspire together to procure one to be indicted for felony or trespass, and he is afterwards acquitted, it shall be intended by law to be maliciously done, for which conspiracy lies; but no action lies where one only prefers a bill of indictment; for it would be in hinderance of justice. . . . Walmsley doubted thereof; for the declaration supposed it to be *malitiose*," Francis Throgmorton's Case Cro. Eliza. at p. 564.

v. Givin,[1] the struggle "was strong and late when the prosecution was by the party suffering and there was no conspiracy," it seems to have been settled in the course of the seventeenth century, perhaps by analogy to the practice of the Star Chamber, that an action would lie if an indictment were preferred by one only.[2] Indeed, it was hardly possible to come to any other conclusion, as it was clearly settled that the action lay for malicious accusations of offences under the degree of felony, and for other malicious abuses of the process of the courts, though committed by one person only. In fact, the idea that the conspiracy to indict maliciously was the gist of the offence had vanished with the disuse of the statutory writ of conspiracy; and the idea that the conspiracy, as such, was an offence had become associated with the new crime of conspiracy, which, as we have seen,[3] rested upon a very different basis. The result was that the wrong had come to consist, not in the conspiracy, which, if present, was only a circumstance of aggravation, but in the act of malicious prosecution, or malicious abuse of process. This fact is very clearly illustrated by the ruling in *Manning v. Fitzherbert* in 1633,[4] that, as the action was brought for the unlawful act causing damage to the plaintiff, it could not be objected to an action for such unlawful act, that different causes of action, i.e. for the unlawful act and for the conspiracy, had been improperly joined.

These developments of the action on the case for conspiracy were giving rise to new varieties of tort. But, though they were all tending in this direction, the cases were neither wholly clear nor wholly consistent. Having regard to the popularity of these actions for malicious prosecution, and the danger to the proper administration of the criminal law of allowing them too freely,[5] this new branch of law needed a clear and authoritative statement. This statement was furnished in 1699 by Holt, C.J., in the case of *Savile v. Roberts*.[6] That case defined the conditions under which the action on the case could

[1] (1713) Gilbert Cases at p. 209.

[2] See Manning v. Fitzherbert (1633) Cro. Car. 271; Carlion v. Mill (1633) Cro. Car. 291; Norris v. Palmer (1675) 2 Mod. 51; cp. Pollard v. Evans (1679) 2 Shower, 50, where the statutory writ is contrasted with the action on the case.

[3] Above 379-384.

[4] Cro. Car. 271. This was an action on the case for a false and malicious accusation of felony before a justice of the peace; on its being moved in arrest of judgment that an action for words, and an action in the nature of a conspiracy, had been joined, the court held that, "it is not in nature of a conspiracy, but an aggravation of the false and malicious accusation."

[5] In 1664 the judges refused to give out copies of indictments for felony unless on special order, "for the late frequency of actions against prosecutors . . . deterreth people from prosecuting for the king upon just occasions," Orders of the Judges in 1664, Kelyng 3; and this practice was followed by Holt and in Blackstone's day, see Thayer, Evidence 230.

[6] (1698) 1 Ld. Raym. 374; S.C. 5 Mod. 405, Carth. 416.

be brought for a malicious prosecution, and thus put this tort upon its modern basis.

It was in substance laid down that, to succeed in this action, the plaintiff must show, firstly, one of three sorts of damage—damage to his fair fame, damage to his person "as when a man is put in danger to lose his life limb or liberty,"[1] or damage to his property "as when he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused."[2] Secondly, he must show "express malice and iniquity in the prosecution."[3] Thirdly, the ground of the action is not the conspiracy but the damage, and therefore the action will lie, though the indictment be preferred by a single defendant only.[4] Fourthly, no action will, as a rule, lie for bringing a civil action maliciously. Under the old law the amercement of the plaintiff who thus sued was, and under the modern law the costs awarded to a successful defendant are, held to be a sufficient compensation.[5] But, fifthly, the bringing of an action maliciously, or a malicious use of the process of the court, may give rise to an action on the case, if special damage be proved.[6] Lastly, it was assumed, as it is assumed in all the cases both on the statutory writ of conspiracy and on the action on the case, that the proceedings must have terminated in the plaintiff's favour. All these propositions were affirmed in the elaborate judgment of Parker, C.J., in 1713 in the case of *Jones v. Givin*,[7] in which an elaborate historical account is given of the growth of this branch of the law.

Thus the common law tort of conspiracy, founded upon the statutory writ and the action upon the case, developed into the torts of malicious prosecution, and other malicious abuses of the process of the court. It remains to enquire whether or not the law has recognized a new tort of conspiracy, corresponding to the new crime of conspiracy which had emerged during this period.

[1] 1 Ld. Raym. at p. 378.
[2] Ibid.
[3] Ibid at p. 381.
[4] Ibid at p. 378.
[5] "The common law has made provision to hinder malicious frivolous and vexatious suits, that every plaintiff should find pledges, who were amerced if the claim was false. . . . But that method became disused, and then to supply it, the statutes gave costs to the defendants. And though this practice of levying of amercements be disused, yet the Court must judge according to the reason of the law, and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action," ibid at p. 380.
[6] "If A sues an action against B for mere vexation, in some cases upon particular damage B may have an action; but it is not enough to say that A sued him falso et malitiose, but he must show the matter of the grievance specially, so that it may appear to the Court to be manifestly vexatious," ibid; changes in procedure have rendered this cause of action less possible, see Quartz Hill Gold Mining Co. v. Eyre (1883) 11 Q.B.D. at pp. 689-691 *per* Bowen, L.J.; but it is still possible, see Clark and Lindsell, Torts (4th ed.) 659-660.
[7] Gilbert Cases 185.

(3) *The modern tort of Conspiracy.*

The question whether there is such a tort as conspiracy is essentially a modern question. Very little authority can be found on it before the latter half of the nineteenth century; and the reason for this dearth of authority in the earlier, and its extent in the later period, is to be found in the course of the legislation as to the application of the doctrine of criminal conspiracy to the activities of combinations of employers and workmen. In 1875 the Legislature enacted that a combination to do an act in contemplation or furtherance of a trade dispute, should not be indictable as a conspiracy, if the act committed by one person would not be a crime.[1] But it was held that this enactment did not prevent a person injured by such a conspiracy from bringing a civil action for the damages caused by it.[2] Hence the tort of conspiracy was brought into great prominence. But, in spite of frequent discussions and decisions in all the courts from the House of Lords downwards, neither its existence as a specific tort, nor, if it exists, its precise definition was settled till quite recently. Full discussion of the problem would here be out of place, as it is essentially a problem belonging to the legal history of the nineteenth century. But, nevertheless, the legal history of this period suggests one or two considerations, to which perhaps sufficient weight has not been attached in the many discussions to which the problem has given rise.

Technically this is a problem of the same kind as that to which I have already alluded in dealing with the history of defamation.[3] A crime had been developed by the court of Star Chamber, and, on the abolition of that court, the crime as thus developed had become a common law misdemeanour. If that misdemeanour was committed, and a person was damaged thereby, could he bring an action in tort? If he could, what was the nature of the tort? What was the connection, if any, between the rules applicable to this tort, and older rules of the common law as to the same or similar wrongs? Were necessarily all the rules applicable to the crime applicable also to the tort?

We have seen that, in the case of defamation, the courts had come to the conclusion that, if the defamation was written, so that the crime of libel had been committed, an action in tort lay at the suit of the injured party, without the need to allege and prove special damage.[4] In other words, the development of the crime of libel had given birth to the tort of libel. No doubt this decision was partly due to the extremely unsatisfactory character of the tort which had been developed in and through the action on the

[1] 38, 39 Victoria c. 86 § 3.
[2] Quinn v. Leathem [1901] A.C. at p. 542 *per* Lord Lindley.
[3] Above 361-364. [4] Above 364-365.

case. But the technical justification for the invention of the new tort was the fact that written defamation was a crime. It would seem that exactly the same principle is applicable to conspiracy; and in the case of *Pedro v. Barrett* in 1697[1] it seems to be admitted. The report of that case runs as follows:—"A brought case against B for falsely and maliciously procuring him to be indicted for conspiracy to lay a bastard child to B, of which indictment upon trial A was acquitted. After verdict for the plaintiff upon not guilty pleaded, adjudged that the action well lay, *for the conspiracy was a thing punishable at common law by fine and imprisonment.*" No doubt these words were spoken of the common law action on the case for a conspiracy, which, as we have seen, developed into the tort of malicious prosecution; but the general principle there laid down is applicable to the new crime of conspiracy, which had been taken over by the common law courts from the Star Chamber.

But, if the common law courts were to recognize a tort of conspiracy corresponding to the crime, had this tort any connection with the older tort of conspiracy remedied by the action on the case? It would seem, at first sight, that the connection was slender. The element of conspiracy had vanished from the older tort, and that older tort had become the tort of malicious prosecution. But nevertheless the older tort left, it seems to me, one permanent legacy. The gist of the action on the case was the damage suffered; and it was because this was the gist of the action that the element of conspiracy had been eliminated. In *Savile v. Roberts*[2] it was argued that conspiracy, being "of an odious nature," was "sufficient ground for an action by itself." But to this argument Holt, C.J., replied, "that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged the action will lie." Similarly, there has never been any doubt that the gist of the tort of conspiracy corresponding to the new crime of conspiracy, if such a tort exists, is the damage suffered; and that therefore an action for it can be brought, just as the old action could be brought, against one defendant.[3]

Now this has a very material bearing on the question whether or not all the rules applicable to the crime are also applicable to the tort. The fact that the conspiracy is the essence of the crime, while the damage is the essence of the tort, must make a great deal of difference in the rules applicable. In the case of libel,

[1] 1 Ld. Raym. 81. [2] (1698) 1 Ld. Raym. at p. 378.
[3] Quinn v. Leathem [1901] A.C. at p. 542; cp. Skinner v. Gunton (1669) 1 Wms. Saunders at pp. 229, 230.

where the difference between the essential features of the crime and the tort are not so pronounced, the law has recognized this difference. Libel is regarded as a crime, because libels, if unpunished, tend to promote breaches of the peace; and therefore a publication to the person defamed suffices, and the truth of the defamatory statement was not a defence, and is not now a defence, unless it is for the public benefit that the truth should be known. On the other hand, the gist of libel regarded as a tort is the damage inflicted; and therefore the publication must be to some third person, and truth is a defence. Now it would seem that somewhat similar considerations should be applied to determine the question of the relation of the crime of conspiracy, to the right of the party injured by a conspiracy to sue in tort. In both cases we must look at the nature of the wrongs redressed by the criminal and civil remedy respectively. But the application of these considerations will not produce quite the same results as in the case of libel, because, as I have said, the essential features of conspiracy considered as a crime differ more markedly from conspiracy considered as a tort, than is the case with the crime and the tort of libel. The crime consists in the conspiracy; but the damage is the gist of the action by the party injured by the conspiracy—the damage, that is, flowing from the unlawful acts done by each and all of the conspirators in pursuance of their joint design. What we must look at, therefore, in order to establish a cause of action, is not so much the conspiracy, as the quality of the acts and the damage flowing therefrom. It follows that the conspiracy is important, not as establishing directly a cause of action in tort, but, firstly, sometimes as showing that the acts done were unlawful, because they amounted to a criminal conspiracy; and, secondly, always as an element in estimating the damage suffered. This seems to be the view expressed in Mr. Arthur Cohen's memorandum on the civil action of conspiracy, which was concurred in by Lord Dunedin and Sir Godfrey Lushington;[1] and we shall see that the case of *Sorrell v. Smith*,[2] which contains the latest pronouncement of the House of Lords on this subject, lays down the law substantially in this way.

But this definition of the scope of the action of conspiracy has not been reached without controversy. It may, I think, be said that two somewhat divergent views as to its scope were taken before the decision in the case of *Sorrell v. Smith*.[3]

[1] "There may be cases where the combination or conspiracy to injure is itself a misdemeanour, although the acts agreed to be done are neither actionable torts nor criminal offences. . . . In such cases it *may* be said that the conspiracy which is the misdemeanour is the ground of the civil action. These however are the only cases in which it can in propriety be said that a civil action may be maintained for conspiracy," Report of Royal Commission on Trade Disputes (1906) at p. 20.

[2] [1925] A.C. 700. [3] Ibid.

(i) According to one set of authorities, conspiracy does not exist at all as an independent tort. The tort consists, not in the conspiracy, but in the unlawful acts causing damage done by each and all of the conspirators. This view would seem to have the support of Lord Justice Scrutton,[1] of Astbury[2] and McCardie, JJ.,[3] and of Sir F. Pollock.[4] If this conclusion be true, it would follow that conspiracy does not exist as an independent tort. The tort consists in the unlawful acts causing damage done by each and all of the parties to a conspiracy; and the conspiracy is only important as a circumstance to be taken into account in considering the legality of the act done, and the damage inflicted. If this be the law, the modern development of the civil remedy for acts constituting a criminal conspiracy presents a very close historical parallel to the development, during the seventeenth century, of the tort remedied by the older action on the case for a conspiracy. Just as in the case of the older remedy the element of conspiracy ceased to be the gist of the action, when it came to be seen that its gist was the damage suffered by the unlawful act of the defendant, and the tort came to consist in the commission of the unlawful act—in the malicious prosecution or the malicious abuse of the process of the courts; so, in the case of the modern tort of conspiracy developed from the new crime of conspiracy, the element of conspiracy ceases to be the gist of the action for exactly the same reason; and the tort comes to consist, not in the conspiracy, but in the unlawful acts which have caused damage.

(ii) According to another set of authorities there is one case in which the existence of a conspiracy is vital to existence of a cause of action. The clearest statement of this view is to be found in Lord Justice Atkin's judgment in the case of *Ware and De Freville v. Motor Trade Association*. The Lord Justice said:[5] "It appears to me to be beyond dispute that the effect of the two decisions in *Allen v. Flood* and *Quinn v. Leathem* is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does

[1] "Conspiracy appears to me to become actionable when the end is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage, and not to be actionable when neither the end nor the means are unlawful. It is said that the end is unlawful if it is to cause damage to another. My comment on this is that it is not true," Ware and De Freville v. Motor Trade Association [1921] 3 K.B. at p. 70.

[2] Valentine v. Hyde [1919] 2 Ch. at pp. 149-150.

[3] Pratt v. British Medical Association [1919] 1 K.B. at pp. 255-260.

[4] Torts (12th ed.) 321-329.

[5] [1921] 3 K.B. at pp. 90-91; and see ibid at p. 84; the same view was expressed by Sargent, J., in the case of Reynolds v. Shipping Federation Ltd. [1924] 1 Ch. at p. 40; see also an article by Mr. Cheshire in L.Q.R. xxxix at pp. 207-211.

become unlawful if done by two or more in combination with intent to injure another. That it is the combination to injure that makes the act unlawful is so plainly laid down in *Quinn v. Leathem* that it seems to me . . . useless . . . to suggest that the fact of combination in that case was only an incidental feature of the case, and not the gist of the matter." It would seem to follow that, according to this view, the existence of a conspiracy may make acts, otherwise lawful, unlawful, if they are done with the intent to injure another person; so that, on this view, it may be contended that there is in this case an independent tort of conspiracy.

This year, in the case of *Sorrell v. Smith*,[1] Lord Dunedin has adjudicated upon the whole matter; and it seems to me that the result of his judgment is a very skilful reconciliation of these two views.[2] After expressly approving Lord Justice Atkin's statement of the law,[3] he points out that it must not be forgotten that a combination formed with intent to injure another is a criminal conspiracy, and so an unlawful act. If a civil action for conspiracy is based on the existence of a criminal conspiracy, a criminal conspiracy must be proved. Such a conspiracy exists if several persons combine to do acts (lawful or unlawful) with intent to injure another. It does not exist if they do lawful acts which injure another person, with the intent, not of injuring that other person, but only of furthering their own interests.[4] It is true that in cases in which the element of conspiracy is not present, intent to injure another will not make an otherwise lawful act unlawful. But, where a conspiracy is proved to exist, it is this *mens rea*—the intent to injure—which, in the case of the crime of conspiracy, as in the case of other crimes, makes all the difference. It will make otherwise lawful acts done in combination criminal, and so unlawful. It comes therefore to this—an intent to injure may make acts illegal as a criminal conspiracy; and so these acts may give rise to an action in tort at the suit of the person damaged thereby, although the same acts if done by one person would give rise to no cause of action, because the existence of the conspiracy makes acts, otherwise legal, illegal. It is obvious that this manner of reconciling the authorities to some extent admits the truth of the first view, by allowing that the gist of the action is the unlawful acts causing damage, and by making the element of conspiracy essential only as proof that the acts done were unlawful—essential only, that is, in those cases in which the existence of a criminal conspiracy is the only cause of

[1] [1925] A.C. 700. [2] Ibid at pp. 723-726. [3] Ibid at p. 719.
[4] Mogul Steamship Co. v. McGregor Gow and Co. [1892] A.C. 25; Sorrell v. Smith [1925] A.C. 700.

their illegality. It follows that, as was said in 1906, it is only in these cases that "it *may* be said that the conspiracy is the ground of the civil action."[1] It is only in these cases therefore that conspiracy can be said to exist as an independent tort.

This controverted question as to the existence and ambit of the tort of conspiracy has thus, to a large extent, been settled, after half a century of keen dispute. On that settlement two observations may, I think, be made. Firstly, it assumes that the crime of conspiracy is very wide in its ambit;[2] for it assumes that a combination to do any act is a criminal conspiracy, if the intent of the persons combining is to injure another. Secondly, it makes one law for the individual, and another for a combination of individuals; for it distinctly decides that acts done in combination, if done with intent to injure, are actionable, although the same acts are not actionable if done by one person. That this may lead to very anomalous results is clear; for, as Lord Lindley said in *Quinn v. Leathem*, if one man acting alone could produce the same effects as several acting together, he ought to be liable in the same way.[3] This anomaly would, it is true, have been avoided, if *Allen v. Flood*[4] had been decided differently, and the views of Lord Esher in *Temperton v. Russell*[5] had been upheld. But it may well be that in that case the law would have laid itself open to the criticism that it restricted unduly individual liberty of action; and it is difficult to see how any such views could be reconciled with the ratio decidendi of *Mayor of Bradford v. Pickles*[6] and *Allen v. Flood*.[7] Probably, in the existing state of the authorities, the solution reached, though it may conceivably lead to some anomalous results, is the best compromise. At any rate it has the merit of recognizing that there is generally a danger in concerted action, which is not generally present in individual action—of recognising, in other words, the root principle upon which the whole law of conspiracy rests.

Maintenance

I have already spoken of the mediæval development of the offence of maintenance. We have seen that, as the result of that development, it had become a recognized offence redressible both by a criminal and a civil remedy; and that, when Coke wrote, it

[1] Above 394 n. 1.

[2] Above 381.

[3] "One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff, for which the plaintiff could have maintained an action," [1901] A.C. at p. 537; cp. Sorrell v. Smith [1925] A.C. at p. 713 *per* Lord Cave, and at pp. 740-741 *per* Lord Sumner.

[4] [1898] A.C. 1.

[5] [1893] 1 Q.B. at pp. 728-730.

[6] [1895] A.C. 587; below 448.

[7] [1898] A.C. 1.

had assumed substantially its modern form.[1] That it had then assumed its modern form was due principally to three causes. In the first place, we have seen that the jurisdiction of the Council and the Star Chamber had sternly repressed those abuses of legal procedure, which had made maintenance one of the most crying evils of the later mediæval period.[2] In the second place, changes in the law of procedure, and more especially the beginnings of the modern law of evidence,[3] had rendered obsolete some of the mediæval cases, which had laid it down that the mere giving of unsolicited testimony would amount to maintenance.[4] In the third place, we have seen that it was beginning to be recognized that it was not every assignment of a chose in action which could be attacked on the ground of maintenance.[5] It is true that reminiscences of the period when maintenance was so crying an evil, that to relax in any way these rules as to non-assignability, would have operated to increase it, lived on in this branch of the law long after it had become a comparatively rare offence;[6] and it is true also that the fact that many of the older rules were obviously ill suited to a more settled age sometimes induced judges to speak as if they thought that it was a semi-obsolete offence.[7] But though, for these three reasons, the offence had both altered its character and become far less frequent, it is an offence which in any political society is as ineradicable as larceny or homicide. Therefore a thin stream of cases, from the seventeenth to the twentieth century, has recognized it, and defined its modern incidents.

It is a commonplace of legal history that the form of the remedies given to redress a particular wrong, or assert a particular right, has had a decisive influence in settling the form and content of that wrong or that right. But it is no less true that changes in political and social conditions have often affected the litigant's choice of the remedies open to him; and thus the disuse of some of the remedies provided by the law, and the more extended use of others, have operated to make a change in the character of the wrong redressed, or the right protected, by these remedies. We get a particularly good illustration of this process of development in the case of maintenance. We have seen that, all through the Middle Ages, and right down to Henry VIII.'s reign, it was treated as a criminal offence, for which the offender could be punished, or for which (under Henry VIII.'s statute) an action for a penalty could be brought.[8] But we have seen that,

[1] Vol. iii 395-399. [2] Vol. v 201-203. [3] Vol. ix c. 7 § 1.
[4] Vol. i 334-335; vol. iii 398. [5] Vol. vii 536. [6] Ibid 533, 535.
[7] See the remarks of Buller, J., in Master v. Miller (1791) 4 T.R. at pp. 340-341.
[8] 32 Henry VIII., c. 9 § 3; vol. iii 396-397; vol. iv 521; vol. v 202.

during the Middle Ages, it was recognized that it could also be redressed by an action at the suit of the party.[1] The law is so stated by Coke in the seventeenth century,[2] and by Hawkins in the eighteenth century;[3] and, when maintenance ceased to be so crying an evil, the criminal remedy (though still available) tended to drop out, and to be replaced by the action for damages. Thus in modern law maintenance came to be regarded as a tort rather than as a crime. Naturally the question arises, what is the nature of this tort?

No doubt its main essential features are the same as those of the crime. We have seen that the definition of the offence, both at common law and according to the law administered in the Star Chamber, and the cases in which, on account of relationship or otherwise, maintenance was justifiable, were substantially settled at the beginning of the seventeenth century.[4] But the question still remains whether all the essential features of the tort redressible by the civil action, are the same as the criminal offence created by that long line of mediæval statutes which end with the statute of 1540.[5] This, it will be observed, is a problem of a very similar kind to that with which we have been faced in dealing with the history of defamation[6] and conspiracy.[7] All the conditions of the problem are not, it is true, exactly the same. In the first two cases we have two lines of development—a line of development, mainly civil, in the common law courts, and a line of development, mainly criminal, in the Star Chamber; and we were obliged to consider the relation between the criminal offence developed in the latter court, and the civil offence which was later developed from it. In the case of maintenance we have an offence created by statutes, which were enforced both by the common law courts and the court of Star Chamber; and this offence could be treated as either a criminal offence punishable on an indictment, or as a civil wrong redressible by an action for damages. Gradually the criminal remedy dropped out, and the offence came to be treated as a tort redressible by an action for damages. In the first two cases the civil action was clearly an action on the case, in which damage was the gist of the action; but in the case of maintenance it was not certain that the civil action was not an action in the nature of an action for trespass, in which nominal damages could be recovered. But, in spite of

[1] Vol. iii 397-398.

[2] Second Instit. 208.

[3] "All offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also they may be indicted as offenders against public justice," P.C. Bk. i c. 83 § 35.

[4] Vol. iii 398; vol. v 202-203.

[5] 32 Henry VIII. c. 9.

[6] Above 361-364.

[7] Above 392-394.

these differences, in all these cases the problem raised was the same—whether or not all the features of the tort were the same as all the features of the criminal offence.

Curiously enough this problem was not fully considered by the courts till 1919, when it was raised by the case of *Neville v. the London Express Newspaper Ltd.*[1] That case raised the two closely connected questions (i) whether an action for maintenance would lie in the absence of proof of special damage; and (ii) whether the success of the maintained litigation was a bar to the action.

(i) On principle it would seem that, if the civil action for maintenance is to be regarded as an action in the nature of an action on the case, damage is its gist; and that, on that hypothesis, the decision of the majority of the House of Lords,[2] that the action did not lie in the absence of the proof of special damage was right. The opinion of the two dissentient lords seems to have proceeded on the ground that, maintenance being admittedly illegal, the law should give a right of action in tort for nominal damages as in the case of trespass or libel, "since the mere invasion of the plaintiff's legal right imports damage, and is sufficient to maintain the action."[3] But the fact that conduct is illegal, or even criminal, does not necessarily prove that an action in tort for nominal damages will lie. This is clearly the law in the case of conspiracy, as the passage from the case of *Savile v. Roberts*,[4] cited above, and the modern cases[5] show. No doubt an opposite conclusion was come to in the case of libel. But that, as we have seen,[6] was largely due to the need for remedying the defects of the common law action on the case, which had wholly failed to provide a satisfactory civil remedy for defamation. The action is, as we have seen, somewhat anomalous; and the fact that an action on the case for defamation lies for nominal damages is the result of the peculiar history of this tort. On the other hand, if the civil action is to be regarded, not as an action on the case, but as a statutory or common law action analogous to trespass, there is a good deal more to be said for the view that an action would lie for nominal damages. The obscurity which hangs about the nature of the civil action naturally gives rise to differences of opinion. But, on the whole, whatever the earlier law may have been, the action of maintenance had probably come, in the eighteenth century, to be regarded as similar to other actions on the case; and, if that be so, the general rule is that laid down by Holt, C.J., in *Savile v. Roberts*. It follows that the general

[1] [1919] A.C. 368.
[2] Lords Finlay, Shaw, and Phillimore; Lords Haldane and Atkinson dissenting.
[3] *Per* Lord Atkinson at p. 405.
[4] (1698) 1 Ld. Raym. at p. 378, cited above 393.
[5] Above 395-397.
[6] Above 364.

rule was quite properly applied by the majority of the House of Lords to the case of maintenance.

(ii) On the other hand, the reasons given by the majority of the House of Lords for holding that the success of the maintained action is not a bar to a right of action for maintenance, are by no means convincing. They proceed mainly on the ground that, as all maintenance is a wrong, the success or failure of the action maintained can have nothing to do with the question whether or no a wrong was committed.[1] But, to argue from the proposition that maintenance is a wrong, to the conclusion that a plaintiff can sue for damages, in a case where the action or defence maintained was just, comes very near to contradicting the rule, upheld by the majority of the House, that such an action will not lie for nominal damages. It may well be that maintenance is a wrong, and that the criminal offence is committed, whether or no the maintained litigation has succeeded or failed.[2] It may well be that the same conclusion follows, if maintenance is a tort like trespass, for which an action will lie for nominal damages. But, if it is only a tort when accompanied by special damage, if the damage, that is, is the gist of the action, it does not follow that, because the crime is committed, the tort is likewise committed, when the maintained litigation has succeeded. We have seen that, in the case of the torts both of libel and conspiracy, it does not follow that, because the crime has been committed, the tort has also been committed. In both cases the conditions under which an action of tort will lie differ from the conditions under which an indictment can be preferred. Lord Phillimore, one of the Lords who dissented from the majority of the House on this point, very properly used the analogy of libel to illustrate his argument;[3] and he might equally well have used the analogy of conspiracy. The result is that the House has committed itself to two rules which, if not actually contradictory, are extremely hard to reconcile. For, though the success of the maintained litigation is not a bar to the action, it is clear that its success will generally prevent the plaintiff from claiming anything but nominal damages;[4] and for nominal damages, the action, according to the first proposition, does not lie.

In fact the House of Lords, though it appealed to history, and even to the Year Books, hardly perceived that the problem was essentially similar to the problem which the development of the

[1] See [1919] A.C. at pp. 383-386, 392-393, 397-404.

[2] Coke, dealing with the case of one who had laboured a jury, says, "and whether the jury pass for his side or no, or whether the jury give any verdict at all, yet he shall be *punished* as a maintainor or embraceor either at the suit of the king or party," Co. Litt. 369a; from the use of the word "punished" it would seem that Coke is referring to the criminal remedy.

[3] [1919] A.C. at p. 434.

[4] See ibid at pp. 380-381, 393, 395.

law of crime and tort in the seventeenth century had raised in the case both of defamation and conspiracy. Given an offence which was a crime, on what conditions could a person injured by the crime sue in tort for any damage which he had suffered? If it had looked at the question in its proper historical perspective, it could hardly have avoided coming to a less contradictory conclusion than that at which it has actually arrived; for it would have avoided the error into which, as it seems to me, many of the Lords fell, of supposing that, because an act is a crime, the same act must, without qualification, necessarily be a tort. If it had grasped this principle it would probably have ruled that, just as the conditions under which the tort and crime of libel or conspiracy can be committed differ, so do the conditions applicable to the tort and crime of maintenance; that just as publication to a third party is needed to constitute the tort, though not the crime of libel, and just as an act causing damage to the plaintiff is needed to constitute the tort, though not the crime of conspiracy; so the failure of the maintained litigation is needed to constitute the tort, though not the crime, of maintenance.

§ 4. Legal Doctrines Resulting from the Laws against Religious Non-Conformity

In the preceding volumes of this work I have given some account of the statutes which penalized various forms of non-conformity to the established church.[1] In this section I propose to give some account of the developments of legal doctrine to which these statutes helped to give rise, and of the corresponding changes in that doctrine which followed upon their repeal.

The result of these statutes was to create a number of offences, which may be called offences against either the religion of the state, or the Christian religion in general. If we look at the dates at which they were enacted, it will be clear that the history of these offences, regarded as offences against the law of the state, as distinct from offences against the ecclesiastical law, does not begin till the Reformation period. During the Middle Ages such offences were essentially matters for the ecclesiastical law, and the function of the state was limited to lending the strength of its secular arm to enforce the decrees of the church. We have seen that the state recognized and obeyed the law of the church, which, till the Reformation, was the papal canon law;[2] and that it was because it so recognized it that the writ de hæretico comburendo must be regarded as existing at common law.[3] The fact

[1] Vol. i 616-619; vol. iv 494-496, 506-507; vol. vi 196-203, 404.
[2] Vol. i 580-588; vol. ii 304-306.
[3] Vol. i 616-618.

that the Reformation of the English church was carried through with the minimum of change, so that the thesis of its continuity could be maintained both by lawyers and ecclesiastics;[1] and the fact that English law, during the sixteenth and seventeenth centuries, was likewise continuously developed from its mediæval principles—ensured that, at the outset, the attitude of the law towards these offences against religion should be essentially mediæval. During the Tudor period, as in the mediæval period, Church and State were regarded, from many points of view, as a single society which had many common objects;[2] and the two members of that single society were still regarded as bound to give one another assistance in carrying out those common objects. The church must help the state to maintain its authority, and the state must help the church to punish non-conformists and infidels. The church was the church of the state, and membership of it was therefore a condition precedent for full rights in the state; the king was the supreme governor of the church;[3] and the law of the church was the king's ecclesiastical law.[4] But, if the church is thus regarded as an integral part of the state, if the church's law is as much the king's law as the law of the state, a fortiori Christianity must be regarded as part of the law of England. In fact, not only Christianity, but also that particular variety of Christianity taught by the Anglican church, was part of that law.[5]

In our day this theory of the relationship between Church and State has almost entirely disappeared. It is true that there is still an established church; that the king is still its supreme governor and the defender of its faith; that its law is still the king's ecclesiastical law, and an integral part of the law of England.[6] But, like many other parts of the law and constitution of England, these are survivals of an older order, from which all real meaning has departed, with the abandonment of

[1] Vol. i 591.
[2] Vol. iv 36-37, 47-48, 81-83.
[3] Vol. i 594.
[4] Ibid 594-596.
[5] Professor Kenny in Cambridge Law Journal i 130-131 has contended that the maxim or rule that "Christianity is part of the law of England" is derived from Finch's book on the Common Law (vol. v 399-401); and that Finch derived it from a statement made by Prisot, C.J., in Y.B. 34 Hy. VI. Pasch. pl. 9, p. 38, which is probably no authority for this wide proposition. But for the reasons which I have given in the text I think that the rule or maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers. It is assumed both by Fortescue, vol. ii 569, n. 3, and by St. Germain, vol. iv 279-280; and it is at the root of the old distinction between mala prohibita and mala in se, vol. vi 218-219. But, for that very reason, it was difficult to find an express authority for it, see the dictum of James, L.J., cited vol. ii 470; and it was probably because Finch was hard put to it to find any authority precisely in point, that he cited this Y.B. For these reasons I cannot agree with Professor Kenny that Finch's misquotation disproves the existence of the doctrine.
[6] Vol. i 595.

that mediæval theory of the relationship of Church to State, to which they owed their origin.[1] That that theory has been completely abandoned is clear from the fact that the state now assumes the attitude of a Gallio to religion. It gives an equal measure of protection to all sects, whether religious or anti-religious, provided that their tenets do not involve a breach of its laws civil or criminal. It refuses to favour one more than another; and practically the only coercive authority which it exercises, is in respect of those whose methods of propaganda are sufficiently coarse and offensive to bring them within the modern rules of the criminal law relating to blasphemous libel.

This vast change in the relations of Church and State has been mainly the result of that policy of "conservatism combined with concession," which has been pursued during the nineteenth century.[2] But that policy has its roots in the past; and the modern relations of Church and State are in fact the result of some four centuries of its application. Its application has necessarily involved many statutory changes in the law, and many gradual modifications in the technical doctrines of the law to correspond with the statutory changes; and, as the result of the modifications of these technical doctrines, changes in the attitude of the courts to the interpretation of the statutes. Therefore, in relating the history of these changes both of the statute law and of the technical doctrines of English law, we must take account of many diverse lines of development, which have operated at different periods. If we look at these lines of development from the point of view of their chronological order, we can, I think, sum them up briefly as follows:

Till the outbreak of the Great Rebellion, the part played by the ecclesiastical law in the repression of all offences against religion, was by no means inconsiderable.[3] It did not indeed play so large a part as in the Middle Ages; for it was controlled by statutes, which were enforced by the common law courts, and it was both controlled and supplemented by the rules and doctrines of the common law.[4] We have seen that, in the latter half of the seventeenth century, the influence of the ecclesiastical

[1] Below 416-417.

[2] Dicey, Law and Public Opinion (1st ed.) 316—"In all ecclesiastical matters Englishmen have favoured a policy of conservatism combined with concession. Conservatism has here meant deference for the convictions, sentiments, or prejudices of churchmen, whenever respect for ecclesiastical feeling did not cause palpable inconvenience to laymen, or was not inconsistent with obedience to the clearly expressed will of the nation. Concession has meant readiness to sacrifice the privileges, or defy the principles, dear to churchmen, whenever the maintenance thereof was inconsistent with the abolition of patent abuses, the removal of grievances, or the carrying out of reforms demanded by classes sufficiently powerful to represent the voice, or to command the acquiescence of the country."

[3] Vol. i 617-620.

[4] Ibid 617-618, 620-621; below 406-407.

law rapidly declined.[1] This was partly due to the dislike of allowing to the ecclesiastical courts any coercive authority over laymen—a dislike which found expression in statutory changes which crippled this part of the jurisdiction of these courts, and practically limited it to a jurisdiction over the clergy.[2] Partly also it was due to the increased control of the common law courts. But, for a considerable time, the law administered by these common law courts maintained much of the spirit of the old system. The statute law had made even Christian non-conformity illegal, and had penalized the various sects, whether Protestant or Roman Catholic, in different ways and degrees.[3] A fortiori any anti-Christian propaganda must be regarded as illegal.[4] Though a small breach had been made in this system by the Toleration Act of 1689,[5] and by the liberal way in which it was interpreted,[6] it continued to be the foundation upon which the law rested till the beginning of the nineteenth century. But, during the earlier half of the nineteenth century, a still larger breach was made by the repeal of nearly all the older statutes which penalized Christian, and even non-Christian, nonconformity.[7] Very few restrictions were left upon the holding and exercise of any kind of religious belief. But, except as modified by these statutes, the common law rules, criminal and civil, as to the illegality of the expression and teaching of definitely anti-Christian beliefs, were left untouched. There had been no formal change in these rules, which were founded on the principle that, as Christianity was part of the law, any attack on it was unlawful.[8] It was however inevitable that, in the atmosphere of universal toleration, which was partly the cause and partly the effect of these statutes, these common law rules and doctrines should change their form and scope. It came to be thought that the expression and teaching of anti-Christian beliefs was only criminal if it amounted to blasphemous libel, and that the reverend questioning of those beliefs entailed no criminal liability.[9] In the twentieth century the propagation of these beliefs was held to be lawful for all purposes, so that it has become possible to establish a trust for their maintenance.[10] Lastly, these changes in common law doctrine have reacted on the manner in which some of the earlier statutes, which gave only a modified relief to Roman Catholics, have been interpreted; with the result that the modifications and restrictions contained in these statutes have been, to all intents and purposes, rendered nugatory.[11]

[1] Vol. i 620-621. [2] Ibid 621.
[3] Vol. iv 494-496, 506-507; vol. vi 196-203. [4] Below 407-410.
[5] 1 William and Mary c. 18; vol. vi 200-201; below 410-411.
[6] Below 411. [7] Below 411-413. [8] Below 413-414.
[9] Below 415-416. [10] Below 416. [11] Below 417-418.

It will be clear from this summary of the development of this branch of the law, that its history falls into certain well-marked periods. They can be classified as follows:—(1) The relation between law and religion in the seventeenth and eighteenth centuries; (2) the new situation created by the repeal or modification of the legislation against religious nonconformity; (3) the effect of this new situation upon legal doctrines as to the relation between law and religion; (4) the effect of this new common law doctrine upon the interpretation of the older legislation. Under these four heads I propose to sketch the history of the development of this branch of the law.

(1) *The relation between law and religion in the seventeenth and eighteenth centuries.*

During the whole of this period the relations between law and religion retained something of their mediæval character, in that the law considered it to be unlawful (except in so far as it might be permitted by statute) to express or to teach religious opinions contrary to those of the established church; and a fortiori to express or teach anti-Christian doctrine. But, long before the end of this period, the manner in which these principles were safeguarded was anything but mediæval; for their maintenance had passed from the ecclesiastical courts to the ordinary courts of law and equity. And the result had been a slight, but only a slight, weakening of their rigidity.

Throughout this period it fell to the ordinary courts to apply the many statutes which penalized the nonconformist, whether Protestant or Roman Catholic. While these statutes were in force, the expression of these opinions was not only illegal, but in many cases criminal; so that no contract or trust, which was designed to help the propagation of these opinions, was lawful. The only exception made to this legislation were the provisions of the Toleration Act of 1689,[1] in favour of certain sects of Protestant nonconformists. With this Act and its interpretation I shall deal under the following head.[2]

During the earlier half of the seventeenth century, the courts of common law were assisted by the ecclesiastical courts, and more especially by the court of High Commission.[3] All these courts exercised, as we have seen, an extensive jurisdiction over heresies of all kinds; and, as late as 1612, in the case of Legate, a writ of de haeretico comburendo issued, and the heretic was burned.[4] In fact in 1618 in *Atwood's Case*,[5] the court of King's Bench ruled that the uttering of scandalous words against the established

[1] 1 William and Mary c. 18.
[2] Below 410-411.
[3] For this court see vol. i 605-611.
[4] Vol. i 618.
[5] Cro. Jac. 421.

religion, was certainly not a matter over which the justices of the peace had jurisdiction, and inclined to the view that such a case should have come before the High Commission. In *Traske's Case*,[1] though the Star Chamber sentenced the accused for maintaining the theses that the Jewish and not the Christian sabbath should be observed, and that pork should be avoided, they expressly did so because the preaching of these opinions tended "to sedition and commotion," and scandalized the king, the bishops and the clergy. The offence of holding these heretical opinions, they held, was "examinable in the ecclesiastical courts and not here."[2] We have seen that the High Commission was abolished in 1641;[3] and that it was not restored with the other ecclesiastical courts at the Restoration.[4] We have seen, too, that the ecclesiastical courts lost in 1677 their right to inflict capital punishment; and that after that date their jurisdiction over the heretical opinions of laymen disappeared.[5]

But, during the latter half of the seventeenth century, the courts of common law stepped into the breach. They had long enforced the statutes against religious nonconformity. They now took over the jurisdiction of the Star Chamber as a 'censor morum,' and punished gross indecency, ribaldry, and blasphemy on the same principles as those on which the Star Chamber had proceeded. They also took over some part of the jurisdiction of the ecclesiastical courts, and punished the expression of infidel opinions, both on the ground that they tended to sedition and commotion, and on the ground that it was contrary to law to attack the foundations of the Christian faith. One or two cases of the late seventeenth and eighteenth centuries will show the principles upon which they proceeded.

In 1663 Sedley was indicted for gross indecency, against the king's peace, and to the great scandal of Christianity.[6] The court of King's Bench expressly claimed to have inherited the Star Chamber jurisdiction as custos morum, and also to punish profane actions which were wholly contrary to Christianity.[7] In 1676 the King's Bench laid it down that the speaking of blasphemous words was criminal, both as an offence against religion, and as an offence

[1] (1618) Hob. 236.

[2] "Now he being called ore tenus, was sentenced to fine and imprisonment, not for holding those opinions (for those were examinable in the ecclesiastical courts and not here) but for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalizing the King, the bishops, and the clergy."

[3] Vol. i 611; vol. vi 112, 135.

[4] Vol. i 611; vol. vi 113, 196.

[5] Vol. i 618-619.

[6] 1 Sid. 168.

[7] "Et fuit dit a luy per les justices que coment la ne fuit a cel temps ascun Star Chamber, uncore ils voil fair luy de scaver que cest Court est custos morum de touts les subjects le Roy, et est ore haut temps de punnier tiels profane actions fait encounter tout modesty, queux sont cy frequent, sicome nient solement Christianity," ibid.

against the state.[1] The state and religion were regarded as allies who must stand together to preserve the social order, so that to speak against religion was as much an offence as to speak against the state. "To say," said Hale, "that religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved." "Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."[2] These cases were followed. In 1721 a person was indicted for a libel against the Trinity,[3] and it appears that he was convicted and sentenced.[4] In 1729 a person was convicted for blasphemous discourses on the miracles, "and the court declared that they would not suffer it to be debated whether to write against Christianity in general was not an offence punishable in the temporal courts at common law."[5] "Christianity," said Raymond, C.J.,[6] "is parcel of the common law of England, and therefore to be protected by it; now whatever strikes at the very root of Christianity, tends manifestly to the dissolution of civil government, and so was the opinion of my Lord Hale in *Taylor's Case*." In 1763 there was another conviction for a blasphemous libel.[7]

Naturally the offences thus punished took different forms. They are classified by Hawkins[8] as blasphemies against God, profane scoffing at Holy Scripture, impostures in religion, open lewdness, offences of a like nature tending to subvert all religion or morality, and seditious words in derogation of the established religion tending to provoke a breach of the peace. Another offence of a similar kind, that of apostasy, was made the subject of a special statute,[9] which, as a matter of fact, has had singularly little effect; for it was held that it did not add materially to the common law;[10] and no convictions are known to have been obtained for its breach.[11] All these offences depended at bottom on the underlying idea that offences against the Christian religion must be treated as offences against the law of the land, because Christianity, being a principal support of the state and its law, the state and its law were especially bound to maintain it.[12]

[1] Taylor's Case, 1 Vent. 293. [2] Ibid. [3] R. v. Hall, 1 Str. 416.

[4] In R. v. Curl (1727) 1 Str. at p. 790, it was stated that Hall was convicted and was then in custody.

[5] R. v. Woolston 2 Str. 834. [6] S.C. Fitz Gibbon at p. 65.

[7] R. v. Annet, 1 W. Bl. 395. [8] P.C. Bk. 1 c. 5.

[9] 9 William III. c. 35.

[10] See Attorney-General v. Pearson (1817) 3 Mer. at pp. 406-408 *per* Lord Eldon C.

[11] See Bowman v. The Secular Society [1917] A.C. at p. 446, *per* Lord Parker.

[12] "This is grounded upon the care that the government hath, or ought to have, by the constitution of the government itself, of the Christian religion, which I conceive is the main end of government. The profession and preservation of Christianity is of so high a nature that of itself it supersedes all law; if any law be made against any point

"Christianity," says Blackstone, "is part of the law of England;" and therefore, in addition to the laws which safeguarded the position of the established church, and penalized nonconformity with it, the law must punish such offences as apostasy and blasphemy.[1]

And this conception was logically followed out. Because any attempt to propagate beliefs inimical to Christianity was a criminal offence, a trust for any sect which professed such beliefs was illegal and void. In 1684 a trust to pay a sum of money to ministers ejected for nonconformity was declared to be void;[2] and, in the case of *De Costa v. De Pas* in 1744,[3] Lord Hardwicke refused to enforce a trust for the "maintenance of a 'Jesiba,' or assembly for daily reading the Jewish law, and for advancing and propagating their holy religion." "The intent of this bequest,' he said, "must be taken to be in contradiction to the Christian religion, which is a part of the law of the land, which is so laid down by Lord Hale and Lord Raymond; and it undoubtedly is so; for the constitution and policy of this nation is founded thereon."

It is true that common law doctrine had made some little progress in the direction of toleration. In *Calvin's Case* Coke had given utterance to the very mediæval sentiment that all infidels are in law perpetual enemies, "for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility and can be no peace."[4] But this idea had been repudiated by Littleton in Charles I.'s reign;[5] and it was obviously contrary to the commercial interests of a country which was beginning to conduct a prosperous trade with infidels.[6] Then

of the Christian religion that law is *ipso facto* void," East India Co. v. Sandys (1684) 10 S.T. at pp. 374-375 *per* Holt *arg.*: and to this Treby, who argued on the other side, assented, ibid at p. 392.

[1] Comm. iv. 59.

[2] Attorney-General v. Baxter 1 Vern. 248; the decree was reversed in 1689, 2 Vern. 105, on the ground that it was a good charitable trust for particular persons to be selected by Baxter, see the extract from Lord Hardwicke's notebook cited by Lord Eldon in Moggridge v. Thackwell (1803) 7 Ves. at p. 76.

[3] 2 Swanst. 487 note.

[4] (1609) 7 Co. Rep. at ff. 17a, 17b.

[5] 1 Salk. 46.

[6] Thus Treby, in his argument in East India Co. v. Sandys (1684) 10 S.T. at pp. 391-392 says, "if this perpetual hostility be taken in a political and proper sense and the law be so, it destroys the licence and privilege of the Company. . . . I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical. 'Tis akin to *Dominium fundatur in Gratia*. The Indians have a right to trade here, and we there, and this is a right natural and human, which the Christian faith doth not alter"; the strictures on Coke's dictum made by Willes, C.J., in Omichund v. Barker (1744) Willes at p. 542, and by Lord Mansfield, C.J., in Campbell v. Hall (1774) 20 S.T. at pp. 294, 323 are well known, and illustrate the very different point of view of the eighteenth century; note also that the mercantile reason was much emphasized in Omichund v. Barker at p. 551, which case overruled Coke's statement, Co. Litt. 6b, that an infidel could not be a witness; see also 2 Swanst. 502 note.

again, in *R. v. Woolston*, the court said that, though to write against Christianity in general was an offence, "they did not intend to include disputes between learned men upon particular controverted points."[1] We shall see, too, that the manner in which the Toleration Act of 1689 was interpreted, is evidence of the growth of a more tolerant spirit.[2] Still, when all deductions have been made, there can be little doubt that, during this period, Christianity was regarded as so integral a part of the law, that any attack on it was an offence, and that no disposition of property designed to propagate anti-Christian views would be upheld. That this was then the law was almost admitted by Lord Coleridge, C.J., in *R. v. Ramsay and Foote*,[3] in which, as we shall see,[4] a very different rule of law was laid down. No doubt he endeavours to explain some of these cases away, but, as Stephen, J., has shown, with very little success.[5] I think that Stephen is quite right in asserting that, in this period, the judges, when they held that Christianity was part of the law, meant to hold that it was "a crime either to deny the truth of the fundamental doctrines of the Christian religion, or to hold them up to ridicule or contempt."[6]

We must now turn to the history of the way in which this principle was gradually undermined. We shall see that the first really decisive steps in this direction were taken by the Legislature; and that this legislation was made the more effectual by the rapid growth of the spirit of toleration among the more educated classes during the eighteenth, and the earlier part of the nineteenth, centuries.

(2) *The new situation created by the repeal or modification of the legislation against religious nonconformity.*

The first modification of the legislation against religious nonconformity was the Toleration Act of 1689.[7] We have seen that it was the services rendered by the Protestant nonconformists to the cause of the Revolution, which secured for them this measure of relief from the disabilities under which they suffered.[8] In form

[1] (1729) 2 Str. 834. [2] Below 411.

[3] "Now according to the old law, or the dicta of the judges in old times, the passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity. But . . . I think that these old cases can no longer be taken to be a statement of the law at the present day," R. v. Ramsay and Foote (1883) 15 Cox C.C. at pp. 234-235.

[4] Below 415.

[5] Fortnightly Rev. xli 289 sqq.; Stephen, H.C.L. ii 470-476.

[6] Fortnightly Rev. xli 293; or as he puts it at pp. 293-294, "the theory is as plain and concise as possible; the truth of some of the fundamental doctrines of Christianity is essential to the welfare of society; therefore everyone shall be punished who denies, reviles, or ridicules them."

[7] 1 William and Mary c. 18. [8] Vol. vi 200-201.

the concessions granted by the Act were not large. It simply, as its title says, "exempted their Majesties' Protestant subjects dissenting from the Church of England from the penalties of certain laws." But, as a necessary consequence, it legalized their meetings for worship, provided they were not held behind locked doors; and it provided penalties for those who disturbed these meetings. In addition, it exempted nonconformist ministers from jury service, and service in certain parochial offices, and it allowed Quakers to make a declaration instead of taking an oath. The Act did not extend either to Roman Catholics or to Unitarians. The courts interpreted the Act liberally. It was held that its effect was to render the worship of the sects coming within the protection of the Act legal for all purposes,[1] so that a trust for the maintenance of their teaching could be enforced by the court, or, in a suitable case, a mandamus could issue to enforce the legal rights of a minister to be admitted to office.[2]

No further statute was passed to legalize the worship of other Protestant nonconformists for more than a century. In 1813 the Unitarians were given the same privileges as had been accorded to Protestant nonconformists by the Toleration Act of 1689; and so much of the blasphemy Act of 1698, as related to the denial of the doctrine of the Trinity, was repealed.[3] But Lord Eldon had grave doubts whether this Act in favour of the Unitarians, could be given the same extensive interpretation as had been given to the Act of 1689 in favour of other Protestant nonconformists. His view was that, though the penalties for the maintenance of these opinions had been removed, the impugning of the doctrine of the Trinity was still "an offence indictable by the common law"; so that a trust to propagate such doctrines was not enforceable.[4] In this respect, therefore, a trust to propagate an opinion which he regarded as anti-Christian, differed from a trust to propagate opinions which, though not conformable to the doctrines of the Church of England, were Christian. But this restricted view of the Act was dissented from in 1842. The judges, in the opinions which they

[1] Attorney-General v. Pearson (1817) 3 Mer. at pp. 409-410 per Lord Eldon; it was said by Lord Mansfield in Evans's Case that the protecting clauses of the Toleration Act had put the worship of the Protestant dissenter, "not merely under the connivance, but under the protection of the law—have established it," cited 3 Mer. 375 n.; for Evans's Case see App. to Furneaux's letters to Blackstone, and Burn Eccl. Law ii 207; see also the passage cited by Lord Buckmaster in Bourne v. Keane [1919] A.C. at pp. 866-867.

[2] R. v. Barker (1762) 3 Burr. 1265.

[3] 53 George III. c. 160.

[4] "If the common law remains yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law, it is quite certain that I ought not to execute a trust the object of which is illegal," Attorney-General v. Pearson (1817) 3 Mer. at p. 399.

gave to the House of Lords in the case of *Shore v. Wilson*,[1] held that no such distinction could be drawn between the enforceability of a trust for the propagation of Unitarian tenets, and the tenets of any other sect of Protestant nonconformists.

In 1829 came the Roman Catholic Emancipation Act,[2] which relieved Roman Catholics from the penalties to which they were still subject, allowed them to sit in Parliament, and threw open to them nearly all the offices of state. But the Act contained provisions for the suppression of Jesuits and other religious orders of male persons belonging to the Church of Rome;[3] and it was not considered to have removed the illegality of charitable trusts for the maintenance of the Roman Catholic religion.

In 1832 Roman Catholics were put on the same footing as Protestant dissenters, in respect to "their schools, places for religious worship, education, and charitable purposes."[4] But the Act was not to affect the provisions in the Act of 1829 as to the suppression of Jesuits and other religious orders.[5] It was held, however, in the case of *West v. Shuttleworth*,[6] that this Act did not operate to validate trusts for the maintenance of superstitious purposes, such as masses for the dead. In fact, the Act of Edward VI.,[7] which, in suppressing certain superstitious uses then existing, had in its preamble declared the illegality of such uses, had long been considered as having had somewhat the same effect in defining what was a superstitious use, as the preamble of the statute of 1601 [8] had in defining what was a charitable use. This was the view taken of the preamble to the Act in *Adams and Lambert's Case* in 1602.[9] It was followed by Duke in his book on Charitable Uses,[10] and, it would seem, was approved as established

[1] 9 Cl. and Fin. 355; at p. 578 Tindal, C.J., said, "that Unitarian preachers and their widows, and other persons professing Unitarian doctrines are capable at the present day of receiving the benefit of charities. . . . I consider, since the statute of 53 Geo. 3 c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away."

[2] 10 George IV. c. 7; some remission of the laws rendering them liable to penalties, and a permission to conduct their worship under strict conditions, had been granted by 31 George III. c. 32.

[3] 10 George IV. c. 7 §§ 28-37.

[4] 2, 3 William IV. c. 115.

[5] § 4.

[6] (1835) 2 My. and K. 684.

[7] 1 Edward VI. c. 14.

[8] 43 Elizabeth c. 4; vol. iv 398.

[9] 4 Co. Rep. at ff. 106b, 109b, 111b, 113a, all cited by Lord Wrenbury in Bourne v. Keane [1919] A.C. at pp. 919-920; all through this case it is assumed that uses, such as those mentioned in the preamble to this statute, are superstitious.

[10] (1st ed.) 106, cited by Lord Birkenhead in Bourne v. Keane [1919] A.C. at pp. 843-844; dealing with gifts for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, or any like intent, he says, "these and such like gifts and dispositions, as these are not to be accounted charitable uses intended by the purview of this statute (43 Eliza. c. 4), but superstitious uses intended by the statute of 1 Edw. 6 c. 14"; clearly the idea is that the preamble of Edward VI.'s statute is to be taken as a guide to what the law will deem a superstitious use, just as the preamble of Elizabeth's statute is to be taken as a guide to what it will deem a charitable use; and this idea is, it seems to me, implied in much of the reasoning in Adams and Lambert's Case.

law by Lord Hardwicke in *De Costa v. De Pas*,[1] Having regard to these authorities, the decision in *West v. Shuttleworth*[2] was inevitable; and it was followed in later cases.[3] In 1860, when the Legislature gave a larger measure of protection to Roman Catholic charities, it assumed that trusts for superstitious uses were still illegal;[4] and when it assumed the illegality of these superstitious uses, it must obviously have used the term superstitious use in the sense in which it had been judicially interpreted. The result of this legislation, therefore, was to remove all penalties and disabilities affecting Roman Catholics, and to legalize, not entirely, but to a very large extent, trusts for the propagation and maintenance of their worship.

In 1846[5] the Jews had been relieved from their disabilities by an Act, which repealed a number of other disabilities and penalties, which earlier legislation had imposed on various classes of nonconformists. Moreover, with respect to their schools, places for worship, education, and charitable purposes, they had been put on the same footing as Protestant nonconformists.[6]

It will be observed that this legislation contained nothing whatever affecting the position of the atheist, or person who professed no religious belief; and the curious history of the manner in which such persons were gradually allowed on all occasions to affirm instead of taking an oath—a history which in its later stages is connected with the name of Bradlaugh—illustrates the reluctance of a Legislature, which was still, almost unconsciously, under the influence of the ideas embodied in the dictum that Christianity was part of the law, to make any concessions to them.[7] Naturally, therefore, during the earlier part of the nineteenth century, it was still held that those who denied the truth of all religion, including the Christian religion, were guilty of a criminal offence. There are a series of such cases in which the old principle was laid down as good law.[8] In fact, as late as 1841, on an indictment for blasphemous libel, Lord Denman, C.J., told the jury that, "if they thought that the libel tended to question or cast disgrace upon the Old Testament it was a libel";[9] and, in the decision of the court on a

[1] "The objection is, that this is a superstitious use, and so that the bequest must go to the crown; but in answer to this it is said, that that can only be in cases that are within the statute of Edward VI. But the cases have gone further," 2 Swanst. 487 note.

[2] (1835) 2 My. and K. 684.

[3] Attorney-General v. Fishmongers Co. (1841) 5 My. and Cr. 11; Heath v. Chapman (1854) 2 Dr. 417.

[4] 23, 24 Victoria c. 134 § 1. [5] 9, 10 Victoria c. 59. [6] § 2.

[7] See Clarke v. Bradlaugh (1881) 7 Q.B.D. at pp. 58-61 *per* Lush, J., for a good account of this matter.

[8] R. v. Carlile (1819) 1 S.T.N.S. 1390, 4 S.T.N.S. 1423; R. v. Waddington (1822) 1 S.T.N.S. 1368-1369; see also R. v. Moxon (1841) 4 S.T.N.S. 694.

[9] R. v. Hetherington 5 Jurist 529-530.

motion in arrest of judgment, substantially the old principle, that a reflection on Christianity in general is indictable, is laid down. It followed also that all attempted dispositions of property, and other transactions, having for their object the propagation of such opinions, were void. Thus in 1850, in the case of *Briggs v. Hartley*,[1] it was held that a trust which contemplated an object inconsistent with Christianity failed; and in 1867, in the case of *Cowan v. Milbourn*, it was held that a contract to let a lecture room for an anti-Christian lecture was void for illegality.[2]

But, some time before *Cowan v. Milbourn* had been decided, the feeling in favour of a more universal tolerance, which was partly the cause and partly the effect of the legislation which I have just described, had begun to react upon these common law doctrines.

(3) *The effect of the new situation created by this legislation upon legal doctrines as to the relation between law and religion.*

During the first half of the nineteenth century, there are indications that some lawyers were beginning to be of opinion that it was not every sort of questioning of the truths of Christianity, which would make the questioner criminally liable. As early as 1729, the court had expressly said that it did not mean to assert that theories advanced by learned men upon controversial points, would expose those who held them to liability, provided that Christianity in general was not attacked;[3] and both Lord Mansfield[4] and Blackstone[5] had maintained that the mere holding, as distinct from the propagation, of opinions was not an offence by English law. We have seen that both the Star Chamber in the earlier part of the seventeenth century,[6] and the common law courts in the later part of that century,[7] had assigned, as their reason for taking cognizance of heretical opinions, the fact that they tended to sedition and commotions; and Blackstone had emphasized the fact that blasphemy consisted in "profane scoffing at the Holy Scripture or exposing it to contempt and ridicule."[8] Having regard, therefore, to the larger liberty of expressing opinions secured by the legislation of the earlier part of the nineteenth century, it is not surprising to find that, about the same

[1] 19 L.J. Ch. 416-417; cf. Murray v. Benbow (1822) 4 S.T.N.S. 1409—the famous case in which Lord Eldon refused to issue an injunction to restrain the publication of a pirated copy of Byron's Cain; see also the authorities cited by Lord Finlay in Bowman v. The Secular Society [1917] A.C. at p. 430.

[2] L.R. 2 Ex. 230. [3] R. v. Woolston 2 Str. 834; above 410.

[4] "The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions," Evans v. The Chamberlain of London, Burn Eccl. Law ii 218, cited 3 Mer. 375 note.

[5] Comm. iv 49. [6] Above 407.

[7] Above 407-408. [8] Comm. iv 50.

period, it began to be thought that the essence of the offence of blasphemy, was not the denial of the truths of Christianity, but their denial in an offensive manner. Starkie, the second edition of whose book on libel was published in 1830, maintained, in substance, that an honest denial of Christianity was not blasphemy; and that the essence of the offence was "a wilful intention to pervert insult and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry calculated to mislead the ignorant or unwary."[1]

The cases already cited show that the criminal law was not for some time expounded in this way. But the trend of public opinion was making for its acceptance. In 1842, in the case of *Shore v. Wilson*,[2] Erskine, J., laid it down that, "it is still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose; yet any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines, which have been assumed as essential to it." This view of the law was followed by Coleridge, J., in *R. v. Pooley* in 1857,[3] and by his son Lord Coleridge, C.J., in *R. v. Ramsay and Foote* in 1883.[4] The correctness of this statement of the law was assailed by Stephen, J.[5] That it was not a correct statement of the law of England in the seventeenth, or even the eighteenth, centuries, I think he proves; and indeed the historical truth of Stephen's view is, as we have seen, almost admitted by Coleridge, C.J.[6] But there is no doubt that, as the nineteenth century proceeded, this newer view of

[1] "Though as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself, on such subjects, but also legally speaking, to publish his opinions for the benefit of others. . . . The law visits not the honest errors, but the malice, of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations, or artful sophistry, calculated to mislead the ignorant or unwary, is the criterion and test of guilt," Starkie, Libel (3rd ed.) 559, 600, cited Stephen, Fortnightly Rev. xli 311.

[2] 9 Cl. and Fin. at pp. 524-525; and he had laid down substantially the same rule in the same year in R. v. Holyoake 4 S.T.N.S. 1381.

[3] Stephen, Fortnightly Rev. xli 311.

[4] 15 Cox C.C. 231; "I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true, when these dicta were uttered, that Christianity is part of the law of the land. . . . To asperse the truth of Christianity cannot *per se* be sufficient to sustain a criminal prosecution for blasphemy," ibid at p. 235; "I now lay it down as law, that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked, without the writer being guilty of blasphemy," ibid at p. 238.

[5] Fortnightly Rev. xli 289; H.C.L. ii 474-476.

[6] Above n. 4.

the law had been gathering strength, because it was obviously so much more in accordance with men's views as to the proper relation between law and religion than the older view[1]—a fact illustrated by the settlement in 1888 of the long controversy as to the right of the atheist to affirm instead of taking an oath.[2] The law laid down in *R. v. Ramsay and Foote* was approved by the Court of Appeal in 1915;[3] and the principle was applied by the House of Lords in 1917.[4] It is therefore now indisputably the law of England.

It did not follow, however, that, because a reverend denial of Christianity was no longer a criminal offence, the law would uphold a trust or a contract to propagate views which were directly contrary to the Christian faith. But even here the former rigid attitude of the law was weakening. Judges were astute to find that trusts for religious purposes were not anti-Christian;[5] and at length in 1917, in the case of *Bowman v. The Secular Society*,[6] it was held that the propagation of such views was not illegal in any sense, and that therefore a bequest upon trust for a company, formed to propagate these views, was valid. The cases of *Briggs v. Hartley*,[7] and *Cowan v. Milbourn*[8] were overruled, with the result that the law now draws no distinction between the propagation of Christian, non-Christian, or anti-Christian opinions. It will help all alike, unless it can be shown that they advocate practises contrary to the rules of English Law. But just as Stephen, J., upheld the older rules as against the newer law laid down in *R. v. Ramsay and Foote*, so in *Bowman v. The Secular Society* Lord Finlay upheld the older law laid down in *Briggs v. Hartley* and *Cowan v. Milbourn;* and in both cases these advocates of the older law were solitary protestants.

The legislation of the nineteenth century, which threw open most of the offices of state to persons who were not members of the established church, destroyed, as Blackstone said it would destroy,[9] the logical necessity for such a church. In like manner

[1] "Parliament, the supreme authority as to our law has passed Acts which render the dicta of the judges in former times no longer applicable. And it is no disparagement to their authority to say that observations which were made under one state of the law are no longer applicable under a different state of things," R. v. Ramsay and Foote (1883) 15 Cox C.C. at p. 235.

[2] 51, 52 Victoria c. 46 (The Oaths Act).

[3] Secular Society v. Bowman [1915] 2 Ch. at pp. 462, 469-470.

[4] S.C. on appeal [1917] A.C. 406.

[5] See Parr v. Clegg (1861) 29 Beav. 589; Thornton v. Howe (1862) 31 Beav. 14; both these cases were decided by Lord Romilly

[6] [1917] A.C. 406.

[7] (1850) 19 L.J. Ch. 416.

[8] (1867) L.R. 2 Ex. 230.

[9] "If every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England," Comm. iv. 53.

the decision in *Bowman v. The Secular Society* leaves the ecclesiastical law of England in a very anomalous position. We have seen that, as late as 1881, it was described by Lord Blackburn as part of the general law of England.[1] If this is so, it would seem that the situation, in which the rules of law and equity sometimes found themselves before the Judicature Acts, is again reproduced. That which one part of the law of England regards as illegal is regarded as legal and enforced by the other part. But the effects of this decision have not stopped here. As we shall now see, the same trend of public opinion, which led up to this decision, has encouraged the House of Lords to change the long accepted interpretation placed upon some of the older legislation dealing with Roman Catholicism.

(4) *The effect of this new common law doctrine upon the interpretation of the older legislation.*

We have seen that the legislation, which freed the Roman Catholics from their disabilities, did not wholly emancipate them.[2] But it is clear that some of the judges were beginning to think that these restrictions were not wholly consistent with the larger liberty which had been accorded to all kinds of religious and anti-religious opinions. In 1860[3] and 1861[4] Lord Romilly expressed some doubts as to the correctness of the law laid down in *West v. Shuttleworth* as to the invalidity of superstitious uses. In 1914 the restrictive clauses in the Act of 1829, directed against monastic orders, were, to a large extent, rendered nugatory by the decision of Joyce, J., in the case of *In re Smith*[5]—the judge whose decision was affirmed by the House of Lords in the case of *Bowman v. The Secular Society*. Finally, in 1919, practically the whole law as to the invalidity of superstitious uses was swept away by the decision of the House of Lords in *Bourne v. Keane*.[6] The House asserted that the preamble to the Chantries Act of Edward VI.[7] could not have the effect which is still accorded to the preamble of Elizabeth's Act of 1601;[8] and it reversed all the cases and dicta which were founded ultimately upon the view that just as the preamble to Elizabeth's Act is a guide to the definition of a charitable use, so the preamble to Edward VI.'s Act must be taken as a guide to the definition of a superstitious use. This was a bold step. When the House of Lords in 1916 was reminded that in 1888 it had reversed a decision of 1849, the retort was

[1] Mackonochie v. Lord Penzance (1881) 6 A.C. at p. 446, cited vol. i 595.
[2] Above 412-413. [3] Re Michel's Trust 28 Beav. at p. 42.
[4] Re Blundell's Trusts 30 Beav. at p. 362; see above 416 n. 5 for Lord Romilly's reluctance to find anything anti-Christian in an otherwise lawful trust.
[5] [1914] 1 Ch. 937. [6] [1919] A.C. 815.
[7] 1 Edward VI. c. 14. [8] 43 Elizabeth c. 4; vol iv 398.

given that "this is hardly the right view to take of your Lordship's judicial functions nowadays."[1] But in this case, the House, as Lord Wrenbury pointed out, reversed dicta 317 years old, a decision 84 years old,[2] and a rule which, in 1917, Lord Parker had regarded as a settled rule of law.[3] But Lord Wrenbury in this case took the position of solitary protestant, which Stephen, J., took in relation to the decision in *R. v. Ramsay and Foote*, and Lord Finlay took in relation to the decision in *Bowman v. The Secular Society*. In all three cases the movement of public opinion in favour of the widest toleration was sufficient to overturn the principles of the older law. Indeed, it was admitted by Lord Birkenhead that it was the same public policy as that underlying the judgment in *Bowman v. The Secular Society* which played a great part in inducing the House of Lords to take the greatest liberty which it has ever taken with established legal principles.[4] That decision is thus the crowning illustration of the manner in which the development of this branch of the law has been dominated at all periods, and more especially in its later phases, by considerations of public policy and by the force of public opinion.

Thus the old theories upon which the relation of State to Church were based, and, consequently, both the old doctrine as to the relation of English law to Christianity, and the technical rules which depended on that doctrine, have been swept away. All that is left is the law as to blasphemous libel as restated in *R. v. Ramsay and Foote*. It is obvious that the dominant factor in the various trains of technical reasoning, which have justified the abolition of the older doctrines of law and equity, and, with the assistance of the Legislature, have impelled them in the direction of universal toleration, has been the influence of public opinion as to the proper relation of the state and its law to religion. Indeed,

[1] Admiralty Commissioners v. S.S. Amerika [1917] A.C. at p. 56, *per* Lord Sumner, cited vol. iii 677 n. 2.

[2] [1919] A.C. at p. 925; he might, as we have seen, above 413, have added that it was a construction in which apparently Lord Hardwicke had concurred.

[3] Bowman v. Secular Society [1917] A.C. at p. 437.

[4] "Unwilling as I am to question old decisions, I shall be able, if my view prevails, to reflect that your Lordships will not within a short period of time have pronounced to be valid legacies given for the purpose of denying some of the fundamental doctrines of the Christian religion, and have held to be invalid a bequest made for the purpose of celebrating the central sacrament in a creed which commands the assent of many millions of our Christian fellow-countrymen. In the second place . . . your Lordships will have the satisfaction of deciding that the law of England corresponds upon this important point with the law of Ireland, of our great Dominions, and of the United States of America. A decision based . . . upon a sound view of the law may reasonably appeal to these two powerful considerations of policy as against the admitted impolicy of disturbing old conclusions," Bourne v. Keane [1919] A.C. at p. 831.

I think that it would be true to say that in no branch of the law has this influence been in the past more pronounced, and that it still continues, and will continue, to exercise at least an equal influence in the future. In the past that influence has been all in the direction of a greater liberty and a fuller toleration, until in our own days, complete liberty and full toleration have been attained. No doubt the use made of this complete liberty and full toleration will largely determine the future trend of public opinion; for it is the fact that this gradually extending liberty has not in the past proved dangerous to the safety of the state, that has made for its final victory. This fact is not unconnected with that growth in the strength of the state, which has enabled it to be more generous in its administration of the criminal law than in the days when it was weak.[1] But if this liberty should be misused so as to endanger the safety of the state, there can be little doubt that public opinion will revert again to its older attitude.

The principles which underlie the past development and the probable future of this branch of the law, have been so fully and eloquently summed up by Lord Sumner, in one of the wisest pronouncements that have ever been made on the subject, that I shall copy his words:[2] "the words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that the opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact. I desire to say nothing which would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that experience having proved dangers once

[1] Vol. v. 196.
[2] Bowman v. The Secular Society [1917] A.C. at pp. 466-467.

thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

How far the law as it exists to-day is likely to be beneficial to the state and to the community remains to be seen. Complete freedom in economic relations has already been tried and found wanting. It is at least doubtful whether it will be any more successful in respect to the publication of opinions, religious or otherwise; and it may well be that in religious and intellectual, as in economic spheres, we shall, as Lord Sumner has indicated, be driven to revert to some of our older ideas. It is not unlikely that those who have abandoned all belief in the authority of a God, will carry their scepticism a little further, and begin to question the authority of the state. The Christianity upon which the state and the law were once founded, though it might at times unduly magnify the authority of the Church, recognized the need for the secular arm of the state, and generally supported its authority. But what of the various non-Christian or anti-Christian sects which seek to take its place? It may well be that "false doctrine heresy and schism" of the strictly theological variety, no longer connote, as they often did connote in the sixteenth and seventeenth centuries, "sedition privy conspiracy and rebellion"; but it does not follow that the state can afford to disregard all kinds of false doctrine. It does not follow that unlimited licence to propagate views and theories at variance with broad principles of Christian morality, will be wholly unproductive of political effects. History lends no countenance to such a conclusion; and the proved efficacy of propaganda supports its teaching. In fact, it is not unlikely that Cæsar, now that he has deliberately abandoned the task of securing for God the things that are God's, will find considerably greater difficulty than heretofore in securing for himself the things that are Cæsar's. If that result should follow one of two courses must be pursued. Either the state must reassert its authority by means of an increase in the severity of the criminal law, and an abridgment of the liberty to express immoral or seditious opinions; or it must be content to pursue a policy of drift and concession to the forces opposed to it, which can only lead straight back to a set of political conditions which will bear no small resemblance to the modified anarchy of mediæval political society—without the redeeming grace of the spiritual elements in that society, which sprang from the deeply rooted religious faith of mediæval men.

§ 5. Lines of Future Development

We have seen that the mediæval law of crime and tort was narrow. It was, so to speak, permeated by the idea of trespass—by the idea, that is, of forcible damage to person or property. At the end of the mediæval period it was only just beginning to transcend this idea through the instrumentality of the writs on the case. We have seen that, during this period, the criminal law was developed, partly by the Legislature, and partly by the new ideas introduced by the Council and Star Chamber; and that the law of tort was developed partly by the latter agency, and partly by a great expansion of the action on the case. Consequently, in the criminal law many new treasons and felonies were created, and the modern misdemeanour made its appearance; while the development of the law of tort was marked by the growth of specific torts, and, as we shall see in the next section, by large changes in and additions to the principles of liability. With some of these developments I have already dealt in the preceding sections of this chapter. At this point it will only be necessary, firstly, to sketch briefly, in respect to certain torts not already dealt with, the manner in which this process of differentation was proceeding; and, secondly, to indicate some of its effects upon the growth of the law.

The Process of Differentiation

(1) *Wrongs to the person.*

During this period we can see the beginnings of the process which will differentiate the wrongs of assault, battery, and false imprisonment, and create the specific torts known by these names in our modern law. In the Middle Ages all these wrongs were redressible by an action of trespass; and they were regarded simply as illustrations of the multifarious trespasses to the person redressed by that writ. But in the cases decided upon writs brought for particular trespasses, and upon writs on the case brought for wrongs analogous thereto, we can see that the law is beginning to acquire some more precise rules as to the conditions under which these wrongs are committed. These rules are the starting points of the further developments which will give this branch of the law its modern shape.

Assault and Battery.—As early as the fourteenth century it was held that trespass would lie for an attempted battery which had failed to take effect—for instance when one had thrown a hatchet at another which had missed;[1] for a threatened battery if

[1] 22 Ass. 99 pl. 60; Belknappe's argument to the contrary was overruled in Y.B. 40 Ed. III. Mich. pl. 19; and in Y.B. 45 Ed. III. Trin. pl. 35 Belknappe as judge laid down the law in this sense; Street, Legal Liability i 10-11.

accompanied by actual damage;[1] and even for mere threatening words which put the plaintiff in fear, and caused him damage.[2] It was held, however, in the case of *Tuberville v. Savage*,[3] that a present threat of violence was needed to constitute an assault, so that where one put his hand on his sword and said, "if it were not assize time I would not take such language from you," it was no assault; though it would have been otherwise if he had held up his hand in a threatening manner and said nothing. In this case stress was laid on the declared intention not to offer violence; and it is probably because no intention of violence can be certainly collected from general words of threatening or abuse, that the law has abandoned the idea that such words can be accounted as an assault.[4] It was the same emphasis on intention which has given us our modern definition of battery. In its original conception it meant the infliction of physical injury;[5] and we have seen that in the Middle Ages an action lay whether it was committed intentionally, negligently, or accidentally.[6] But it was held, during this period, that "the least touching of another in anger" is a battery.[7] This at once introduces the question, What is a touching in anger? and this question can only be answered by a reference to the intent of the party who touches another.[8] Thus it was held in *Tuberville v. Savage* that a touching, "done in earnest discourse and not with intent of violence is no assault," and therefore no battery.[9] But this rule at once introduces into the offence a new element—the element of insult—which may justify heavy damages for a battery which inflicts only trifling physical injury.[10]

The writ of trespass for assault and battery remedied, not only violence offered immediately to the plaintiff's own person, but also violence offered to him indirectly through violence

[1] Y.B. 45 Ed. III. Trin. pl. 35.

[2] 27 Ass. 134 pl. 11; Y.BB. 37 Hy. VI. Pasch. pl. 8 at p. 20b *per* Prisot, C.J.; 7 Ed. IV. Hil. pl. 31 *per* Danby and Choke, JJ.; the same rule was laid down in Y.B. 17 Ed. IV Trin. pl. 2 p. 4b by Fairfax, J., but denied by Nedham, J., and Billing, C.J.; cp. Pollock, Torts (12th ed.) 216 n. (*p*).

[3] (1669) 1 Mod. 3.

[4] Evely v. Stouly (1615) 2 Buls. at p. 327 *per* Dodderidge, J.; Pollock, Torts (12th ed.) 216, citing 'the Circuiteers' (L.Q.R. i 232):—"For Meade's Case proves, or my Report's in fault, that singing can't be reckoned an assault." The opinion of Nedham, J., and Billing, C.J., in Y.B. 17 Ed. IV. Trin. pl. 2 p. 4b seems to be in harmony with the later law.

[5] See Street, Legal Liability i 4-6.

[6] Vol. iii 376.

[7] Cole v. Turner (1705) 6 Mod. 149 *per* Holt, C.J.

[8] "The factor which the law accepts as sufficient to justify this extension is found in the wrongful or hostile intent of the wrong-doer; in his malice, as the element is termed in other departments of tort," Street, op. cit. i 6.

[9] (1669) 2 Keb. 545; "if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery," Cole v. Turner (1705) 6 Mod. 149 *per* Holt, C.J.

[10] Street, op. cit. i 6; Pollock, Torts (12th ed.) 213.

or threatened violence to his servants and tenants.[1] As Sir F. Pollock has said,[2] "examples of this kind are not uncommon down to the sixteenth century or even later; we find in the pleadings considerable variety of circumstance which may be taken as expansion or specification of the *alia enormia* regularly mentioned in the conclusion of the writ." A good example in this period is the case of *Garret v. Taylor*.[3] In that case the defendant had threatened the plaintiff's workmen and customers, so that they desisted from working for or trading with him. It was held that the plaintiff could recover damages in an action on the case. We shall see that the principle underlying such cases was one of the principles contributing to developments in the law of tort, which were called for by the growth of commerce and industry during this period—developments which have, owing to the legislative changes of the nineteenth century, assumed immense importance in modern times.[4]

False Imprisonment.—"False imprisonment," as Mr. Street says,[5] "was one of the first trespasses recognized by the common law. A laying of violent hands upon the person, and an actual forceful deprivation of liberty, is the element undoubtedly at the root of liability in this wrong. In other words, the typical original imprisonment involved a battery." But even in mediæval times this notion was extended. In Edward III.'s reign Thorpe, C.J., ruled that, "there can be said to be an imprisonment in all cases where a man is arrested by force and against his will, be it in the high street or elsewhere, even though he be not confined in a house."[6] What amount of restraint will amount to the commission of the tort has been elaborated in the later cases. It was settled, at the end of the seventeenth century, that the restraint must be total, so that, if all means of escape are not blocked, the tort is not committed.[7] We have seen that some aspects of the tort shade off into the very different tort of malicious prosecution; and that it was only gradually that the line between them was clearly drawn.[8]

Besides these specific wrongs to the person a large number of other unclassified wrongs were redressed by the action on the case. In all these cases the question whether or not a tort had been

[1] F.N.B. 87 N.
[2] Torts (13th ed.) 234, and references there cited.
[3] (1621) Cro. Jac. 567.
[4] Below 431.
[5] Op. cit. i 12-13, citing Bracton's Note Book cases 314, 465.
[6] 22 Ass. 104 pl. 85.
[7] "A has a chamber adjoining to the chamber of B, and has a door that opens into it, by which there is a passage to go out; and A has another door which C stops, so that A cannot go out by that. This is no imprisonment of A by C because A may go out by the door in the chamber of B, though he be a trespasser by doing it. But A may have a special action upon his case against C," Wright v. Wilson (1699) 1 Ld. Raym. 739 *per* Holt, C.J.
[8] Above 388.

committed depended upon the question whether the defendant was guilty of negligence. But of the growth and influence of this conception I shall speak in the following section.[1]

(2) *Wrongs to property.*

Of wrongs to a plaintiff's right to the possession of chattels and land, and of the kinds of damage to property redressible by the various writs of trespass, I have already spoken.[2] As in the case of wrongs to the person, a number of other unclassified wrongs to property were redressed by the action on the case, if the defendant had acted negligently.[3] I have also said something of the development of the scope of nuisance by means of action on the case.[4] At this point it will only be necessary to call attention to two other aspects of the law as to nuisance, which have given rise to important bodies of rules in the modern law of tort.

(i) It was recognized, certainly by the beginning of the sixteenth century, that a nuisance might either be public and remediable by indictment, or private and remediable by action on the case at the suit of the person damaged thereby. But the question whether, and under what conditions, a person damaged by a public nuisance, could sue for damages, remained somewhat debateable down to the close of this period. It had been laid down by Fitzherbert in 1536[5] that an action would lie for a public nuisance, if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance. "If one makes a ditch across the highway, and I come riding in my way by night, and I and my horse are thrown into the ditch, so that I suffer great damage . . . in this case I shall have an action against him who made the ditch across the way, because I am more damaged by this than any other." But Baldwin, C.J., dissented. He considered that any stoppage of the highway was simply a public nuisance, and punishable only by indictment;[6] and in this divergence of opinion we can see the beginnings of long standing doubts upon this matter. Though Fitzherbert's view was accepted,[7] differences of opinion arose in the seventeenth century as to what could be considered to be sufficiently special damage to entitle a plaintiff to sue. Holt, C.J.,

[1] Below 449-458. [2] Vol. vii 57 seqq., 402 seqq. [3] Below 458.
[4] Vol. iii 11, 28; vol. vii 328-331, 340-341. [5] Y.B. 27 Hy. VIII. Mich. pl. 10.
[6] "Semble que cest accion ne gist pur le pleintiff sur l'estoppel de haut chemin, car le Roy ad le punition de cela, et il est present en le Leet, et la il sera redresse: pur ce que il est common nuisance a touts liges le Roy, et donques n'est reason que un private particulier person aura accion sur cela; car per meme le reason que l'un person aura accion pur cela, per meme le reason chescun aura sur cela, et donques il sera puni C fois pur meme le cause," ibid.
[7] Williams's Case (1595) 5 Co. Rep. at f. 73a; Fowler v. Sanders (1618) Cro. Jac. 446.

and Rokeby, J., ruled that the plaintiff must be prepared to show a damage to himself directly arising from the nuisance, over and above that suffered by the public;[1] so that, if, for instance, through a stoppage in a road, a man lost a valuable piece of business by his late arrival, such damage could not be recovered. The delay in the journey was no more than was suffered by the rest of the public, and the loss of the business was too remote.[2] But other judges were of opinion that such consequential damage was not too remote, and could be recovered.[3] This difference of opinion has lasted down to our own days, and has given rise to judgments in the House of Lords which are not easily reconcilable.[4]

(ii) So soon as the application of the action on the case to remedy a nuisance had begun to widen the conception of a nuisance, the difficulty arose of drawing the line between those species of damage which are *absque injuria*, because they are only the necessary result of the legitimate user of a man's property, and those species of damage which will support an action, because they are the result of an improper or excessive user of that property.[5] As early as 1410 this difficulty arose in the Gloucester Grammar School Case.[6] The masters of an ancient grammar school sued the defendant who had set up a rival school, and had, by his competition, lowered the fees which they were formerly able to charge. It was held that, though there would have been a good cause of action if the profits of an incorporeal hereditament, such as a franchise of fair ferry or mill, were disturbed by the setting up of a rival fair ferry or mill, in the absence of such a franchise, no action lay for damage occasioned by legitimate competition.[7] This

[1] "The plaintiff could not have an action for stopping of this way, because his coal mine was near it; for though it is a convenience to him, yet the situation does not give him any greater right to the way than any other of the king's subjects . . . the case of 27 H. 8, 27 is no authority for this action; for there Baldwin, Chief Justice, was of opinion against the action, and his opinion has been held law ever since," Iveson v. Moore (1700) 1 Ld. Raym. at pp. 492, 493.

[2] "If a highway is so stopped that a man is delayed in his journey a little while, and by reason thereof he is damnified, or some important affair neglected; this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct and not consequential; as for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway," Paine v. Partrich (1692) Carth. at p. 194 *per* Holt, C.J.

[3] Iveson v. Moore (1700) 1 Ld. Raym. at pp. 489, 491 *per* Gould and Turton, JJ., with whom, after a fresh argument at Serjeants' Inn, the other judges agreed, ibid at p. 495.

[4] Ricket v. Metropolitan Rly. Co. (1867) L.R. 2 H. of L. 175; Lyon v. Fishmongers Co. (1876) 1 A.C. 662; Pollock, Torts (12th ed.) 410 n. *l*.

[5] "*Hankford.* Dampnum puit estre absque injuria, coment si j'ay un molyn, et mon vicine leve un auter molyn, peront le profite de mon molyn est diminish, j'averai nul action vers luy, uncore il est damage a moy *quod Thirning concessit*," Y.B. 11 Hy. IV. Hil. pl. 21.

[6] Ibid

[7] "Nient semble, pur ceo que in vostre cas vous avez frank tenement et enheritance en le Market, mes icy le plaintiff ont nul estate en le Schoolmastership etc., mes pur le temps non certein, et il sera encounter reason, que un Master sera di turbe

was quite in harmony with the principle recognized by the common law that, except as restrained by rules of the statute or common law, trade ought to be free.[1] The principle was restated by Holt, C.J., in *Keeble v. Hickeringill*;[2] but with the qualification that, if violent or other illegal means were used by the defendant to further his interests at the expense of the plaintiff, an action would lie.[3] We shall see that the application of this principle has, like the application of the principle that trespass or case will lie if a man is damaged by menaces to his tenants or servants,[4] helped to develop a very important branch of the law of tort in modern times.[5]

The only other important wrong to property which need here be mentioned is the tort of deceit. We have seen that in the Middle Ages its scope was very narrow, but that it was widened by the application to it of the action on the case.[6] We have seen that this action on the case for a deceit was applied chiefly to deceits in the performance of certain contracts, and that it played some part in the development of the action of assumpsit.[7] The earliest development of deceit was therefore in connection with contracts.[8] As deceit on the case could be brought, either for the breach of an express warranty, or for damage occasioned by a statement known to the maker to be false, it was perhaps natural that the conception of deceit as an independent tort, consisting in making a false statement with knowledge of its falsity to the damage of another, did not readily emerge. But we have seen that the conception of deceit was, during this period, being rendered more precise by cases turning mainly upon the contract of sale;[9] and it was the analysis of the nature of deceit in these cases which helped the courts in 1789, in the case of *Pasley v. Freeman*,[10] to allow an action in tort for a false and fraudulent statement which caused damage to another,[11] though there was no contractual relation between the deceiver and the person deceived.[12]

tenir Schole ou luy pleist, sinon que le fuit en cas ou un University fuit corporate, et Escholes fondus sur ancient temps, et en case d'un molyn (comme jeo disoy avant) si mon vicine levy un molyn, auters que soloient moulder a mon molyn, alent a l'auter molyn, peront mon tolne est amenus, pur cel cause jeo n'avera my action," Y.B. 11 Hy. IV. Hil. pl. 21 *per* Hankford, J.; "et l'opinion del Court fuit que le briefe ne gist my."

[1] Vol. iv. 350.

[2] (1707) 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19; the best report of Holt, C.J.'s judgment is that taken from his MSS. in 11 East 574 note.

[3] 11 East at p. 576.

[4] Above 423.

[5] Below 431.

[6] Vol. iii 407-408.

[7] Ibid 429 and n. 3.

[8] Ibid 407-408; above 68.

[9] Above 68-69.

[10] (1789) 3 T.R. 51.

[11] Especially the broad statement of Croke, J., in Baily v. Merrell (1616) 3 Bulstr. at p. 95 that "when these two (fraud and damage) do concur and meet together, there, an action lieth," which was cited by Buller, J., 3 T.R. at p. 56, and by Lord Kenyon C.J., at p. 64.

[12] Grose, J., in his dissenting judgment, 3 T.R. at p. 53, said, "When this was first argued at the bar . . . I confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action for

(3) *Wrongs to domestic relations.*

We have seen that in the Middle Ages the peculiar status of wards, infants, wives, and servants was very much more emphasized than it is in modern law.[1] We have seen too that the law of property, and the remedies for the infringement of proprietary rights, were then much more highly developed than the law of contract, and the remedies for breach of contract.[2] It is in the period when these ideas were predominant that the law relating to these kinds of wrongs originated; and all through the history of this branch of the law they have made their influence felt. It is this fact which helps to account for the unsatisfactory state of some of our modern rules.

It was in the case of the ward who was heir to property that the proprietary character of the father's or guardian's rights were most evident. The law knew a writ of right of wardship;[3] and it very early adapted the writ of trespass to the purpose of protecting the father's or the guardian's rights, by the invention of writs for the ravishment of the ward.[4] But on this branch of the law the long life of feudal wardship, and the great value of the feudal incident of marriage, exercised a very unfortunate effect.[5] These two reasons led the law to take the view that what it protected was not the rights of the parent or guardian as such, but the pecuniary interest which the parent or guardian had in the marriage of his heir. It followed, therefore, that these remedies were not available for the abduction of any child, but only for the abduction of a child who was an heir. Trespass, it was said in *Barham v. Dennis*,[6] was based upon a proprietary interest, and in a son or daughter a father had no property. It was only available, therefore, to protect the father's proprietary interest in the child's marriage.[7] For this reason the courts

deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The cases on this head are brought together in Bro. tit. Deceit pl. 29, and in Fitz. Abr. I have likewise looked into Danvers, Kitchins, and Comyns, and I have not met with any case of an action upon a false affirmation, except against a party to a contract, and where there is a promise, either express or implied, that the fact is true which is misrepresented."

[1] Vol. iii 61-65, 215 (wards), 513-520 (infants), 520-533 (wives); vol. ii 460-463 (servants).

[2] Ibid 355-356, 590. [3] Vol. iii 17. [4] Ibid 17, n. 1, 27.

[5] For these incidents see vol. iii 61-66, 516. [6] (1600) Cro. Eliza. 770.

[7] "They held also that the father should not have an action for the taking of any of his children which is not his heir; and that is by reason the marriage of his heir belongs to the father . . . and by reason of this loss only the action is given unto him. . . . But for the taking of a son or daughter not heir, it is not upon the same reason, and therefore not alike. Here the father hath not any property or interest in the daughter, which the law accounts may be taken from him," ibid at p. 770; and it would seem from Gray v. Jefferies (1587) Cro. Eliza. 55 that this remedy was only available when one took the heir and married him, and that it did not lie for the loss of the marriage for any other reason, or for injuries to the child, even if these injuries occasioned the loss of the marriage.

refused to recognize that the father had the same kind of proprietary interest in his child as he had in his servant[1] or his wife.[2] The result was that his interest in his children was unprotected unless the child happened to be his heir.

One of the judges, indeed, in *Barham v. Dennis* was prepared to take a more liberal view. "The father," said Glanville, J.,[3] "hath an interest in every one of his children to educate them, and to provide for them; and he hath his comfort by them; wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." If his view had prevailed, the development of this branch of the law would have been infinitely more satisfactory. As it did not prevail the law was driven to find a remedy, by the application to the relation of parent and child, of the writ provided to protect the relation of master and servant; and the result is, as Sir F. Pollock has pointed out, that the development of the law has been "halting and one-sided."[4] No doubt this device helped to mitigate the hardship of the law, more especially as very slight acts of service were, in later law, allowed to be sufficient to support an action.[5] But it did not afford a complete remedy. If, for instance, the child was too young to be capable of service, no action would lie for injuries to it.[6]

It is the application of this remedy to the relation of parent and child which is still used to give a remedy to a parent for the commonest and most flagrant injury to his rights as a parent—the seduction of a daughter. It would seem that it was in the middle of the seventeenth century that this particular application of trespass was made. In 1653, in the case of *Norton v. Jason*,[7] the plaintiff brought Case for entering his house, assaulting his daughter, and getting her with child. Rolle, C.J., gave it as his opinion that, "although the daughter cannot have an action, her father may, although not for entering into his house, because it was with his leave, nor for assaulting his daughter, and getting her with child,

[1] Below 429. [2] Below 430.
[3] Cro. Eliza. at p. 771. [4] Torts (12 ed.) 226.
[5] In Y.B. 22 Hy. VI. Mich. pl. 49, p. 31, Newton, C.J., lays it down that the relation of master and servant cannot be presumed from the relation of parent and child—"Si jeo porte bref de *Transgressio quare filium meum et haeredem in servicio meo existentem rapuit*, jeo voile bien que cel bref ne vaut: le cause est, tout soit il [rapuit] mon fitz et heir, il n'est enclude en ce qu'il est mon servant: car il poit servir ou luy plest"; but the later law was not so strict, see Weedon v. Timbrell (1793) 5 T.R. at p. 361 *per* Ashurst, J.; cp. Jones v. Brown (1794) 1 Esp. 217; Evans v. Walton (1867) L.R. 2 C.P. at p. 619 *per* Bovill, C.J.; in the last named case Bovill, C.J., says, "no evidence of service is necessary beyond that which the law will imply as between parent and child"—a view of the law quite contrary to that of Newton, C.J.
[6] Hall v. Hollander (1825) 4 B. and C. 660; but Bayley, J., thought that the father might have Case for expenses occasioned by the child's cure—a view which has been followed in the United States, Street, Legal Liability i 268 n. 7.
[7] Style 308.

because this is a wrong particularly done to her, yet for the loss of her service caused by this he may have an action." But, he added, "it is a pretty case and fit to be argued." There is another case of 1664 in which the plaintiff brought, not Case, but trespass quare clausum fregit;[1] but this form of action was obviously inapplicable, as Rolle, C.J., had pointed out, if the entry was by the leave and licence of the father. These cases, however, made it clear that the principle on which the modern action for seduction rests had been reached. It was laid down in 1664 that, if trespass quare clausum fregit was brought, the damages were not limited to the loss of service, but that the injured feelings of the parent could be taken into account, as an aggravation of the wrong done in breaking his close.[2] If, on the other hand, Case was brought per quod servitium amisit, the injured feelings of the parent could be considered in assessing the damages for loss of service.[3]

The courts have thus done their best to adapt this remedy to the case of seduction. But the incompleteness of the remedy is here even more marked than in other cases of injuries to children. For, in the oft-quoted words of serjeant Manning,[4] "the quasi-fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, and leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers."

Of the remedies given by the law for the abduction of a servant I have already spoken.[5] We have seen that they were supplemented by the provisions of the Statutes of Labourers. They rested at bottom on the idea that the master had a quasi-proprietary interest in his servant's services; and that idea is connected with ideas as to the status of a servant, which originated in the rules of law applicable to villein status. We have seen, too, that these rules were made the foundation in *Lumley v. Gye*[6] of an entirely new development of the law. In that case the real right of the master to his servant's services, was in effect given to all persons entitled to the benefit of any contract; for it was laid down that it is an actionable wrong to interfere, without just cause or excuse, with any existing contractual relation.

The same principles as were applied to the servant were applied

[1] Sippora v. Basset 1 Sid. 225.

[2] "Quant ceo est ex turpi causa come fuit icy, l'accion poet esse done in evidence sur tiel general declaration south les parolles (alia enormia), et le reason est, quia le ley ne voet compell le party de monstre ceo de record. Mes en touts auter cases de trespass le special matter pur que damages serra done doet estre plead," 1 Sid. 225; cp. Russell v. Corne (1704) 2 Ld. Raym. at p. 1032 *per* Holt, C.J.

[3] Bennett v. Allcott (1787) 2 T.R. at pp. 167-168 *per* Buller, J.

[4] Note to Grinnell v. Wells (1844) 7 M. and Gr. at p. 1044.

[5] Vol. ii 462-463; vol. iv 383-385.

[6] (1853) 2 E. and B. 216; vol. iv 384-385.

to the wife. The husband's interest in his wife's consortium, unlike the parent's interest in the consortium of his children, was considered to be sufficiently proprietary to support an action of trespass.[1] This is quite distinct from the right which the husband had, jointly with his wife, to sue for wrongs committed against her.[2] The latter right depended upon the incapacity of the wife to sue in her own name.[3] It was the incapacity of the wife to consent, which was the principle upon which the husband was allowed to bring the particular form of the action of trespass or action on the case, known as the action of criminal conversation, against one who had committed adultery with his wife.[4]

(4) *Wrongs connected with commerce and industry.*

Certain of the wrongs with which I have dealt in this and preceding chapters bear witness to the growing importance of commerce and industry. Some aspects of the law of defamation, of malicious abuse of the process of the courts, and of nuisance, the development of the conception of deceit, and the development of the idea of conversion—all afford illustrations. In addition, there is a solitary case of 1580 or 1595, in which an action of deceit was maintained for counterfeiting another's trade mark.[5] But much the most important instance of this influence on the law of tort is the beginning, at the close of this period, of the modern doctrine of employer's liability, with the history of which I shall deal in the following section.[6] Indeed, if we except this doctrine, it may I think be said that the growth of industry and commerce has not, during this period, exercised so great an influence on the law of tort as might have been expected. The explanation of this phenomenon is, it seems to me, somewhat as follows :—

We have seen that during the whole of this period all branches of commerce and industry were minutely regulated by the Legislature.[7] Wages were in theory fixed by the justices; and combinations to alter the rates of wages thus fixed were illegal.

[1] Guy v. Livesey (1619) Cro. Jac. 501; Hyde v. Scyssor (1620) ibid 538.

[2] Hyde v. Scyssor (1620) Cro. Jac. 538; Russell v. Corne (1704) 2 Ld. Raym. 1032.

[3] Vol. iii 526; cp. vol. v 315.

[4] See Galizard v. Rigault (1702) 2 Salk. 552, where the right to bring this action is assumed by Holt, C.J.; Street, Legal Liability i 264; as Mr. Street has pointed out, ibid 269 n. 1, "the idea in allowing trespass for assault and battery to be used in an action for seduction is that the girl's consent to the act of intercourse is irrelevant as against her father, just as the consent of the wife is irrelevant as against her husband, in an action for criminal conversation"; cp. Pollock, Torts (12th ed.) 227 n. *i*, and 228 n. *l*.

[5] Cited by Dodderidge, J., in Southern v. How Popham 144, as decided 22 Eliza; but in Cro. Jac. 471 it is said to be decided 33 Eliza.; as Mr. Street has pointed out, op. cit. i 418-419, it was not till the eighteenth century that this branch of the law began to develop.

[6] Below 472-482.

[7] Vol. iv 314-407; vol. vi 313-360.

Forestalling and regrating were offences known to the law. The corn laws tended to keep uniform the price of corn. There were many regulations and restrictions both as to apprenticeship and modes of manufacture. The difficulties placed by the Legislature on the assumption of corporate form,[1] tended to prevent the formation of large combines of manufacturers. In addition, in certain localities there still existed restrictions imposed by local bye-laws, under the authority of powers conferred by mediæval charters. When, in the course of the nineteenth century, nearly all the restrictions imposed by these multifarious laws were swept away under the influence of the doctrine of laissez faire, a number of new problems were set to the law of crime and tort. We have seen that one, and perhaps the most important of these problems, arose in connection with the crime and the tort of conspiracy.[2] But the same causes which led to the growth of this branch of the law of tort, led also to the growth of other branches. The principle of cases like *Garret v. Taylor*,[3] and more especially of *Keeble v. Hickeringill*,[4] and the exact definition of the new tort resulting from the decision in *Lumley v. Gye*,[5] all assumed great importance in cases which turned on the legality of certain activities of Trade Unions of employés and combinations of employers. Indeed, the fact that the common law could, from the basis of the principles contained in the Year Books and cases of this period, construct a body of law which was fitted to regulate the new industrial problems, to which the era of laissez faire had given rise, is perhaps the strongest illustration, in modern times, of the adaptability, and of the practical character of the principles evolved by a system of case law.

The Effects of these Developments on the Growth of the Law

We can, I think, distinguish three important effects of these developments on the growth of the law.

Firstly, the development of the substantive law in and through the forms of action, made it sometimes unreasonable, and sometimes excessively technical. The manner in which the fiction of per quod servitium amisit was used to supplement the defective character of the remedies given for wrongs to domestic relations, is the strongest instance of the evolution of an unreasonable set of rules.[6] The manner in which the rights of the parties were made dependent upon the correct appreciation by the pleader of the

[1] Above 219-221.
[2] Above 384, 392-397.
[3] (1621) Cro. Jac. 567; above 423.
[4] (1707) 11 East 574 note; above 426.
[5] (1853) 2 E. and B. 216; above 429.
[6] Above 428-429.

right form of action[1]—more especially, in later law, on the often fine distinction between Trespass and Case;[2] and the impossibility of joining two causes of action which fell under different forms,[3]—are both striking illustrations of the technical character of its rules.[4]

But secondly, the growth of specific torts, and the definition of the essential characteristics of these torts, helped to concentrate attention on the substantive rules of the law of tort. In the mediæval period the law of tort was largely contained in the rules as to the competence of various forms of action—Detinue and various forms of Trespass, Case and the various forms of Case. During this period, the law was acquiring a number of substantive rules, which are independent of adjective law; and this new importance of the rules of substantive law will increase during the eighteenth and early nineteenth centuries. This meant that the problem of distinguishing *damna cum* from *damna sine injuria* was presented to the courts in a somewhat different form. We have seen that, in the Middle Ages, the growth of the action on the case had brought this problem before the courts;[5] and in the law of this period and later it was often before the courts. But, while in the Middle Ages it was regarded rather as a problem relating to the competence of actions, in later law it is regarded as a problem relating to the substantive rights of the parties. It may be that, in many cases, "discussions of legislative principle have been darkened by arguments on the limits between trespass and case, or on the scope of a general issue"; and that "in place of a theory of tort we have a theory of trespass."[6] For all that, it is true that, during this period, the law is much nearer to a theory of tort than it was in the Middle Ages.

Thirdly, these developments necessitated a thorough revision of the mediæval principles of civil liability for wrong. We have seen that many of the later developments of the older torts, such as assault and battery, involved a consideration of the intention of the defendant;[7] an intention to deceive was the essence of deceit; and malice was an essential element in the tort of malicious

[1] Maitland, Forms of Action 298, 361-362.

[2] "We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion," Reynolds v. Clarke (1726) 1 Str. at p. 635 *per* Lord Raymond, C.J.; this dictum was cited with approval by Blackstone, J., in Scott v. Shepherd (1773) 2 W. Bl. at p. 897; see also Savignac v. Roome (1794) 6 T.R. at p. 130 *per* Grose, J.

[3] "A man who had been assaulted and accused of theft in the market place of his town was obliged, if he wished for redress for the double wrong, to issue two writs and to begin two litigations, which wound their course through distinct pleadings to two separate trials," Bowen, Administration of Justice in the Victorian Period, Essays A.A.L.H. i 518.

[4] For other illustrations in other branches of the law see vol. i 634 and n. 2, 645.

[5] Vol. iii 408.

[6] Holmes, The Common Law 78.

[7] Above 422.

prosecution.[1] The large mass of wrongs to person and property remedied by actions on the case, were coming to depend on the question whether the defendant had acted negligently to the damage of the plaintiff, and not merely on the question whether he had caused him damage by his act. Commercial necessities were showing that the mediæval rules as to the master's liability for the acts of his servants were too narrow. Of the manner in which all these causes transformed the mediæval principles of civil liability I shall speak in the following section.

§ 6. The Principles of Liability

Criminal Liability

We have seen that during the mediæval period criminal, unlike civil liability, was based upon the presence of a *mens rea*. We have seen, too, that the rules as to the possible defences to a criminal charge, and as to incapacities which would excuse from guilt, or mitigate punishment, were growing more precise; and that this growing precision was partly the cause, and partly the effect of the firmness with which the central principle of the criminal liability—the need for a *mens rea*—had come to be grasped.[2] During this period, (1) the nature of this *mens rea* in relation to various specific crimes was being analysed and elaborated; and (2) the same process of analysis and elaboration was taking place with reference, both to the incapacities which would excuse from guilt, and to some of the defences which might be made to a charge of crime. Under these two heads, therefore, I shall sketch shortly the development of this branch of the law.

(1) *The requirement of mens rea.*

It was well settled in the sixteenth century (in spite of the opinion to the contrary held in the fourteenth century)[3] that a mere intention to commit a crime, unaccompanied by any overt act, entailed no criminal liability. "The imagination of the mind to do wrong," it was said in *Hales v. Petit*,[4] "without an act done, is not punishable in our law, neither is the resolution to do that wrong which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offence to the world, and when the act is done it is punishable." And by an act was meant a voluntary act, so that, "if A by force takes the arm of B, and the weapon in his hand, and

[1] Above 391.
[2] Vol. iii 372-375.
[3] Ibid 373 and n. 4.
[4] (1563) Plowden at p. 259.

therewith stabs C, this is murder in A, but B is not guilty."[1] In fact, the manner in which the common law courts adopted the Star Chamber's view as to the criminality of attempts to commit crimes,[2] and treated these attempts as common law misdemeanours,[3] removed the chief reason for reviving the dangerous doctrine that a mere intent to commit a crime entailed liability.

To produce criminal liability, therefore, there must be both an act and a guilty intent. It followed that if one killed another accidentally he did not commit murder—"for it is the will and intention that is regularly required, as well as the act and event, to make the offence capital."[4] So in the case of larceny, "as it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi*, otherwise it is not felony, for it is the mind that makes the taking of another's goods to be a felony or a bare trespass only."[5] It followed also that, though ignorance of law never excused from criminal liability,[6] ignorance of fact might, if it negatived any sort of guilty intent.[7] This principle was applied in 1639, in the case of *R. v. Levett*,[8] where the accused, under the mistaken but justifiable impression that a person in the house was a burglar, killed her.

The more difficult question now arises, what is the nature of this guilty intent which the law requires as a condition of criminal liability? The answer in general terms is that it is different in different classes of crimes—in 1503, for instance, Marowe saw that the guilty intent required for murder was different from that required for larceny;[9] and that, in certain classes of crimes, the law has specified certain kinds of acts, and ruled that the doing of them amounts to the guilty intent required by the law for the commission of these crimes. We have seen that in other branches of the law there was a tendency in this direction, which was partly due to the difficulty of proving intent, where the parties to an action were not competent witnesses;[10] and no doubt the tendency was emphasized in the criminal law from motives of public policy. The safety of the state and its citizens made it necessary that the meagre mediæval rules should be extended. The result

[1] Hale, P.C. i 434, citing Reniger v. Fogossa (1551), Plowden at p. 19; but it was only physical violence which operated in this way—"if it be only a moral force, as by threatening, duress, or imprisonment etc. this excuseth not," ibid; see below 443-445.

[2] Vol. v 201. [3] Kenny, Criminal Law 82.

[4] Hale, P.C. i 38. [5] Ibid 508. [6] Ibid 42.

[7] "But in some cases ignorantia facti doth excuse, for such an ignorance many times makes the act itself morally involuntary," ibid.

[8] (1639) Cro. Car. 538.

[9] De Pace, Oxford Studies in Social and Legal History, vol. vii 378.—"Et nota que en mort de home lentent de celui que fait le morte ne fait le felony come il fait de Theft. . . qûar si home entende de bater ascun person et en cette baterie il tua une autre, ceo est felony nient obstante son entent ne fut de luy occider. Mes en ascun cas de mort de homme entent ferra le felony."

[10] Vol. iv 481-482.

is that the *mens rea* or guilty intent required by the law, though it originated in the idea that accompanying the act there must be an element of moral blameworthiness, though it still connotes such moral blameworthiness, has become a very technical notion. Its assumption of this technical form is mainly the work of this period of our legal history. Let us take as illustrations of this process the manner in which it has come to be defined in relation to murder, manslaughter, and larceny.

It is clear that Coke was stating a well settled principle when he says of the "malice prepensed" or "malice aforethought" which is necessary for murder, that it exists "when one compasseth to kill wound or beat another and doth it sedato animo"; and that this malice was "so odious in law," that "though it be intended against one, it shall be extended towards another."[1] So far as the compassing is a compassing to kill, this definition gives us the natural meaning of the term; but in the statement that a compassing to wound or beat, and still more in the statement that a blow intended for another, will, if death ensues, amount to malice aforethought, we are departing from the natural meaning of words. But this extension was still further extended in the course of the sixteenth century. It was held by a majority of the judges in 1536,[2] that, if a person was killed accidentally by one of the members of a band engaged on a felonious act, all could be held to be guilty of murder. The judges in this case were not unanimous;[3] but it was the opinion of the majority which has prevailed.[4] A fortiori malice was implied if A assaults B with intent to rob him, and in the course of the struggle A kills B.[5] "He that doth a cruel act voluntarily," said Holt, C.J., "does it of malice prepensed."[6] This idea was further extended to cover the case where an act likely to cause damage had caused death, though there was no intention to hurt anyone.[7] It was not difficult to conclude from this that murder was committed, if death had ensued as the result of doing any unlawful

[1] Third Instit. 51, citing inter alia Bracton's dictum at f. 155a that "si quis unum percusserit et occiderit, cum alium percutere vellet in felonia, tenetur"; this was no doubt the source of Marowe's similar statement, above 434 n. 9. Halloway's Case (1629) Cro. Car. 131; Hale, P.C. i 466; we have seen that Marowe states the law even more widely.

[2] Mansell and Herbert's Case, Dyer 128b—a mob had assembled in order to assault and rob a house, and a woman coming out of the house was killed by a stone thrown by one of the mob at another person.

[3] The dissentient judges were evidently reluctant to extend the meaning of malice; they said, "no malice was intended against the woman, and murder cannot be extended beyond what was intended."

[4] Above 329; Hale, P.C. i 441-442.

[5] Ibid 465; Coke, Third Instit. 52.

[6] R. v. Mawgridge (1707) Kelying at p. 127; cf. Coke, Third Inst., 62—"if it be voluntary the law implieth malice."

[7] See R. v. Hull (1664) Kelying, 40; Foster Crown Law, 262-263; Kenny op. cit. 135-136.

act.[1] This wide rule was, however, narrowed down by Foster to the case when the unlawful act was also felonious and malum in se—e.g. if A, intending to steal B's poultry, shoots at them and accidentally kills C.[2] But it is probable that even this mitigated form of the rule would not now be followed.[3] Another extension recognized in this period is, however, still part of the law—the case where a person kills an officer of the law, or magistrate, in the regular[4] execution of his duty, though he had no intention of killing him.[5] In these ways, through the decisions given in this period, the particular *mens rea* known as malice aforethought which was needed to make homicide murder, was so extended that it has come to be, as Professor Kenny has said, merely an "arbitrary symbol."[6] "For the malice may have in it nothing really malicious, and need never be really aforethought."[7]

Manslaughter is said by Hale to be "the voluntary killing of another without malice express or implied."[8] But this does not mean, as Professor Kenny points out,[9] that there is no *mens rea*. It merely means that the guilty intention is of a different character. The character of the guilty intent required was, it would seem from Hale, elucidated chiefly by cases which drew the line between murder on the one hand, and a merely accidental killing on the other. Some of these cases depend on the fact that the person who caused the death has been careless—e.g. the case of the builder who drops a piece of stone without due warning;[10] and often the question whether murder or manslaughter has been committed will depend on the degree of carelessness shown.[11] Others depend on the fact that, though there was no intention to cause death, the death was in fact caused by the accused in the course of doing an

[1] "If the act be unlawful it is murder. As if A meaning to steal a deer in the park of B shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy nor knew not of him," Coke, Third Instit. 56.

[2] Crown Law, 258-259—"The rule I have laid down supposeth that the act from which death ensued was *malum in se*. For if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man."

[3] Kenny, op. cit. 137-138.

[4] Cook's Case (1639) Cro. Car. 537; Hale, P.C. i 458.

[5] Young's Case (1586) 4 Co. Rep. 40a; Mackalley's Case (1612) 9 Co. Rep. at ff. 68a, 68b; Hale, P.C. i 457 seqq.

[6] Op. cit. 132

[7] Ibid 132-133 as Stephen, J., said in R. v. Serné (1887) 16 Cox C.C. at p. 312, "the words malice aforethought are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed."

[8] P.C. i 466.

[9] Op. cit. 115-"we shall better avoid confusion of language if we say, 'without any of those *more guilty* forms of malice which amount to murderous malice.' For malice, in its wide legal sense (that is to say *mens rea*) is essential to every crime."

[10] R. v. Hull (1664) Kelyng 40.

[11] Above 435 n. 7.

unlawful act—e.g. playing at an unlawful game [1]—but an act not sufficiently unlawful to make the homicide murder.[2] Others depend on the fact that the death occurred in the course of a sudden quarrel which negatived the idea of premeditation;[3] and, for the same reason, a homicide committed under severe provocation will generally be manslaughter, if done in the heat of the moment.[4] Here again, therefore, the *mens rea* required by the law may be of the most various kinds, and of all degrees of moral guilt. It is for this reason that manslaughter is said to be "an elastic crime," "for the degrees of guilt which may accompany it extend from the verge of murder to the verge of excusable homicide." [5]

In the case of larceny it is the intention to steal which makes all the difference between the felony and a bare trespass. But whether this intention is present or not must be judged by the circumstances of the case. Hale considered that it was possible to illustrate, but not to define, "all the circumstances evidencing a felonious intent." [6] From that day to this, the reported cases have gone on illustrating these circumstances, till it is possible to lay down one or two general rules; and, even when Hale wrote, one or two of them had emerged. Thus, it was no felony to take A's horse from a common for a ride, when the horse was restored to the common at the end of the ride.[7] Similarly, if my servant takes my horse and uses him for his own occasions, it is no felony if he returns him; but if, while on his journey, he sells him as if he were his own, "that act of selling" is declarative of his first taking to be felonious." [8] Again, "if A, thinking he hath a title to the horse of B, seiseth as his own, or, supposing that B holds of him, distrains the horse of B without cause, this regularly makes it no felony but a trespass, because there is a pretence of title, but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." [9]

These illustrations show that the growth of the criminal law is largely bound up with the elaboration and differentiation of the different sorts of mental attitude, which is needed to constitute a *mens rea* in different classes of crimes; for, when this elaboration

[1] Hale, P.C. i 472-473.

[2] See Kenny, op. cit. 110; it is on this principle that one who kills another in a duel is guilty of murder, vol. v 199-201.

[3] Coke, Third Instit. 55; above 303.

[4] Coke, Third Instit. 55; Royley's Case (1612) Cro. Jac. 296; Maddy's Case (1671) 1 Vent. 158.

[5] Kenny, op. cit. 124.

[6] "But in cases of larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury," P.C. i 509.

[7] Ibid. [8] Ibid. [9] Ibid.

and differentiation have been made, we have gone a long way to defining the most essential features of these different crimes. We shall now see that this same process has helped the law to attain some more definite rules as to the various incapacities which will excuse from guilt, and has had some influence on the law as to some of the defences which can be made to a charge of crime.

(2) *Incapacities and defences.*

The three incapacities of which I intend to speak shortly are infancy, insanity, and drunkenness.

Infancy. It would seem that the modern rules relating to the incapacity of infants were first settled in the case of capital offences —treason and the felonies. We have seen that it was well settled in this period that a child below the age of seven could not be guilty of a felony, that between seven and fourteen there was a rebuttable presumption to the same effect, and that over fourteen his capacity was regarded as normal.[1] In fact, from that time to this, there have been a few instances in which children of under fourteen have been convicted, and one or two in which they have even been executed;[2] and Hale testifies to the fact that so many crimes were committed by youths between fourteen and twenty-one, that, "if they should have impunity by privilege of such their minority, no man's life or estate could be safe."[3] With regard to crimes under the degree of felony, the law was not by any means so certain. In the case of crimes of violence, such as riot or battery, the same rule as that applicable to felony was enforced in Hale's time.[4] But then, as now, the misdemeanours covered a wide field, and some of them, then as now, were remote from the sphere of crime. For this reason, in certain of these cases, the law adopted the rule applicable to the proprietary or contractual capacity of infants, and exempted them from liability if they were under twenty-one. Thus for mere nonfeasance (unless the liability were ratione tenurae) they were exempt, because laches could not be imputed to them.[5] Similarly, if the law imposed a penalty for a wrongful dealing with property, but the penalty could be regarded as only collateral to the main purpose of the law, viz. to discourage such dealings with property, an infant under twenty-one escaped.[6] But these exemptions are now probably obsolete;

[1] Vol. iii 372.

[2] Hale, P.C. i 26-27; Bl. Comm. iv 23-24; Kenny, op. cit. 50-51.

[3] "Experience makes us know, that every day murders, bloodshed, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority no man's life or estate could be safe," P.C. i 25.

[4] Ibid 20.

[5] Ibid; see R. v. Sutton (1835) 3 Ad. and E. at pp. 601-603.

[6] "When the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanour, there in many cases the infant

and for all ordinary misdemeanours the rule is the same as in the case of felony.

Insanity.—"No felony or murder," says Coke,[1] "can be committed without a felonious intent and purpose . . .; but furiosus non intelligit quid agit, et animo et ratione caret, et non multum distat a brutis, as Bracton saith, and therefore he cannot have a felonious intent." For this reason insanity was a bar either to the institution or the continuance of criminal proceedings. We have seen that it was settled in the mediæval period that madness, if it existed when the crime was committed, negatived liability.[2] It was further settled in this period that, if a person of sound mind commits a crime and becomes mad before his arraignment, he cannot be arraigned; "and if such person after his plea and before his trial, become of non-sane memory, he shall not be tried; or, if after trial he become of non-sane memory, he shall not receive judgment; or, if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution."[3] In spite of some doubts as to whether these rules were applicable to high treason, if it took the form of an attempt to kill the king,[4] these rules were recognized to be of universal application in the seventeenth century.

There remain the much more difficult questions, (i) what the law will regard as such insanity as will totally exempt from criminal liability; and (ii) how it will treat what may be called cases of partial insanity, that is cases where a person is clearly not sane, and yet not wholly bereft of reason. No part of the criminal law is so fluid as this, largely because it is a question partly belonging to legal and partly to medical science; and because the latter science has, as medical knowledge advances or the fashion in medical theory changes, adopted very variable views on this matter.[5] On two points however the law has been clear from the seventeenth century onwards. Firstly, it is not necessary, in order to escape liability, that the accused should

under the age of twenty-one shall be spared, though possibly the punishment be enacted by Parliament. If an infant of the age of eighteen years be convict of a disseisin with force, yet he shall not be imprisoned. . . . If an infant be convict in an action of trespass vi et armis, the entry must be *nihil de fine, sed pardonatur quia infans*," P.C. i 21.

[1] Beverley's Case (1603) 4 Co. Rep at f. 124b.

[2] Vol. iii 372 and n. 9.

[3] Hale, P.C. i 35.

[4] Coke said in Beverley's Case (1603) 4 Co. Rep. at f. 124b that, "in some cases *non compos mentis* may commit high treason as if he kills or offers to kill the king"; but this is contrary to what he says in Third Instit. 6; and that it is not law is shown by 33 Henry VIII. c. 20 (see vol. iv 499-500), as is practically admitted by Coke, loc. cit. and by Hale, P.C. i 35, 37; but Hale, P.C. i 37, though he proves it to be a baseless exception, refused to deny it "because it tends so much to the safety of the king's person."

[5] On the whole subject see Stephen, H.C.L. ii chap. xix.

have been found a lunatic by inquisition.[1] "The trial of the incapacity of a party indicted or appealed of a capital offence is, upon his plea of not guilty, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree as may excuse him from the guilt of a capital offence."[2] Secondly, the law presumes every one to be sane till the contrary be proved.[3]

(i) The first question—what the law will regard as such total insanity as will exempt from all liability—is, as Hale says, a question of fact. But on the question how this question of fact shall be answered the law has given very different answers at different periods. Professor Kenny says,[4] "At one time a view prevailed that no lunatic ought to escape punishment unless he were so totally deprived of understanding and memory as to be as ignorant of what he was doing as a wild beast. But, ever since the epoch-making speech of Erskine in defence of Hadfield (in the year 1800),[5] a view at once more rational and humane has prevailed, which bases the test upon the presence or absence of the faculty of distinguishing right from wrong." Later, a still more precise test was evolved. Did the accused know the nature of the act which he was doing, and, if he did know it, did he know it was wrong? If so, and if the act was contrary to law, he is punishable.[6] This test was suggested in reference to persons suffering from insane delusions, i.e. the partially insane; but it obviously supplies a test for coming to a conclusion whether or not any person is wholly insane.

(ii) The second question—the treatment to be accorded to cases of partial insanity—is far more difficult. Hale is evidently at a loss how to deal with these cases. In cases of recurrent intervals of madness, indeed, there is no difficulty. If during these intervals the person affected is wholly mad, the rule as to

[1] As to this see vol. i. 474-475. [2] Hale, P.C. i 33. [3] Ibid.

[4] Op. cit. 53, citing R. v. Arnold (1724) 16 S.T. at p. 765, where Tracey, J., said, "it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or wild beast; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth show a man who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did."

[5] 27 S.T. 1282; Stephen H.C.L. ii 159.

[6] M'Naghten's Case (1847) 10 Cl. and Fin. at p. 210; as is there said, "the mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged"; as can be seen from the way in which Tracey, J., used this test in R. v. Arnold, above n. 4, the new test set out by the judges in M'Naghten's case is more favourable to the accused, and better calculated to give effect to the modern ideas as to the treatment to be accorded to the insane

total insanity applies.[1] But if the accused is not wholly destitute of reason, he inclines to the view that such insanity will not excuse in the case of any capital crime—"for doubtless, most persons, that are felons of themselves, are under a degree of partial insanity, when they commit these offences." On the whole, he can only recommend that each case should be treated on its own merits, and concludes with the somewhat fatuous suggestion that, as such persons have generally as great understanding as a child of fourteen, they should be treated accordingly.[2] But, in spite of this, Hale's treatment of the subject is, as Stephen says, "marked by his ordinary shrewdness and judgment, and does recognize, though faintly and imperfectly, the main divisions of the subject";[3] and Blackstone[4] could add little to his statement.

No authoritative pronouncement on this subject was made till 1843; and then the test suggested was, as we have seen, whether the accused knew the nature of the act he was doing, and whether he knew that it was wrong. It followed from this that, if a person was labouring under a partial delusion, and was not in other respects insane, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real."[5] Since 1843, however, the law has developed, because the discoveries of medical science have revealed more of the infinite complexities of the problem of insanity. Thus it is now recognized that, to the mind of a madman, there may be a connection between his delusion and his crime, which is not apparent to a sane person; and that account should be taken of the effect of insanity upon emotion and will power.[6] These considerations have led to a more merciful administration of the law, than a literal following of the rules laid down in 1843, would justify. It is obvious that the development of this branch of the law must, to some extent, depend upon the development of medical science.

Drunkenness.—The rule laid down in the sixteenth century was short and clear—drunkenness was no excuse for crime, but rather an aggravation of the offence. "If a person that is drunk," it was said in 1551,[7] "kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but in as much as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby"; and Coke,[8] Hawkins[9] and Blackstone[10] lay down the law in the same way. Hale, however, allows two modifications of

[1] Hale, P.C. i 30-31.
[2] Ibid 30.
[3] H.C.L. ii 150-151.
[4] Comm. iv 24-25.
[5] M'Naghten's Case (1843) 10 Cl. and Fin. at pp. 209-211.
[6] Kenny, op. cit. 55-56.
[7] Reniger v. Fogossa, Plowden at p. 19.
[8] Beverley's Case (1603) 4 Co. Rep. at f. 125a; Co. Litt. 247a.
[9] P.C. Bk. 1 cap. 1 § 6.
[10] Comm. iv 25-26.

this rule. Firstly, if the intoxication was not caused by his own fault, as where it was caused by "the unskilfulness of his physician or by the contrivance of his enemies"; and, secondly, if by habitual drunkenness "an habitual or fixed phrensy be caused."[1] In the first case it would seem that, if the effect of the intoxication was such that a temporary or a permanent insanity were caused, the person so affected was to be treated as if he were insane. But there seem to be no cases of this kind in the books; and, as we shall see immediately, the development of the law as to the effect of drunkenness on criminal liability has removed the necessity for this exception. Probably at the present day drunkenness, whether caused by the accused's own fault or not, will have the same effect on his liability for a crime committed while in that state. At most the fact that the drunkenness was not caused by his own fault, would, if did not excuse from liability, be a ground for a mitigation of punishment. In the second case the accused is, as Hale says,[2] treated as insane. But at the present day this treatment is accorded, both in the case where the insanity is "fixed and habitual," and where it is merely temporary. "Drunkenness," said Stephen, J.,[3] "is one thing, and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness even for a time, as would have relieved him from responsibility, if it had been caused in any other way, then he would not be criminally responsible."

It is in respect of the effect of drunkenness, which does not fall under either of these two heads, that the law in the nineteenth century has departed from the older rule.[4] If drunkenness does not amount to insanity, the drunkard can, unlike the madman,[5] be tried and convicted.[6] But, under the influence probably of the contemporary modifications which were taking place in the law as to insanity,[7] the judges began to think that drunkenness should be allowed to modify or negative criminal liability in certain cases. But exactly what these conditions were, and how in principle they should operate, was for some time not very clear. There are some loose dicta in the earlier cases;[8] but in the middle and the latter

[1] P.C. i 32. [2] Ibid.

[3] R. v. Davis (1881) 14 Cox C.C. at p. 564.

[4] "The law stood as thus expressed for many years, and, as far as we know, the point was first decided in a contrary sense in *R. v. Grindley* decided in the year 1819," R. v. Meade [1909] 1 K.B. at p. 898.

[5] Above 439.

[6] See Director of Public Prosecutions v. Beard [1920] A.C. 479.

[7] Above 440-441.

[8] Thus in R. v. Grindley, 1 Russell, Crimes (7th ed.) i 88 n. b, Holroyd, J., said that the fact that party was drunk, was a material fact to be considered in coming to a conclusion whether or not an act was premeditated; but this was repudiated by Park, J., in R. v. Carroll (1835) 7 C. and P. at p. 147, who said that Holroyd, J., had retracted

half of the nineteenth century, it was coming to be thought that, "where intent is of the essence of a crime with which a person is charged, that intent may be disproved by showing that at the time of the act charged, the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent."[1] But in 1909, in *R. v. Meade*, the rule was laid down more broadly. It was said that the presumption that a man intends the natural consequences of his acts, may be rebutted by showing that his mind was "so affected by the drink he had taken, that he was incapable of knowing that what he was doing was dangerous, i.e. likely to inflict serious injury."[2] But in 1920, in the case of the *Director of Public Prosecutions v. Beard*,[3] the House of Lords put the law on a clear and logical footing, by holding that, in as much as a *mens rea* of one sort or another is, with very few exceptions,[4] a necessary constituent of all crimes, the true rule is that, if the drunkenness has produced in a person accused of a crime, an incapacity to form the particular intent necessary for the commission of that crime, he cannot be convicted;[5] and that it is only in these circumstances that drunkenness, not amounting to insanity, is a defence.[6]

Let us now turn to certain defences which rest ultimately on the fact that, in the circumstances, no *mens rea* is imputable. These defences are coercion, compulsion, and necessity.

Coercion.—This, as Hale points out,[7] is not usually a defence. The doctrine of ministerial responsibility had, when Hale wrote, been well established, and prevented the royal command from being an excuse for the commission of crime.[8] It was also clear that neither the command of a parent to his child, nor of a master to his servant, was any defence.[9] The only relationship which could give rise to this defence was that of husband and wife. We have seen that, during the mediæval period, it was recognized that, if a married woman committed certain crimes under the coercion of her husband, she escaped from liability.[10] This rule was

his opinion; in R. v. Monkhouse (1849) 4 Cox C.C. at p. 56 Coleridge, J., ruled that drunkenness might be a defence, "if such as to prevent his restraining himself from committing the act in question"; cp. Director of Public Prosecutions v. Beard [1920] A.C. at p. 495.

[1] R. v. Meade [1909] 1 K.B. at p. 898.

[2] At p. 898. [3] [1920] A.C. 479. [4] Vol. iii 374.

[5] "The difficulty has arisen, largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is, not whether he was incapable of forming the intent, but whether he was incapable of foreseeing or measuring the consequences of the act," [1920] A.C. at pp. 503-504.

[6] It is said, Kenny, op. cit. 61, that it "may produce such a mistake of fact as will in itself excuse an otherwise unlawful act"; *sed quære* whether a mistake so produced, unless it negatives the necessary intent, can or should have any effect on the drunken man's liability. [7] Hale P.C. i c. vii.

[8] Ibid 43-44; vol. vi 101-103, 267. [9] Hale, P.C. i 44. [10] Vol. iii 530-531.

extended during the latter part of the seventeenth century. As thus extended, it runs as follows:—Whenever any one of a certain limited number of crimes is committed by the wife in the presence of her husband, she is presumed to have committed it under the coercion of her husband, and for that reason escapes liability.[1] Hale's[2] opinion was that the reason for thus extending the law, and allowing coercion to be presumed from the mere presence of the husband, was probably "because the judges wished to give to married women some sort of rough equivalent for the benefit of clergy enjoyed by their husbands."[3] But the limits of the rule are uncertain. It does not apply to treason or murder,[4] nor to misdemeanours specially connected with the management of the house;[5] and it can be rebutted by proof that the wife was the active partner in the crime.[6] Moreover, taken in connection with the non-admissibility of this defence in other cases, it may, as Stephen points out, produce obviously unjust results. If a husband, wife, and their child of fifteen commit larceny, though it be proved that the child acted under threats by the father, and that no threats were offered to the wife, the child will be convicted, and the wife will escape.[7]

Compulsion.—Hale lays it down that "in times of war and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace."[8] The defence, therefore, is not available in time of peace. There are apparently only two cases in which Hale's principle has ever been put forward as a defence.[9] The result is that the law

[1] Stephen, Digest of the Criminal Law *Art.* 30; Kenny, op. cit. 71-72; it is fairly clear from the authorities which are collected by Stephen, op. cit. 332-336, that the rule, in its modern form, is not much older than Hale; Hale, P.C. i 45-46, admits that there is authority against this form of it, and states it only as "the modern practice and fittest to be followed"; it is probable that Bacon had something to do with the establishment of the practice; he says in his Maxims (Works Ed. Spedding vii 344) "where baron and feme commit a felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes her husband"; but this, as Stephen says, "goes infinitely beyond his authorities."

[2] "Otherwise for the same felony the husband may be saved by the benefit of clergy, and the wife hanged," P.C. i 45-46.

[3] Stephen, H.C.L. ii 106; it was only a rough equivalent, for, as Hale says, P.C. i 46, "in manslaughter *committed jointly* by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture."

[4] Hale, P.C. i 45.

[5] "A wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife has a principal share," Hawkins, P.C. Bk. 1 Cap. 1 § 12.

[6] R. v. Cruse (1838) 8 C. and P. 541.

[7] H.C.L. ii 106.

[8] P.C. i 49; vol. iii 372.

[9] R. v. M'Growther (1746) Foster, Crown Law 13; R. v. Crutchley (1831) 5 C. and P. 133; Stephen, H.C.L. ii 106.

relating to it is, as Professor Kenny says,[1] "both meagre and vague."

Necessity.—That certain kinds of public necessity will excuse what would otherwise be a breach of the law, has long been a recognized principle. Some illustrations of this principle have been worked out into elaborate rules—the rules, for instance, as to the measures which may be taken in self-defence,[2] or to arrest criminals,[3] and the rules which are summed up under the misnomer martial law.[3] Lord Mansfield once suggested that an extraordinary case might arise, in which imminent danger might excuse the deposition of a colonial governor by his council;[4] and his statement was approved by the court in *R. v. Dudley*.[5] But naturally the limits of this principle are and must be vague; and cases like that suggested by Lord Mansfield, will probably be decided upon political, rather than upon strictly legal, considerations. In cases which turn upon private rather than on public necessity the law has always been very reluctant to admit this defence. There are one or two dicta in the sixteenth century pointing to its admission in certain cases;[6] but it is now settled that no private necessity is, as a general rule, allowed as an excuse for the commission of a crime against some third person. A man who is assaulted and in peril of death, has no right to kill an innocent third person in order to effect his escape;[7] and a man who is in dire necessity for clothes or food or drink, has no right to steal to satisfy his needs.[8] It is just possible to imagine exceptions to this general rule—but no case so far has occurred in which the validity of such an exception had been admitted.[9] As Stephen says,[10] "these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards, the jury not being themselves under the pressure of the motives which influenced the alleged offenders."

[1] Op. cit. 73.
[2] Vol. iii 312-314, 377-378, 598-604.
[3] Vol. i 578; vol. vi 52-54.
[4] R. v. Stratton (1779) 21 S.T. at p. 1224.
[5] (1884) 14 Q.B.D. at p. 285.
[6] "If a man steal viands to satisfy his present hunger, this is no felony nor larceny," Bacon, Maxims, Works (Ed. Spedding) vii 343; for which there is some authority in the argument of Reniger v. Fogossa, Plowden at p. 19.
[7] "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailants' fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact: for he ought rather to die himself than kill an innocent," Hale, P.C. i 51; R. v. Dudley (1884) 14 Q.B.D. 273. This rule is not inconsistent with Bacon's dictum, Works vii 344, that, if a shipwrecked sailor on a plank thrust another off to save himself from drowning, he commits no crime; he does no bodily harm to the other, and what he does is in self-defence; see Kenny, op. cit. 76 n.
[8] Hale, P.C. i 54-55; Bl. Comm. iv 31-32; as Blackstone points out, the poor law makes such a permission quite unnecessary.
[9] See Kenny, op. cit. 76 n.
[10] H.C.L. ii 109-110.

In these various ways the law, starting from the idea that a *mens rea* or element of moral guilt is a necessary foundation of criminal liability, has so defined and elaborated that idea in reference to various sorts of crimes, that it has come to connote very many different shades of guilt in different connections. But, though *mens rea* has thus come to be a very technical conception with different technical meanings in different contexts, it has never wholly lost its natural meaning; and, because its natural meaning has never been wholly lost sight of, the necessity for its presence, in some form, has supplied the principle upon which many of the circumstances, which will negative criminal liability, are based. These, in their turn, have been so developed that they have become the foundation of different bodies of technical doctrine; and in these ways a large part of our modern criminal law has been developed. We shall now see that the very different developments which have taken place in the rules of civil liability, have likewise created no inconsiderable part of our modern law of tort.

Civil Liability

During the mediæval period the principle which underlay the law as to civil liability can be stated somewhat as follows:[1] A man is liable for all the harm which he has inflicted upon another by his acts, if what he has done comes within some one of the forms of action provided by the law, whether that harm has been inflicted intentionally, negligently, or accidentally. A man acts at his peril. This absolute liability for damage caused by an act which comes within one of the forms of action, even though the damage is the result of pure accident, was restated by Bacon at the end of the sixteenth century;[2] and it was used by Hale in the seventeenth century to point the contrast between criminal and civil liability.[3] It was logically followed out (i) in respect to the defences open to a defendant, and (ii) in respect to a person's liability for the acts of his servants. (i) A defendant could escape from liability if he could prove that his act was, in the circumstances, permitted by the law, either in the public interest, or in the necessary defence of his person or rights of property; or that the act, which was the immediate cause of damage, was done, not by himself, but by the plaintiff; or that it was unavoidable by reason of an 'act of God.'[4] (ii) As a defendant was liable only for his acts, he could not as a rule be held liable for any tort committed by his servant, which he had not commanded or

[1] See vol. iii 375-377.
[2] Ibid 376-377.
[3] Ibid 375.
[4] Ibid 377-379, 380.

ratified; for unless he had commanded or ratified it, it could not be said to be his act.[1]

It is clear that this principle of civil liability rests ultimately upon a very primitive basis. It obviously takes account, not of the moral shortcomings of the defendant, but only of the loss of the plaintiff; and this characteristic is reminiscent of the days when the compensation payable was regarded, not as a penalty for wrongdoing, but as a means whereby the plaintiff was induced to forego his right to take revenge.[2] But, as in other cases, the precocious development of English law gave an unusually long life to this principle, because it had been made the basis of a technical system of fixed rules. The result is that some of the rules, to which it gave rise, long remained a part of English law; and the principle itself was unsuccessfully invoked as a ground of liability as late as 1891.[3]

It was during this period that the principle began to be undermined. In the first place, a certain number of the new torts, which were springing up in this period, were based on some form of wrongful intent—they were essentially malicious wrongs. In the second place, in a very much larger number of cases the courts were beginning to base the defendant's liability, not on the fact that he had acted, but on the fact that he had acted negligently, to the damage of the plaintiff. Both these causes tended firstly to restrict, and then to encroach upon, the sphere of the mediæval principle. But the mediæval principle, though greatly restricted in its sphere, did not wholly disappear. A place is still found for it in modern law; but it is a very different place from that which it occupied in the mediæval law; and it is founded on very different principles. In the third place, at the close of the seventeenth century, the beginnings of the modern doctrine of Employers' Liability entirely changed the mediæval principles relating to this part of the law.

I propose to relate the history of these changes under the following heads:—(1) the conceptions of wrongful intention and negligence as bases of liability; (2) the place of the mediæval principle of liability in modern law; and (3) the doctrine of Employers' Liability.

(1) The conceptions of wrongful intention and negligence as bases of liability.

The part played by wrongful intention in the law of tort is and always has been small. It has come to be an essential element in

[1] Vol. iii 382-385. [2] Vol. ii 50-52.
[3] Stanley v. Powell [1891] 1 Q.B. 86.

the tort of deceit,[1] of malicious prosecution,[2] and of defamation, when the words complained of were spoken on an occasion which is protected by a qualified privilege.[3] We have seen that at one time the courts laid it down that malice was always an essential element in the tort of defamation. But this malice was always implied by the law from the making of the defamatory statement; and it is now recognized that it is not an essential element in the tort.[4] A very similar development has taken place in respect of the new tort of persuasion to break a contract created by *Lumley v. Gye*.[5] It was at one time thought that its essence was the malicious persuasion to break a contract.[6] But that idea has been ruled by the House of Lords to be erroneous.[7] Just as the essence of the tort of defamation is the publication of untrue defamatory statements without just cause or excuse, so the essence of this new tort created by the case of *Lumley v. Gye* is the fact that a breach of contract has been knowingly and wilfully procured without just cause or excuse. The part, therefore, played by the element of wrongful intention in creating civil liability is very small; and, except in the case of those torts in which the existence of such an intention is an essential factor, the fact that such an intention exists will not make an act, otherwise lawful, tortious. With respect to the exercise of rights of property this proposition was affirmed by the House of Lords in 1895,[8] and with respect to the exercise of other rights in 1898;[9] and there can be little doubt but that it is historically sound.[10] We have seen that, in the mediæval period, the courts refused to base civil liability upon intent—"the thought of man is not triable"; and, later, wrongful intent was only partially admitted as a ground of liability in the case of certain specified torts. The contrary decision would have given to wrongful intent a far more extensive effect in creating civil liability, than was warranted by any of the previous decisions. It would, in effect, have given to it a different, but almost as extensive an effect, as negligence has come to have in the creation of this liability.

[1] Vol. iii 408; above 426.
[2] Above 391.
[3] Above 372, 375.
[4] Above 374-375.
[5] (1853) 2 E. and B. 216; for the development of this tort see vol. iv 383-385; above 431.
[6] Bowen v. Hall (1881) 6 Q.B.D. 333; Temperton v. Russell [1893] 1 Q.B. 715.
[7] Allen v. Flood [1898] A.C. 1; at p. 121 Lord Herschell said, "A study of the case of *Lumley v. Gye* has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word maliciously was found in the declaration, the validity of which was then under consideration; but I do not think the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract."
[8] Mayor of Bradford v. Pickles [1895] A.C. 587.
[9] Allen v. Flood [1898] A.C. 1; and see Lord Herschell's statement at p. 124.
[10] See Pollock, Torts (12th ed.) 157-158.

We have seen that the idea that civil liability was based upon negligence was unknown in the mediæval common law. The central idea of the mediæval common law, was that civil liability was based upon an act causing damage, if that act fell within one of the causes of action provided for by the law.[1] This idea obviously excludes any direct reference to negligence as a cause of liability. But we have seen that the conception of negligence is latent in the principle that a man is only liable for the damage which is the proximate consequence of his act.[2] The fact that the conception of negligence is latent in this principle was naturally emphasized by the growth of actions on the case, in which the damage flowing from the act was the gist of the action. In an ordinary trespass, in which a forcible act directly caused damage to the plaintiff's person or property, the connection between the act and the damage was generally obvious. But, when the damage was not the direct result of the defendant's act, it was necessary to show that it was its proximate consequence. To a modern lawyer it would seem that the obvious method of ascertaining whether or not the damage is the proximate consequence of the defendant's act, is to enquire whether the defendant foresaw or ought to have foreseen such damage as a necessary consequence of his act; to rule that, if he foresaw it or ought to have foreseen it, he was negligent; and that because he was thus negligent he is liable. But this way of looking at the problem is essentially modern, and it has only become possible as the result of a long historical development, the outlines of which I must here try to trace.[3]

When the actions on the case first began to be developed, the mediæval notions as to the basis of civil liability were engrained in the minds of the lawyers. If they had been asked why an act directly causing damage to the plaintiff gave rise to liability enforceable in an action of trespass, they would have said that such an act gave rise to liability because it was unlawful. The same reasoning was applied to some of the earliest actions on the case. An act which caused damage in certain specified ways was regarded as giving rise to liability because it was an unlawful act. Thus inn-keepers, common carriers, smiths, surgeons, taverners, vintners, or butchers, could be made liable in an action on the case if, as the result of want of care, skill, or honesty, the persons who had come into business relations with them were damaged.[4] We should say

[1] Vol. iii 375-377. [2] Ibid 379-380.

[3] The best historical account of the general development of the conception of negligence is to be found in Street, Foundations of Legal Liability i chap. xiii; the historical matter in Holmes, Common Law Lecture III is mainly concerned with development of the idea in the sphere of trespass, which is dealt with below 453-458; on this latter point see also Wigmore, Responsibility for Tortious Acts, Essays A.A.L.H. iii 505-507; Pollock, Torts (12th ed.) 142-147.

[4] Vol. iii 385-386.

at the present day that they were liable for fraud or negligence. In the Middle Ages they were said to be liable "by the common custom of the realm"—that is they were liable because their conduct was regarded by the law as wrongful. Similarly, we have seen that any person was liable in an action on the case if, having undertaken to do something for another, he had done it so badly that that other was damaged.[1] We should say at the present day that such liability was founded on a breach of contract. In the Middle Ages it was considered to be a liability for conduct which, by reason of the undertaking, was regarded by the law as wrongful.[2]

But, as damage was the gist of the action on the case, the court, in coming to a conclusion whether or not a defendant could be made liable in such an action, was bound to consider whether or not the damage alleged could be said to be a sufficiently proximate consequence of the defendant's act to entail liability; and this question could only be answered by asking whether any ordinarily prudent man would have foreseen that damage would probably result from his act. Thus the courts were gradually familiarized with the conception of negligence; and, since the idea of negligence was brought before them in this way, three consequences followed. In the first place, they naturally, from the first, adopted the objective standard of the ordinarily prudent man; for they were not trying to determine whether this or that defendant had been negligent, but whether, having regard to what any ordinarily prudent man would have foreseen, a particular damage, flowing from a given defendant's acts, was a sufficiently proximate consequence of those acts to entail liability. This principle was not indeed formally laid down till 1837;[3] but, as Sir F. Pollock says, the idea "pervades the mass of our authorities";[4] and it pervades them, because this manner of regarding negligence was necessitated by the way in which the conception came into the common law. In the second place, the courts necessarily regarded negligence as being correlative to the existence of a duty not to harm the plaintiff in the manner of which he was complaining;[5] for, until such a duty had been established, the mere fact that the defendant had harmed the plaintiff could give rise to no cause of action; and therefore the enquiry whether the damage was the proximate con-

[1] Vol. iii 386, 429-431.

[2] Note that Blackstone, Comm. iii 163-165, states the mediæval rules, but classes them under those "presumptive undertakings or *assumpsits*," arising from the "general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires"—at that date the idea of contract or quasi-contract was in the ascendant; and even at the present day, as Mr. Street points out, op. cit. i 87, the subject of negligence is as important in the law of contract as in the law of tort.

[3] Vaughan v. Menlove (1837) 3 Bing. N.C. 468.

[4] Torts (12th ed.) 444.

[5] Ibid 439-440.

sequence of the defendant's act would be unnecessary. In the third place, we get that distinguishing characteristic of the law of tort, as compared with the law of contract, that "the primary question of liability may itself depend . . . on the nearness or remoteness of the harm complained of. Except where we have an absolute duty and an act which manifestly violates it, no clear line can be drawn between the rule of liability and the rule of compensation."[1] We shall see, however, that a clear line has been drawn by the Court of Appeal between the principle upon which liability to compensate is based, and the principle upon which the amount of the compensation is assessed. The question whether the damage was sufficiently probable for a reasonable man to have anticipated is relevant in determining the question of negligence—that is of liability to compensate: it is not relevant in determining the measure of damages.[2]

There are many proofs that, during the sixteenth and seventeenth centuries, the constant need to inquire whether, in any given case, the damage complained of by the plaintiff was a sufficiently proximate consequence of the act of the defendant, was familiarizing the courts with the idea that in a large number of cases liability was grounded upon negligence. We have seen that, in the field of crime, the line between murder and manslaughter was often fixed by reference to the degree of negligence shown;[3] and the rule that a defendant was not liable for damage done by an ordinarily tame animal, unless scienter was proved, involves the idea that liability is founded upon negligence.[4] But, in the sphere of tort, it seems that the conception was at first applied where the duty owed by the defendant to the plaintiff arose out of some contractual, quasi-contractual, or proprietary relation. Thus, in 1601, Coke laid it down that "where a man delivers a horse to another to keep safe, the defendant *equum illum tam negligenter custodivit, quod ob defectum bonæ custodiae interiit*, the action on the case lies for this breach of trust; so if my shepherd, whom I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an action upon the case lies."[5] Similarly, we have seen that it was well settled that persons, like smiths or innkeepers, who were bound by law to exercise their callings skilfully, were under a duty of a delictual or quasi-contractual nature, if they caused damage by their negligence.[6] A like principle was applied in the sphere of

[1] Pollock, Torts (12th ed.) 30.
[2] Re Polemis [1921] 3 K.B. 560; below 462-464. [3] Above 436.
[4] This rule was well established by the decisions of the sixteenth and seventeenth centuries, see Anon. (1537) Dyer 25b, 29a; Mitten v. Faudrye (1625) Popham 161; Boulton v. Banks (1632) Cro. Car. 204; Kinnion v. Davies (1637) ibid 487; Jenkins v. Turner (1697) 1 Ld. Raym. 109.
[5] The Countess of Shrewsbury's Case 5 Co. Rep. 14a.
[6] Vol. iii 385-386, 448; above 80.

property law. In 1674 it was held that, where the defendants were bound by prescription to maintain a fence, and by reason of their negligence they failed to maintain it, so that the plaintiff's mare got through the gap and was drowned, the plaintiff could recover in an action on the case.[1]

We have seen, however, that the law made certain bailees, to whom possession of goods had been entrusted, liable, even though they had not been negligent. These rules were, as we have seen, due mainly to the position which the law attributed to possessors as such, and partly to the fact that they had become fixed before the common law had attained the conception of negligence.[2] But it is clear from *Southcote's Case*[3] that the court, in the light of the new conception that liability should be founded on negligence, was beginning to think that they were hard rules.[4] They were not extended to the newer varieties of bailees;[5] and we have seen that Coke advised that they should be evaded by making special contracts as to the measure of liability.[6] The manner in which Holt, C.J., in the case of *Coggs v. Bernard*,[7] put the law as to bailees on its modern basis, and applied to their liabilities the Roman rules as to negligence, which he had taken from Bracton, is the best proof that, at the beginning of the eighteenth century, the judges were coming to the conclusion that negligence should generally be regarded as a basis of liability; and that, in the absence of negligence, no liability should as a rule be imputed. In fact, that decision gave effect to a tendency in this direction, which had been felt in different ways throughout the sixteenth and seventeenth centuries.[8] But even then two survivals of the older law were still left—the innkeeper and the common carrier. The innkeeper is still absolutely liable, as he was liable in the Middle Ages,[9] by the common custom of the realm, for the safe custody of the goods of his guests.[10] The common carrier,[11] common hoyman, or master of a ship, being persons "that exercise a public employment," were bound to "answer for the goods at all events," except as against acts of God and the king's enemies.[12] But the

[1] Anon. 1 Vent. 264-265; Star v. Rookesby (1711) 1 Salk. 335.

[2] Vol. vii 450-451.

[3] (1601) 4 Co. Rep. 83b.

[4] Note that in Gelley v. Clerk (1607) Cro. Jac. 188 the innkeeper's liability as a bailee of his guests' goods was limited to those who were actually staying in his inn as guests.

[5] "If a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged . . . but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged, if they are stolen by thieves," 4 Co. Rep. at f. 84a.

[6] Ibid; above 259.

[7] (1704) 2 Ld. Raym. 909; vol. vii 453.

[8] Above 452-453.

[9] Vol. iii 385-386.

[10] Cayle's Case (1584) 8 Co. Rep. 32a; (1624) Hutton at p. 100; Robins and Co. v. Gray [1895] 2 Q.B. at p. 504 *per* Lord Esher, M.R.

[11] For the detailed history see Holmes, Common Law 197-205.

[12] 2 Ld. Raym. at pp. 917-918.

exemption of other bailees entrusted with the possession of goods from this absolute liability, had destroyed the older reasons for the rule;[1] and its application to these persons, as an exceptional rule, was based by Holt, C.J., on public policy.[2] As applied to common carriers, it was accepted by Lord Mansfield;[3] and it is still part of the law. But even in Holt's day it was clearly regarded as an exceptional rule which required to be justified.

Since the law had reached this stage by the end of the seventeenth century, it is not surprising to find that a further step was then taken. "The conception," as Mr. Street puts it,[4] "of common law liability for negligence was so extended as to make one liable, in an action on the case, for damage flowing from the negligent performance of his own projects and undertakings, unconnected with the duty arising from statute, public calling, bailment, or prescription." This extension was certainly made in 1676 in the case of *Mitchil v. Alestree*.[5] In that case the defendant had brought an unruly horse into Lincoln's Inn Fields for the purpose of breaking him. The horse escaped from the defendant, and damaged the plaintiff. The court held that the plaintiff could recover. "It was the defendant's fault to bring a wild horse into such a place, where mischief might probably be done, by reason of the concourse of people. Lately, in this Court, an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning him." And Wylde, J., said, "if a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief; an action lies against the master."

But, just as it was difficult to apply this new conception of negligence to certain kinds of bailees, whose position had been defined by older rules of law, so it was difficult to apply it in cases where the act complained of was a direct act of violence. Such an act was generally a trespass, and therefore an unlawful act; and if it was an unlawful act, there could be no question of the defendant's liability. But such an act may be the result of a perfectly lawful act done purely accidentally; and we have seen that, as late as the end of the sixteenth century, Bacon restated the mediæval rule that, even in such a case, the person doing the

[1] Vol. vii 452-453.

[2] "This is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered," 2 Ld. Raym. at p. 918.

[3] Forward v. Pittard (1785) 1 T.R. 27.

[4] Foundations of Legal Liability i 189.

[5] 1 Vent. 295.

act was liable.[1] In fact, right down to the nineteenth century, there is a chain of authority in which the mediæval rule is stated and relied on. Thus in 1617, in the case of *Weaver v. Ward*,[2] the same distinction as that which Bacon drew between civil and criminal liability was drawn, and it was said that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault." In 1681, in the case of *Lambert v. Bessey*,[3] the rule that "in all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering," is repeated; and Brian's dictum that, "if a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing," was also repeated—a dictum again repeated and approved by Blackstone, J., in *Scott v. Shepherd*.[4] In 1682, in the case of *Dickenson v. Watson*,[5] in an action by the plaintiff against the defendant for wounding him with his pistol, a plea that the defendant was emptying his pistol in a vacant place, and that the plaintiff had crossed the line of fire unknown to the plaintiff, was held bad; for in trespass the defendant shall not be excused without an avoidable necessity, which is not shewn here." In 1700 the same view was urged in argument in the case of *Mason v. Keeling*;[6] and in 1724 it was apparently held that trespass lay for a merely accidental hurt.[7] In 1783 it was used in argument by Erskine, as Bacon had used it, to illustrate the difference between criminal and civil liability.[8] In 1799 this thesis was maintained in argument in the case of *Ogle v. Barnes*;[9] and in 1803, in the case of *Leame v. Bray*,[10] it was restated by Grose, J., "Looking into all the cases from the Year Book in the 21 H. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." There was a ruling to the same effect in 1823 in the case of *Wakeman v. Robinson*;[11] and in 1868, in the case of *Rylands v. Fletcher*,[12] Lord Cranworth approved of the reasoning of Sir T. Raymond in *Lambert v. Bessey*,[13] which, as we have seen, restated the mediæval principle. In 1891, in the case of *Stanley v. Powell*,[14] the view that a man may be liable for a purely accidental

[1] Vol. iii 376-377. [2] Hob. 134. [3] Th. Raym. at pp. 422, 423.
[4] (1773) 2 W. Bl. at p. 896. [5] T. Jones 205.
[6] 12 Mod. at pp. 332-333. [7] Underwood v. Hewson 1 Str. 596.
[8] The Dean of St. Asaph's Case 21 S.T. at p. 1022, cited Pollock, Torts (12th ed.) 142.
[9] 8 T.R. at p. 190. [10] 3 East at p. 600.
[11] 1 Bing. at p. 214. [12] L.R. 3 H. of L. at p. 341.
[13] (1681) Th. Raym. 421. [14] [1891] 1 Q.B. 86.

trespass to the person was put forward in argument, and finally overruled.

It would, however, be misleading to think that the lawyers, as late as the nineteenth century, were prepared to hold that direct damage, caused by an unavoidable accident in the doing of a lawful act, would expose to liability. We shall see that some of these dicta were qualified in a way which shows that the new conception, that liability should be based on some moral shortcoming, was making its influence felt in the sphere of trespass.[1] Others were contained in dissenting judgments,[2] or only in argument.[3] Others were said in the course of discussions as to whether trespass or case was the proper form of action—that is in cases in which the mind of the court was not addressed to this specific point.[4] Lord Cranworth's approval of the dictum in *Lambert v. Bessey* was confined to cases of the type of *Rylands v. Fletcher*, which, as we shall see, are governed substantially by the mediæval principle of liability.[5] Nevertheless, as a matter of historical fact, these dicta do, it seems to me, truly represent the mediæval view as to liability. But that mediæval view was too narrow; and both the ethical ideas and the social needs of modern times made it necessary that it should be modified.

The earliest way in which this modification was effected was foreshadowed in the mediæval period. It was, as we have seen, admitted that 'the act of God' or inevitable necessity would excuse.[6] Much was made of this in the later cases; and in some of them the way was prepared for later developments, by statements that, if the defendant could prove inevitable necessity, he was not liable, because he was not negligent. Thus, in the case of *Weaver v. Ward*,[7] the court said that the defendant might have succeeded, if he "had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt"; and there is a long line of cases in which it was held that unavoidable necessity was a good defence. Thus in 1696, in the case of *Gibbons v. Pepper*,[8] it was held that if the defendant had pleaded not guilty, and had given in evidence facts which showed that the damage was the result of an inevitable accident, "this matter might have acquitted him

[1] E.g. Weaver v. Ward (1617) Hob. 134.

[2] E.g. Lambert v. Bessey (1681) Th. Raym. 421; Scott v. Shepherd (1773) 2 W. Bl. 892.

[3] Above 454 nn. 6, 8, 9, 14. [4] E.g. Leame v. Bray (1803) 3 East 593.

[5] L.R. 3 H. of L. at p. 341—"this is the principle of law *applicable to cases like the present*"; I do not think that his dictum can be given, as Mr. Beven gives it, Negligence i 557, any more general application.

[6] Vol. iii 380-382. [7] (1617) Hob. 134. [8] 1 Ld. Raym. 38.

upon the evidence." In 1767, in the case of *Beckwith v. Shordike*,[1] the court clearly thought that an involuntary accident could not expose to liability; and in 1823 Dallas, C.J., ruled[2] that, "if the accident happened entirely without default on the part of the defendant or blame imputable to him, the action (trespass) does not lie." There is a series of cases from the first half of the nineteenth century, in which it was held that, in an action of trespass, matters of excuse must be specially pleaded,[3] which obviously shows that such matters of excuse, if proved, would be a good defence.

This expansion of the idea of an unavoidable or inevitable necessity which, in effect made the act involuntary, was, I think, the main line of reasoning along which the law was developed. But it was not the only line. (i) In certain cases, in which a defendant was sued for trespass committed by his animals, it was held that, if he had done all he could to restrain them, he was not guilty. Thus in 1625, in the case of *Mitten v. Faudrye*[4] the defendant had chased trespassing sheep belonging to the plaintiff out of his land with a dog, and the dog had further pursued them and damaged them. The plaintiff brought trespass; and it was held that, as the defendant had done his best to call in his dog, he was not liable. Moreover, Dodderidge, J., laid it down in that case that if a man was "driving cattle through a town, and one of them goes into another man's house, and he follows him, trespass does not lie for this, because it was involuntary."[5] We have seen that in the fifteenth century liability for damage caused by cattle so driven was only negatived, when the plaintiff's omission to fulfil a legal duty to fence was the cause of the damage;[6] and it would seem that the law was the same in 1795.[7] Probably, therefore, Dodderidge stated the law too widely for his own day.[8] His statement has, however, come to be substantially correct.[9] But it is now based, as McCardie, J., has pointed out,[10] on the much broader principle stated by Lord Blackburn in *River Wear Commissioners v. Adamson*,[11] that property adjoining a highway is liable to be in-

[1] 4 Burr. at pp. 2093-2094. [2] Wakeman v. Robinson 1 Bing. at p. 215.
[3] Milman v. Dolwell (1820) 2 Camp. 378; Knapp v. Salsbury (1810) ibid 500; Boss v. Litton (1832) 5 C. and P. 407; Cotterill v. Starkey (1837) 8 C. and P. at pp. 694-695.
[4] Popham 161. [5] Ibid at p. 162.
[6] Y.B. 10 Ed. IV. Pasch. pl. 19; cited vol. iii 378.
[7] Dovaston v. Payne 2 Hy. Bl. 527.
[8] Wigmore, op. cit. Essays A.A.L.H. iii 515.
[9] Tillett v. Ward (1882) 10 Q.B.D. 17; see an illuminating discussion of the law on this point by McCardie, J., in Gayler and Pope Ltd. v. Davies & Son Ltd. [1924] 2 K.B. at pp. 78-84.
[10] [1924] 2 K.B. at pp. 82-83; Lord Blackburn had already expressed the same view in Rylands v. Fletcher (1866) L.R. 1 Ex. at pp. 286-287.
[11] (1877) 2 A.C. at p. 767.

jured by the traffic on the highway, so that the owner must bear his loss unless he can show that some third person is in fault—which he will not do merely by proving that the third person is the owner of the things which did the damage. Similarly the scienter rule, as applied to dogs, is based on the idea that a man is not liable for damage done by his dog unless he knew his dog was fierce.[1] (ii) In one of the latest cases on this subject—*Holmes v. Mather*[2]—the rule that a man is liable only for the proximate consequences of his acts was used to show that, if the act of the defendant was a proper act, and the accident happened not by reason of but in spite of it, he could not be held liable, because the act which was the proximate cause of the damage was not his act.[3] This reasoning would, as we have seen, been accepted as valid in the Middle Ages.[4] But the way in which this reasoning was used and applied was certainly not mediæval, and showed that the conception of negligence had made its appearance even in the sphere of trespass.

The test suggested as to whether any given act was a trespass or not, was whether, firstly, it was a direct act of violence, and, secondly, whether it was wrongful "either as being wilful or as being the result of negligence."[5] Let us consider what is involved in this test. If the act which damages the plaintiff is unlawful, there is of course nothing more to be said—it is obviously a trespass.[6] Difficulties begin when the act is not in itself unlawful. In such a case I think the mediæval common law would have

[1] See the cases cited above 456 n. 3.

[2] (1875) L.R. 10 Ex. 261—an action for injury to the person occasioned by a runaway horse.

[3] "Here, as in almost all cases, you must look at the immediate act which did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked at the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened. I think the proper answer is, you cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was," L.R. 10 Ex. at p. 268 *per* Bramwell, B.

[4] Vol. iii 380.

[5] "If the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) when the act is wrongful, either as being wilful, or as being the result of negligence," *per* Bramwell, B., L.R. 10 Ex. at pp. 268-269; Mr. Beven, Negligence, i 568, says that, "the doing a lawful act is not in itself sufficient to save from liability, unless further it is done in circumstances that free the doing of it from taint of blame . . . . and an act cannot be without blame and involuntary when there is free unfettered choice to act or refrain, independently of any considerations outside the will of the person whose decisions determines the action"; historically I think this correctly represents the earlier law laid down in many cases before Holmes v. Mather, but not the law as stated in that case.

[6] Beven, Negligence, i 565, 566; above 449.

made the defendant liable, even though the act was purely accidental, if it was an act of violence committed by him which directly damaged the plaintiff.[1] As the result of the cases of the seventeenth eighteenth and nineteenth centuries, which we have just been considering, the defendant escaped liability, if his act was the result of such an unavoidable or inevitable necessity that his act was in effect involuntary; and mitigations also had been allowed in certain cases of trespass committed by a defendant's animals.[2] It would seem that the definition of a trespass as an act of violence either wilful or negligent, which was laid down in *Holmes v. Mather*, in effect carried the mitigation of a defendant's liability for trespass a stage further. A "wilful" act, I think, means an act done intentionally. The word "wilful" obviously excludes involuntary acts, and I think also lawful acts which are voluntary, but which are done both without negligence, and without intention of harming the plaintiff. This seems clearly to go beyond the cases which we have just been considering, because it does not demand that the act should have been the result of such unavoidable necessity that it was in effect an involuntary act. In *Holmes v. Mather* the act of attempting to curb the runaway horses was a lawful voluntary act; it was not done negligently; and there was no intention to harm the plaintiff. It was therefore held not to be a trespass to the plaintiff. The development of the law having reached this point, the decision in the case of *Stanley v. Powell*,[3] that a lawful act, which damages another accidentally, gives rise to no cause of action, was inevitable. In that case the act of the sportsman in firing his gun was a lawful act; and the hitting of the beater which followed was clearly not intended, and was found by the jury not to have been the result of negligence.[4] It did not therefore comply with the definition of a trespass laid down in *Holmes v. Mather*.

Thus negligence came to be recognized as the basis of civil liability in a large and miscellaneous class of wrongs to person and property, which covers the largest part of the sphere of torts. The introduction and extension of this conception through the action on the case, has done for the law of tort somewhat the same service as the product of another action on the case—the doctrine of consideration—has done for the law of contract.[5] Just as it is through the doctrine of consideration that English law arrived at its conception of a simple contract, so it is through the

[1] Vol. iii 375-377. [2] Above 455-457. [3] [1891] 1 Q.B. 86.

[4] Beven, Negligence i 568-570, naturally dissents from this decision, above 457 n. 5; his view is that the act of the defendant was a voluntary act attended with possible danger to others, that it was therefore not without blame, and consequently was a trespass.

[5] See Pollock, Torts (12th ed.) 21-22.

conception of negligence that it has been able to fix the standard of carefulness which it requires one man to observe in his dealings with another. Both conceptions have grown up under the shadow of the law of actions; and both, now that the old forms of actions are things of the past, have emerged as substantive legal principles. And just as the contract under seal remains in our modern law as a survival of the days before the doctrine of consideration was evolved,[1] so in our law of tort there are survivals of ideas based upon the mediæval principle of civil liability. One illustration is, as we have seen, the liability of the common carrier.[2] A second is the technical meaning of the defence miscalled contributory negligence. Perhaps we may regard as a third the rule as to the measure of damages for negligence recently laid down by the court of Appeal in *In re Polemis*.[3] Of the history of the second and third of these three bodies of doctrine I must at this point say something.

(i) *Contributory negligence.*

Something like a doctrine of contributory negligence was recognized in Roman law;[4] and in a system of law which grounded liability upon negligence, it was a natural and a logical doctrine. But we have seen that the conception of negligence has only gradually and partially been accepted as a ground of civil liability in the common law;[5] and it was only at the beginning of the nineteenth century, when this development was complete, that we begin to hear of the phrase "contributory negligence." On the other hand, the doctrine that, if the plaintiff's act was the proximate cause of the damage, the plaintiff could not recover, was well established mediæval doctrine, and wholly consonant with the mediæval principles of civil liability.[6] But, when liability came to be based, not merely on an act which caused damage, but on a wrongful act; and when the largest number of acts which were wrongful, were wrongful because they were negligent; it was inevitable that the mediæval doctrine should somewhat change its shape. As early as the beginning of the seventeenth century there was a dictum to the effect that, if a plaintiff suffered damage by reason of his own negligence, he could not recover;[7] and naturally, as liability came to be more

[1] Vol. iii 419-420. [2] Above 452-453. [3] [1921] 3 K.B. 560.

[4] "Quod quis ex culpa sua damnum sentit, non intellegitur damnum sentire," Dig. 50. 17. 203; cp. Dig. 9. 2. 11. pr., cited Beven, Negligence (3rd ed.) i 149 n. l.

[5] Above 449-458. [6] Vol. iii 378-379.

[7] Bayly v. Merrel (1606) Cro. Jac. 386—a case in which an action on the case for deceit was held not to lie, because the plaintiff could easily have found out the truth if he had used ordinary care; it was said at p. 387, "it was a matter which lay within his own view and conusance; and if he doubted of the weight thereof he might have weighed it; and was not bound to give credence to another's speech; and being his own negligence he is without remedy."

and more generally grounded on negligence, this method of statement gained ground. But, though a change was made in the method of statement, the substance of the doctrine still retained a great deal of the mediæval principle; and it is this mixture of mediæval and modern principles which has given this doctrine its modern shape.

The change in the method of statement can be illustrated by the form of the plea of a defendant in a running down case.[1] It runs as follows:—"that he, the defendant, just before and at the said time when he was driving the said cart and horse, in the said declaration mentioned . . . in a careful moderate and proper manner; and that, whilst he, the defendant, was so driving the same, to wit, at the said time when, etc., the said Sarah [the plaintiff] negligently carelessly and improperly ran along and across the middle of the said highway, near to and against the said horse and cart of the said defendant, and was thereby then cast and thrown to and upon the ground, and kicked, trampled upon, and run over, and crushed, as in the said declaration mentioned, without any default on the part of the defendant. And so the defendant in fact saith that the said hurt and damage in the said declaration mentioned were occasioned and happened to the said Sarah by and through the mere negligent careless and improper conduct of her the said Sarah, and not through the fault or improper conduct of the defendant." It is clear that the plea in substance appeals to the mediæval principle that the plaintiff, having in effect been damaged by her own act, and not by the act of the defendant, could not recover. It was not really a plea that the plaintiff was to blame for negligence which had contributed to the accident; but a plea that her negligent act was the direct cause of the accident. But the fact that the doctrine was thus stated in terms of negligence—that emphasis was laid on the negligence rather than on the act—made a reconsideration of the old doctrine necessary from this new point of view. The results of that reconsideration were, in effect, to affirm the mediæval principle in the terms of the new phraseology—if my negligent act is the direct or immediate or proximate cause of the damage, I cannot recover; and thus to produce that unfortunate divergence between the real contents of the doctrine and its name, which, more than any other single cause, has led to difficulties in its application.

That the mediæval principle was, in effect, affirmed in the disguise of the new phraseology, is clear from the cases of the nineteenth and twentieth centuries. In 1809, in the well-known

[1] Cotterill v. Starkey (1839) 8 C. and P. at p. 692 n. *a*.

case of *Butterfield v. Forrester*,[1] the defendant had negligently put an obstruction in a highway with which the plaintiff had collided, but the plaintiff could not recover because, "if he had used ordinary care, he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault." In 1810 Lawrence, J., ruled that a plaintiff could not recover from a negligent defendant, because "the immediate and proximate cause" of the damage was his own unskilfulness as a driver.[2] In 1838 Parke, B., said, "the rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong."[3] In 1858, in the case of *Tuff v. Warman*, the Exchequer Chamber laid it down that, "the proper question for the jury . . . is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or the want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened."[4] In 1916 the manner in which the rule was laid down in *Tuff v. Warman*, was expressly approved by Lord Sumner.[5]

It would seem to follow that the question of negligence is only material in order to show that acts done by the plaintiff and defendant are wrongful. The substance of the defence called "contributory negligence" is not the fact that the plaintiff has been negligent; but that his negligent act is the direct cause of the accident. In other words, as in the Middle Ages, the defendant, who succeeds on this plea, escapes because it was not his wrongful act, but the wrongful act of the plaintiff, which was the direct cause of the accident. It follows that, as the plaintiff must in all cases prove that it was the negligent act of the defendant which caused the damage of which he is complaining, if his negligence had as great a share in causing the damage as that of the defendant—if, for instance, the negligent acts of the plaintiff and defendant were contemporaneous, he cannot recover.[6] In fact the decision in the

[1] 11 East 60; approved by Esher M.R. in The Bernina (1887) 12 P.D. at p. 70.
[2] Flower v. Adam 2 Taunt. 314, at p. 317.
[3] Bridge v. Grand Junction Railway Co. 3 M. and W. at p. 248.
[4] 5 C.B. N.S. at p. 585.
[5] British Columbia Electric Railway Co. v. Loach [1916] 1 A.C. at pp. 724-725.
[6] The Bernina (1887) 12 P.D. at p. 89 *per* Lindley, L.J. It should be noted that, though it is logically correct to say that such a case of contemporaneous negligence is a

case of *British Columbia Electric Co. v. Loach*,[1] that the defendant's previous and continuing negligence, which prevented him from having the last chance of escape, was a sufficient answer to negligence on the part of the plaintiff, which was in fact the direct cause of the accident, is the first case in which a plaintiff, whose negligence was in fact the direct cause of the accident, was allowed to recover. So that, paradoxical though it may seem, it might be contended that this was the first case in which a consideration of the comparative negligences of the plaintiff and defendant was a real element in the defence. As I said in an earlier volume,[2] the doctrine in the form in which it exists in our modern common law is anomalous. It is anomalous, because it represents an attempt to piece together two incompatible theories of civil liability—the mediæval theory that liability is based on an act which causes damage, and the modern theory that liability is, as a general rule, based upon some moral fault, either of the negligent or of the intentional variety.[3]

(ii) *The measure of damages for negligence.*

This is a very modern question; and it was only definitely settled (as far as the court of Appeal can settle it) in 1921 by the case of *In re Polemis*.[4] Down to the decision of this case it was a very moot point whether the measure of damages for negligence was to be determined by the same test as that which determined the existence of negligence—the test, that is, of an enquiry whether the damage caused was such that a reasonable person might have anticipated it;[5] or whether, where negligence had been proved, the wrongdoer was liable for all the damage directly flowing from his negligence, whether he could have anticipated it or not. The

case of contributory negligence, because the negligence of both parties contributed to the accident, *the defence* of contributory negligence is only available to a defendant who can prove that the plaintiff's negligence was subsequent to his own; some confusion is sometimes caused by neglecting to distinguish between cases where there has been contributory negligence, and cases where *the defence* of contributory negligence is available—e.g. in Davies v. Mann (1842) 10 M. and W. 546 there was contributory negligence, but *the defence* of contributory negligence was not available, because the defendant's negligence was subsequent to the plaintiff's, and the direct cause of the accident. In other words, when we are speaking of *the defence* of contributory negligence, we are not using the words "contributory negligence" in the ordinary sense, but in a very technical sense.

[1] [1916] 1 A.C. 719. [2] Vol. iii 378-379.

[3] Lindley, L.J., in The Bernina (1887) 12 P.D. at p. 89, after dealing with the case of contemporaneous negligence, above 461, and after stating that the rule in that case is the logical result of the common law principles, says, "why in such a case the damages should not be apportioned I do not profess to understand"; it is submitted that the historical evolution of the rule supplies the explanation; it is in fact the direct and logical consequence of the mediæval principle.

[4] [1921] 3 K.B. 560.

[5] The authorities in favour of this view are very well summarised in Mr. R. A. Wright's unsuccessful argument for the appellants in In re Polemis [1921] 3 K.B. at pp. 564-566; and in Sir F. Pollock's article in L.Q.R. xxxviii 165.

case of *In re Polemis* decides, in accordance with the preponderance of recent opinion,[1] that the latter alternative is correct.

Upon purely logical grounds the justice of this conclusion is perhaps open to question. If we are basing liability upon an act which causes damage, without any reference to negligence, the rule is logical enough. But if we are basing liability upon a negligent act, and if negligence consists in a failure to foresee results which ought reasonably to have been foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results. In the law of contract it is admitted that the agreement of the parties governs the situation, so that only those damages can be recovered, "which may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."[2] If the basis of the liability in contract—the agreement and its breach—is allowed to affect the measure of damages for breach of contract, it is a little difficult to see why the basis of the liability for negligence —the failure to foresee acts which ought reasonably to have been foreseen—is not allowed to affect the measure of liability for negligent acts.

But, upon historical grounds, the conclusion arrived at in the case of *In re Polemis* is interesting for three reasons: firstly, because it shows the continuous bias of the courts in favour of making a defendant liable for all the consequences of a wrongful act flowing directly therefrom, without reference to his mental state.[3] From this point of view it is comparable to the manner in which the courts have treated the defence of contributory negligence; for, as in that case, the go-by is given to any consideration of the respective seriousness of the negligence of the two parties, and the court merely looks to see to whose act of negligence the damage is directly attributable;[4] so in considering the measure of damages for a negligent act, the court gives the go-by to the basis upon which the liability is founded, by refusing to consider what damage might reasonably be expected to result from the negligence, and merely looks to see what damage has directly resulted. It seems to me that, just as Lindley, L.J., doubted the justice of the rule governing the defence of contributory negligence,[5] so there is some point in the doubt of Vaughan-Williams, L.J., as to the justice of

[1] See Beven, Negligence (3rd ed.) i 105-108; Weld-Blundell v. Stephens [1920] A.C. at pp. 983-984 *per* Lord Sumner.

[2] Hadley v. Baxendale (1854) 9 Ex. at p. 354.

[3] Vol. iii 375-377; above 449-450.

[4] Above 461-462.

[5] Above 462 n. 3.

the rule governing the measure of damages for a negligent act.[1] In both cases the logical consequences of taking negligence as a basis of liability seem to be disregarded. Secondly, this rule is historically interesting because it shows the continued adherence to the very primitive principle laid down by Bacon[2] and Hale,[3] that, in adjudicating upon questions of civil liability, the law looks, not at the extent of the demerits of the wrongdoer, but at the damage of the party injured. This is, in fact, the ground upon which the rule is based by Beven;[4] and it is, it seems to me, the only logical ground upon which it can be based. Thirdly, the rule makes it very much easier to estimate the measure of damages; for it makes it unnecessary to separate the items of damage fairly attributable to the defendant's negligence, from those not fairly attributable. In thus laying down a rule which makes for simplicity and the saving of labour, at the cost of neglecting other considerations which might lead to a different solution, the judges of this century have followed the example of their predecessors in other periods of the history of the common law.[5]

It follows that both the manner in which courts have treated the defence of contributory negligence, and the manner in which they have treated the measure of damages for negligence, illustrate the imperfect way in which the conception of negligence has, owing to its comparatively recent and gradual introduction into the common law, been reconciled with earlier conceptions of liability. In this, as in other branches of the common law at different periods—in the mediæval law, for instance, as to conveyancing,[6] as to incorporeal things,[7] and as to the corporation sole[8]—the survival of earlier ideas has exercised a distorting effect upon later legal developments. We shall now see that there are certain other cases in which earlier principles of liability have in substance survived, but for reasons very different from those upon which they were originally based.

(2) The place of the mediæval principle of liability in modern law.

[1] "It seems to me difficult to be satisfied with a rule which would make the measure of damages, where the wrongful act is absolutely the same in two cases, differ absolutely according to the loss which has been sustained by the person who is injured by the collision—though the wrongful act of the wrongdoer is identical in both cases. Still the rule seems now to be fully adopted," The Racine [1906] P. at p. 277.

[2] Cited vol. iii 375. [3] Cited ibid 376.

[4] "The test is not the *mala mens* of the actor, but the *damnum et injuria* to the sufferer," Negligence i 108; as I have already pointed out, vol. ii 51-52, vol. iii 371-375, we can trace this principle back to the Anglo-Saxon period.

[5] We can see parallels in the way the mediæval common law treated the husband's right to curtesy, vol. iii 187; the married woman's proprietary capacity, ibid 524; and the jury, vol. i 318.

[6] Vol. iii 224. [7] Ibid 97-101. [8] Ibid 481-482.

In our modern law there are two main classes of cases in which the mediæval principle of liability is still applied. The first is the case where one man has done an act which infringes his neighbour's possession of, or right to possess, land or chattels. The second is the class of cases which, in our modern law, fall under the rule in *Fletcher v. Rylands*.[1]

(i) We have seen that, in certain cases, acts which infringe another's possession of land or goods were and are justifiable.[2] But, apart from these exceptions, any interference with possession or the right to possess is an act which will entitle the injured party to bring an action in tort. The fact that the act is done accidentally, or in good faith, or under a justifiable error, is no defence.[3] At a time when civil liability for all wrongs, both to person and property, was based on this principle, the severity of the law would hardly seem to call for explanation. But we have seen that, in the fifteenth century, some mitigation of this strict liability was hinted at in the cases where the damage was inevitable or caused by "the act of God."[4] It is not surprising, therefore, that the tendency to mitigate these rules should have been applied both to injuries to the person and to injuries to property.[5] Thus we have seen that it was said in Edward IV.'s reign that, if a drover was driving cattle along a highway, and by chance they got a mouthful of corn, no action lay; and that by custom the same rule applied if, in ploughing, the plough turned upon another's land.[6] We have seen, too, that in Henry VII.'s reign Rede, J., had said that if two men's cattle were together in a field, one might drive the other's cattle till he could get them into a strait place where they could be severed;[7] and in the same case the same judge said that, where the executors of a deceased man take the goods of another together with the goods of the testator, they are not liable to be sued in trespass, because they had no means of knowing which were the goods of the deceased, and which were the goods of a stranger.[8] In one or two later cases, also, we see traces of the same tendency. We have seen that, in the absence of a scienter, a man is not liable for damage done by his dog,[9] or, it would seem, for any of his other animals mansuetae naturae;[10] and though, as we shall see, a man is absolutely liable if cattle break out of his close and trespass on that of

[1] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H. of L. 330.
[2] Vol. iii 377-378. [3] Ibid 382; below 456-467. [4] Vol. iii 380-382.
[5] See Wigmore, Essays A.A.L.H. iii 508.
[6] Y.B. 22 Ed. IV. Pasch. pl. 24, cited vol. iii 380-381.
[7] Y.B. 22 Hy. VII. Trin. pl. 5 (p. 28), cited vol. iii 381.
[8] "On ne peut *prima facie* avoir parfait conusance que des biens sont al testator, et que a l'estranger."
[9] Above 456, 457. [10] Manton v. Brocklebank [1923] 2 K.B. 212.

another,[1] he is not absolutely liable for the trespasses of his cattle while being driven along the highway.[2] In the case of *Beckwith v. Shordike*[3] the court seems to have thought that an involuntary and accidental entry on the plaintiff's close was no trespass; and in the case of *Davis v. Saunders*[4] damage done to the plaintiff's ship without the negligence of the defendant, and while he was doing a lawful act, was held to give no cause of action.

It is clear, therefore, that there was a tendency to apply to liability for damage to property the same sort of mitigation as was applied to damage to the person. But this tendency has not been allowed to develop to anything like the same extent as in the parallel case of damage to the person. It would not indeed be true to say that it has had no effect whatever.[5] It would seem that in cases like *Davis v. Saunders*, where damage has been caused by vis major in the doing of a lawful act, there is no trespass and therefore no liability; and the strict rule of liability has certainly been modified, both in the case of dogs and other animals manusuetæ naturæ and not known to be savage, and in the case of damage accidentally caused by cattle while being driven along the highway.[6] Moreover, in *Manton v. Brocklebank* Lord Justice Atkin said[7] that "if *Holmes v. Mather*[8] be correctly decided trespass to goods must be the result of an act either wilful or negligent." This in effect asserts that liability for trespass to the person and to property rest upon the same principles. And no doubt there is a sense in which this is true. If, in *Stanley v. Powell*,[9] the shot, instead of hitting the beater, had hit a plate belonging to the host which had just been unpacked from a lunch basket, it is obvious that the plaintiff could not have been made liable. On the other hand, it is quite clear that for any asportation or conversion of a chattel, or for any act which amounts to the breaking of the plaintiff's close, a man is absolutely liable; and that many of the modifications of the strict rule, suggested in some of the earlier cases,[10] are not accepted as law at the present day. It is clear that if one turns his plough, or accidentally enters upon another's land;[11] or, it would seem, if executors take the goods of another under the

[1] Below 470-471. [2] Above 456-457.
[3] (1767) 4 Burr. at p. 2093; above 456.
[4] (1770) 2 Chitty (K.B.) 639, cited Pollock, Torts (12th ed.) 146.
[5] This seems to be the view of Wigmore, op. cit., Essays, A.A.L.H. iii 508.
[6] Above 456-457, 465. [7] [1923] 2 K.B. at p. 229.
[8] (1875) L.R. 10 Ex. 261. [9] [1891] 1 Q.B. 86.
[10] Above 465.
[11] Basely v. Clarkson (1681) 3 Lev. 37; "by the laws of England every invasion of private property, be it never so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing," Entick v. Carrington (1765) 19 S.T. at p. 1066 *per* Lord Camden, C.J.

bona fide and justifiable belief that they belong to the deceased;[1] or if one converts another's goods, though he has no knowledge or means of knowledge to displace his bona fide and justifiable belief that they are his own[2]—all can be made liable in an action of trespass or conversion. How then can we explain this apparent contradiction that, though in theory liability for trespass to the person and to property rests upon the same principles, yet in practice liability for trespass to property is more severe, and, in many cases, does not differ very materially from the mediæval principle?

The explanation is, I think, this: even the smallest interference with possession or the right to possess is an unlawful act, and, because it is an unlawful act,[3] it gives rise to an action for trespass or conversion. It is only if the act involves no asportation or conversion in the case of a chattel, or no breaking of the plaintiff's close in the case of land, that it will only be tortious if it is either wilful[4] or negligent; and such cases must obviously be rare. If we go further, and ask why the law has always adhered rigidly to the view that any such interference is an unlawful act, we shall, as Sir F. Pollock has pointed out,[5] find the reason in the manner in which, owing to procedural conveniences, delictual remedies came to be used for the protection of ownership and possession. Ejectment,[6] trespass quare clausum fregit, trespass de bonis asportatis, and conversion,[7] were all essentially delictual remedies. But we have seen that they have come to be the regular actions, in which not only torts to possession and ownership can be redressed, but also rights to possession and ownership can be asserted. Thus "the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries, where the right was assumed not to be in dispute, became quite obliterated."[8] And, it should be remembered that the common law did not draw any hard and fast line between possession and ownership. A possessor is treated as owner as against all the world save as against the man with the better right.[9] But rights of ownership have come to be regarded as absolute rights as against all the world.[10] Therefore any infringement of these rights must be accounted an unlawful act which will give rise to an action for damages, whatever may be the cause for that

[1] They might of course be entitled to an indemnity as against the estate if they had acted honestly and reasonably, see Re Raybould [1900] 1 Ch. 199.
[2] Hollins v. Fowler (1874) L.R. 7 H. of L. 757.
[3] Above 449.
[4] See above 458 for the sense in which this term is used.
[5] Torts (12th ed.) 11-14.
[6] Vol. vii 7, 57.
[7] Vol. vii 402-440.
[8] Pollock, Torts (12th ed.) 13.
[9] Vol. iii 91-95, 352-353; vol. vii 59-60, 449.
[10] Vol. vii 62-68, 426-430.

infringement, and whether or not the person who has infringed them is morally blameworthy.[1] As he is thus in effect absolutely liable for any act which has the result of infringing these rights, his liability is in all essentials governed by the same principles as governed all liability for tort in the mediæval common law.[2]

(ii) The principle of the class of cases which fall under the rule in *Fletcher v. Rylands*[3] is thus stated by Sir F. Pollock:[4] "The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbour to such risk is held answerable to his neighbours as an insurer against consequent mischief." In effect his liability is essentially the same as that imposed by the mediæval common law; for, though absence of negligence will not excuse him, vis major,[5] or the fact that the damage is caused, not by his own act, but by the act of the plaintiff or of a third person with whom he is in no way connected,[6] is a good defence. His acts are at his peril; but for damage which results, not from his act, but from the act of God or of the plaintiff or of a third person, he is not liable.[7]

The decision in this case is the starting point of the modern law as to the liability of one who engages on a dangerous undertaking, because it stated broadly and clearly the nature of the liability imposed, and the cases to which it applies. It is clear that the rule could not have been laid down in this way in the mediæval common law, because the principle of civil liability set out in that case was applied, not merely to dangerous acts which caused damage, but to all acts, if they came within some one of the forms of action recognized by the law—a truth which was, as we have seen, recognized by Lord Cranworth in his judgment in *Fletcher v. Rylands*.[8] This rule could only emerge as a distinct and exceptional rule when the mediæval principle of civil liability had ceased to be the general rule. It follows, therefore, that, till well on in the nineteenth century, the time was hardly ripe for its enunciation. But though, as expressed in *Fletcher v. Rylands*, it is a modern rule, it has at least two ancient roots. In the first place, it gives effect to the idea, expressed in different ways at different periods, that the doing of dangerous things should give

[1] Pollock, Torts (12th ed.) 11-12. [2] Vol. iii 375-377.
[3] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H. of L. 330.
[4] Torts (12th ed.) 490.
[5] Nichols v. Marsland (1875-1876) L.R. 10 Ex. 255; 2 Ex. Div. 1.
[6] Box v. Jubb (1879) 4 Ex. Div. 76; he would of course be liable for the act of his servant, acting within the scope of his employment, under the modern doctrine of employers' liability, and also for the acts of an independent contractor, see L.Q.R. xxv 320.
[7] For the similarity of these rules to the general rules as to civil liability in the Middle Ages see vol. iii 378, 380.
[8] (1868) L.R. 3 H. of L. at p. 341; above 454, 455.

rise to a stricter liability. In the second place, it is influenced by the survival of the mediæval rules as to damage to property, which I have just described.[1]

(*a*) The principle that the doing of obviously dangerous acts should impose a stricter liability was recognized in the Middle Ages. One of these cases was the liability imposed on householders to keep their fires from causing damage. The form which this stricter liability took was not the form taken by the rule in *Rylands v. Fletcher*, for that rule was then the general rule of civil liability. It took the form of a rule that a householder was liable for damage caused by his fire, even though that damage was occasioned not by his own act, but by the act of his servants or guests.[2] This strict rule of liability for damage caused by fire was recognized in 1698 in the case of *Tuberville v. Stamp*;[3] but it was altered by the Legislature in 1707;[4] and liability for the acts of one's servants, whether in the course of doing a dangerous act or not, is now governed by the modern principle of employers' liability.[5] But this mediæval rule is clearly one illustration of the recognition of the first of the ideas on which the rule in *Rylands v. Fletcher* is based.

Another illustration is to be found in the development of the law as to the keeping of animals. We have seen that liability for the damage caused by ordinarily tame animals was modified by the growth of the scienter rule;[6] but, as Hale points out, the old strict liability remained if scienter could be proved, or if the animal was naturally wild.[7] In 1700, in the case of *Mason v. Keeling*, Holt, C.J., stated the law in the same way as Hale had stated it. He said, "if it had been said that the defendant knew the dog to be *ferox*, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally

[1] Above 467-468.

[2] Vol. iii 385; Wigmore, op. cit., Essays A.A.L.H. iii 511-512.

[3] 1 Salk. 13; the allegation of negligence, which there appears, was clearly unnecessary, see Wigmore, *loc. cit.*, and the statutes cited in the next note; as we have seen, we should not attach much weight to the adverbs used in writs or declarations, vol. iii 452 n. 9; it was because Blackstone paid too much attention to them that he erroneously stated, Comm. iii 211, that the liability for cattle trespass, below 470-471, and for damage done by fire, ibid i 419, was for negligently keeping one's cattle or fire; cp. Lord Lyndhurst's criticism in Viscount Canterbury v. the Queen (1842) 4 S.T.N.S. at pp. 774-775.

[4] 6 Anne c. 31 § 6, made perpetual by 10 Anne c. 14 § 1.

[5] Below 472 seqq.

[6] Above 456-457.

[7] "In case of such a wild beast, or in case of a bull or cow, that doth damage, when the owner knows of it, he must at his peril keep him up safe from doing hurt, for tho' he uses his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages," P.C. i 430.

mischievous in their kind, he shall answer for the hurt done by them without any notice; but if they are of a tame nature there must be notice of the ill quality."[1] Holt, C.J., thus lays down the modern rule as to liability for the acts of dangerous animals clearly enough; but the distinction which he drew, based on the question whether or not the defendant had a valuable property in the animal, calls for an explanation. It was said as late as 1676 that, if a savage animal escaped, the former owner ceased to be liable for any damage afterwards done by the animal.[2] This was based on the view that such an animal by its escape became a res nullius, so that his former owner, because he had ceased to be the owner, ceased to be liable for its acts.[3] This rule has ceased to be law in the form in which it was stated in 1676,[4] though possibly it still influences the law as to the trespass of such animals on to another's land.[5] Holt probably had this rule in his mind;[6] but what he was chiefly thinking of was the very much stricter liability which the law then imposed, and still imposes, on a person whose cattle trespass on another's property. It is true that his statement of the law was not accurate;[7] for, as we have seen, it was not true that the owner of cattle was bound to answer for all damage done by them.[8] But he was and is absolutely liable if they escape from his land, and trespass on to another's land. This liability is another root of the rule in *Rylands v. Fletcher:* but its consideration falls more properly under the following head.

(*b*) The absolute liability of the owner of cattle if they escape from his land, and trespass on to the land of his neighbour, has ancient roots. It may have originated in the primitive idea that animals which had done damage were in some way guilty, and that the owner must be made liable as a means "of getting at the animal which was the immediate cause of offence."[9] But, certainly by the fifteenth century, these primitive ideas had disappeared. The rule that the owner of trespassing cattle was liable had become a fixed rule of law, as to the reasonableness of which the author of the Doctor and Student had doubts;[10] but there can be no doubt that it could be and was explained on

[1] 12 Mod. at p. 335. [2] Mitchil v. Alestree 1 Vent. 395 *per* Twisden, J.

[3] Vol. vii 492, 493; see Holmes, Common Law 22, for the view that this dictum was influenced, perhaps unconsciously, by the notion that the ground of liability was noxal, i.e. based on the ownership of a guilty thing.

[4] May v. Burdett (1846) 9 Q.B. at p. 113.

[5] Thus in Cox v. Burbidge (1863) 13 C.B. N.S. at p. 438 Williams, J., says, "if I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour."

[6] Ibid at p. 440 *per* Willes, J.

[7] Ibid at pp. 440-441 *per* Willes, J.; as he says, Holt's dictum "exhausts itself on the liability of the owners of horses and oxen for trespasses committed by them on land."

[8] Above 456, 465-466. [9] Holmes, Common Law 10.

[10] Bk. 1 c. 9, cited Wigmore, op. cit., Essays A.A.L.H. iii 514 n. 4.

somewhat the same grounds as the rule which made anyone liable who infringed another's possession or right to possession.[1] As we have seen, the right to a free enjoyment of possession is as much an incident of ownership as the right to its undisturbed possession. In the sphere of the real actions the former right was protected by the assize of nuisance, as the latter right was protected by the assize of novel disseisin.[2] Liability for trespass by cattle was put on this proprietary ground in 1480;[3] and clearly, if this liability is regarded in this way, it is in effect a liability for nuisance. The nature of this liability was, as we have seen, generalized and elucidated by the action on the case for nuisance.[4] Thus, in 1611, it was stated specifically in *Aldred's Case* that liability for nuisance depended on the principle "sic utere tuo ut alienum non lædas";[5] and in 1705, in the case of *Tenant v. Goldwin*, the rule as to liability for cattle trespasses was based upon the same principle. "Every man," said Holt, C.J.,[6] "must so use his own as not to do damage to another. And as every man is bound so to look to his cattle, as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office, that it may not flow in upon and damnify his neighbour." Clearly, if this liability is put upon this proprietary ground, it must be as absolute as the liability for the disturbance of possession. This, it would seem, is the true reason for this liability, and not "the archaic one that trespass by a man's cattle is equivalent to trespass by himself."[7]

Both these two lines of precedents, and especially the second, influenced the decision in *Fletcher v. Rylands*. The following passage, from the judgment of Blackburn, J., which was quoted with approval by Lord Cairns, proves both this fact, and the fact that the nature of the liability is essentially a survival of the general principle of liability recognized by the mediæval common law:[8] "We think that the true rule of law is, that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse

[1] "Quant il mit eins ces beasts en son commen, luy covient occupier son commen issint que il ne fait tort a auter home, et si le terre en quel il doit cest commen avoir, ne soit enclose, come est icy, donques covient de garder les beasts en le commen et hors de chescun estranger," Y.B. 20 Ed. IV. Mich. pl. 10 *per* Brian, C.J.

[2] Vol. iii 11. [3] Above n. 1. [4] Vol. vii 329-330, 340-341.

[5] 9 Co. Rep. at f. 59a. [6] 2 Ld. Raym. at p. 1092.

[7] Pollock, Torts (12th ed.) 504, says, "observe that the only reason given in the earlier books (as indeed it still prevails in quite recent cases) is the archaic one that trespass by a man's cattle is equivalent to trespass by himself"; cp. Bl. Comm. iii 211; but the cases cited would seem to show that some of the judges at any rate had a clear view of the true reason for this liability.

[8] (1866) L.R. 1 Ex. at pp. 279-280; (1868) 3 H. of L. at pp. 339-340.

himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God. . . . The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." And then he went on to point out that the law was the same in the case of a person who kept a mischievous animal—he must keep it at his peril.[1] It is clear, therefore, that whether we look at the nature of the liability thus imposed, or at the character of the defences permitted,[2] the underlying principle is the same as that which governed civil liability is general in the mediæval common law.[3]

In these two classes of cases, therefore—the case where a man has interfered with his neighbour's possession of or right to possess land or chattels, and cases coming under the rule in *Rylands v. Fletcher*—the mediæval principle of civil liability still holds—but for reasons very different from those on which it rested in the Middle Ages. These cases, therefore, are two of the strongest illustrations of Holmes' aphorism that, "when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and they gradually receive a new content, and at last a new form from the grounds to which they have been transplanted."[4]

We must now turn from these cases, in which the older principles have survived in another form, to the case where a wholly or almost wholly new principle of liability has been introduced into the common law.

(3) The doctrine of Employers' Liability.[5]

Of the principles applied by the mediæval common law to the

[1] L.R. 1 Ex. at p. 281. [2] See as to this L.Q.R. xxv 321.
[3] Vol. iii 375-377, 378, 380.
[4] The Common Law 36; for another instance of its application in another branch of the law see vol. iii 177.
[5] Much the best account of the history of the law on this topic will be found in Wigmore, op. cit., Essays A.A.L.H, iii 520-537.

master's or employer's liability for the acts of his servant I have spoken in an earlier volume;[1] and we have seen that these principles were applied throughout this period.[2] It is true that in 1676, in the case of *Mitchil v. Alestree*, the court was, on the facts, prepared to presume the existence of a special authority to do the act—bringing unruly horses into Lincoln's Inn Fields—which had caused the damage to the plaintiff.[3] But it is clear from the case of *Kingston v. Booth*[4] in 1685 that, without such special authority, the master could not be made liable for his servant's torts. In that case Withins, Holloway, and Walcot, JJ., resolved, firstly, that, "if I command my servant to do what is lawful, and he misbehave himself or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased"; and, secondly, "if I command my servants to do a lawful act . . . and bid them take care they hurt not the plaintiff; if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding." It is clear, therefore, that, right down to the Revolution, the law on this subject was substantially the same as it was in the Middle Ages.

But we have seen that the seventeenth century had been a century of expansion and change in all branches of commerce and industry. Even in the Middle Ages the law merchant favoured a more extended liability than that recognized by the common law;[5] and we have seen that, in the early days of the seventeenth century, the civil law rules applied by the court of Admiralty exhibited the same characteristic.[6] But, as the result of the Great Rebellion, the common law had absorbed the greater part of the commercial jurisdiction formerly exercised by the court of Admiralty.[7] Both the changed commercial and industrial conditions, and the enlarged commercial jurisdiction of the common law courts, were making it clear that a reconsideration of the mediæval rules which governed this branch of the law was necessary. But the judges of the courts of common law who disgraced the bench in the latter years of Charles II.'s and in James II.'s reigns,[8] were not competent to tackle what was in effect a complicated problem of law and public policy. It was not till after the Revolution, when the quality of the bench had been restored, that any effort was made to deal with it; and fortunately for the common law it found

[1] Vol. iii 382-387. [2] Above 227-228, 250.

[3] "It shall be intended the master sent the servant to train the horses there," 2 Lev. at p. 173 sub. nom. Michael v. Alestree.

[4] Skinner 228. [5] Vol. iii 387. [6] Above 250-253.

[7] Vol. i 556-558, 570-572; vol. v 140-148, 153-154. [8] Vol. vi 503-511.

in Holt, C.J., a lawyer who, by reason both of his technical equipment and his knowledge of the commercial needs and conditions of the day, was eminently qualified to do for this branch of the law what he had done for many other branches of commercial law.[1]

The reports show that it was his decisions that laid the foundations of the modern law. In 1691, in the case of *Boson v. Sandford*,[2] an action on the case was brought by a shipper of goods against the owners of the ship, for damage caused to the goods by the negligence of the master. Eyre, J., gave judgment for the plaintiff on the narrow ground that the owners of the ship were in effect carriers,[3] and were therefore liable by reason of the special liability for the acts of their servants imposed on carriers;[4] and it would seem that some reliance was placed on the mediæval rules which made sheriffs and other agents of the crown liable for the misdeeds of their underlings.[5] But Holt rested his judgment on the broad principle that "whoever employs another is answerable for him, and undertakes for his care to all that make use of him."[6] In 1698, in the case of *Tuberville v. Stamp*,[7] the plaintiff complained that, being possessed of a close of heath adjoining that of the defendant, the defendant's servant lit a fire on the defendant's close which consumed the heath on his close. It was held that he had a good cause of action. Here again it was possible to ground the decision on the mediæval rules as to liability for fire;[8] and apparently the majority of the judges rested their decision on this ground.[9] But Holt doubted whether the mediæval rule applied to any fires but those in houses;[10] and he put the liability upon the broader ground that, "if my servant doth anything prejudicial to another, it shall bind me, when it may be presumed that he acts by my authority, being about my business."[11] Similarly in 1699 he ruled at nisi prius that, if A's servants driving A's cart collide with B's cart and cause damage, A is liable;[12] and we have seen that in 1701, in the case of *Lane v. Cotton*,[13] he came to the mis-

[1] For an account of Holt see vol. vi 264-268, 270-272, 516-522.

[2] 2 Salk. 440; S.C. 3 Mod. 321.

[3] "Eyre Justice held there was no difference between a land carrier and a water carrier, and that the master of a ship was no more than a servant to the owners in the eye of the law," 2 Salk. 440.

[4] Vol. iii 386.

[5] 3 Mod. at pp. 323-324; for these rules see vol. iii 387.

[6] 2 Salk. 440.

[7] Skinner 681; S.C. Comb. 459, 1 Ld. Raym. 264.

[8] Vol. iii 385.

[9] 1 Ld. Raym. 264.

[10] According to the report in Comb. 459; but according to the report in 1 Ld. Raym. 264 he agreed with the other judges on this point.

[11] Comb. 459; in 1 Ld. Raym. at pp. 264-265 Holt's ruling is thus stated, "if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended that the servant had authority from his master, it being for his master's benefit,"

[12] 2 Salk. 441.

[13] 1 Salk. 17.

taken conclusion that the postmaster-general was liable for the loss of a letter occasioned by the negligence of an official in the post office,[1] on the authority of the mediæval rules which made sheriffs bailiffs and others liable for the misdeeds of their deputies.[2] In 1709, in the case of *Hern v. Nichols*,[3] he held that a merchant was liable for the fraud of his factor—"for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."[4] From the first, however, this liability was limited to the case where the servant was about his master's business. In 1698 it was held at nisi prius that "where a servant usually buys for his master upon "tick," and takes up things in his master's name, but for his own use, that the master is liable, but it is not so where the master usually gave him ready money";[5] and in 1699, in the case of *Middleton v. Fowler*,[6] Holt explained the principle to be that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master." The same principle was again enforced in 1704 in the case of *Ward v. Evans*.[7] At the same time other cases laid it down, in conformity with the mediæval principle,[8] that if the master had profited by the act or contract of his servant the master was liable.[9]

It is clear from these cases that the origins of this new principle were very mixed. But I think it probable that two main streams of doctrine contributed to it—firstly a Roman influence which filtered through the court of Admiralty and mercantile custom, and secondly an English influence derived from the mediæval modifications of the general common law principle governing the master's liability.

(i) We have seen that doctrines, ultimately derived from the Roman learning as to quasi-delict, were applied in the court of Admiralty to settle the liability of the master and owner of a ship to the shipper and passengers for the delicts of the crew, and the

[1] Vol. vi 267-268. [2] Vol. iii 387. [3] 1 Salk. 289.

[4] He gave a similar explanation of the rule in Sir Robert Wayland's Case, 3 Salk. 234—"the master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers."

[5] Boulton v. Arlsden 3 Salk. 234; so it was said, ibid at p. 235, that, "a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes, though the money is never applied to the master's use. But where he is not allowed or accustomed to deliver out notes, then his note shall not bind the master, unless the money is applied to the master's use."

[6] 1 Salk. 282. [7] Ibid 442. [8] Vol. iii 528.

[9] "Where the master gives the servant money to buy goods for him, and he converts the money to his own use, and buys goods upon 'tick,' yet the master is liable, so as the goods come to his own use, otherwise not," Boulton v. Arlsden (1698) 3 Salk. 324.

liability of the owner to the same persons for the delicts of the master.[1] It is certainly significant that the case of *Boson v. Sandford*[2]—the earliest case in which the doctrine appears in a common law court—was an action by a shipper against the owner for damage suffered by the master's negligence. Moreover it is not unlikely that, as the necessities arising from a larger commerce were felt in the court of Admiralty at an earlier date than in the courts of common law, the court of Admiralty should introduce ideas which helped to establish the new principle which was demanded by those necessities. But it is clear that this was only one of the influences which went to the making of the modern principle. If it had been the only influence, probably the doctrine would have taken the form which the author of a recent work on this subject would like to have seen it take. It would have made an employer liable for his servants' torts only to those who were in some sort of contractual relation with the employer.[3] But the cases of this period show that it was not so limited by Holt. Here again it is just possible that the Roman rules as to the actions de effusis aut dejectis had some slight influence;[4] but I think that it is clear that the influences which made for this more extended rule came mainly from the mediæval common law.

(ii) The rule which made householders liable for damage by fire caused by their servants, appears in *Tuberville v. Stamp*;[5] and the rule as to common carriers in *Boson v. Sandford*.[6] The rule that a man might be liable if he had undertaken to do something, and, through his servant, had done it badly,[7] appears in *Wayland's Case*;[8] and the rule that a master might be liable if property acquired by his servant came to his use appears in *Boulton v. Arlesdn.*[9] Moreover the influence of this rule was long felt in the idea, which appears in *Tuberville v. Stamp*, that the fact that the act was for his master's benefit was a reason for holding the master liable[10]—an idea the effects of which were not wholly eliminated till 1912.[11] The mediæval rule as to the liability of sheriffs and

[1] Above 250-253. [2] (1691) 2 Salk. 440.

[3] This is the main argument of Dr. Baty's ingenious book on Vicarious Liability.

[4] In Noy's Maxims c. 44 it is said that "we shall be charged if any of our family lay or cast anything into the highway to the nuisance of his Majesty's liege people"; and Holt, C.J., in Tuberville v. Stamp (1698) 1 Ld. Raym. at p. 264 ruled that "if my servant throws dirt into the highway I am indictable"; this rule is stated by Blackstone, Comm. i 419, like Noy stated it, as a rule which made a master liable for the acts of his family; Blackstone compares it to the Roman rule set out in Institutes 4. 5. 1; and it is just possible that that may be its origin; on the other hand it may be a solitary survival of the liability of the householder for his "mainpast," vol. iii 383.

[5] (1698) 1 Ld. Raym. 264; above 474.

[6] (1691) 2 Salk. 440; above 474. [7] Vol. iii 386-387.

[8] "If a smith's man pricks my horse, the master is liable," 3 Salk. 234.

[9] Ibid; above 475 n. 9. [10] Above 474 n. 11.

[11] Lloyd v. Grace Smith and Co. [1912] A.C. 716.

bailiffs and other officers of the crown for the misdeeds of their underlings, appears in the case of *Boson v. Sandford*;[1] and we have seen that it was the basis on which Holt rested his dissenting judgment in the case of *Lane v. Cotton*.[2]

Both these streams of doctrine thus joined to create the modern doctrine of employers' liability; and, as the technical reasons assigned for the decisions which established it were very various, it followed that the basis on which it rested was not at first clearly perceived. It was sometimes put on the ground that the master by implication undertakes to answer for his servant's tort—which is clearly not true. Sometimes it was put on the ground that the servant had an implied authority so to act—which again is clearly not true. Sometimes it was grounded on the fiction that the wrong of the servant is the wrong of the master,[3] from which the conclusion was drawn that the master must be liable "because no man shall be allowed to make any advantage of his own wrong";[4] and sometimes on the ground that the master who chooses a careless servant is liable for making a careless choice.[5] Blackstone gives all these reasons for this principle. In addition, he deals with the totally different case where a master has actually authorized the commission of a tort; and cites most of the mediæval cases of vicarious liability with the special reasons for each of them.[6] It is not surprising that he should take refuge in the maxim "qui facit per alium facit per se,"[7] or that others should have used in a similar way the maxim "respondeat superior."[8] His treatment of the matter illustrates the confusion of the authorities; and it is noteworthy that he does not allude to the true reason for the rule—the reason of public policy—which Holt, C.J., gave in *Hern v. Nichols* and in *Wayland's Case*.[9]

That this was the true reason for the rule was only gradually perceived. As Professor Wigmore has pointed out, the judges at first relied mainly on the theory of implied command,[10] sometimes classing the liability as quasi-contractual;[11] and, considering the

[1] 3 Mod. at pp. 323-324; above 474. [2] Vol. vi 267.

[3] Viscount Canterbury v. the Queen (1842) 4 S.T. N.S. at p. 778 *per* Lord Lyndhurst; Tobin v. the Queen (1864) 16 C.B. N.S. at p. 350.

[4] Wigmore, op. cit. Essays, A.A.L.H. iii 531-532.

[5] Viscount Canterbury v. the Queen (1842) 4 S.T. N.S. at p. 778.

[6] Comm. i 417-420.

[7] "As for those things which a servant may do on behalf of his master, they all seem to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium facit per se*," ibid 417.

[8] See e.g. Bartonshill Coal Co. v. Reid (1858) 3 Macqueen at p. 283, where both these Latin tags are introduced by Lord Cranworth; as Professor Wigmore says, Essays A.A.L.H. iii 532, both have been used "to evade giving a clear reason."

[9] Above 475 and n. 4. [10] Essays, A.A.L.H. iii 527.

[11] Thus it was said in Boson v. Sandford (1691) 3 Mod. at p. 323 that, "though the neglect in this case was in the servant, the action may be brought against all the

character of the older rule which this modern rule had superseded,[1] this was only natural. The notion of a liability resting on an implied command could easily be represented as a development of the notion of a liability resting upon an express command. But, at the end of the eighteenth and the beginning of the nineteenth centuries, it began to be more plainly seen that this liability did not depend on agency at all. It followed that these phrases about implied commands were out of place. Therefore the phrases "scope or course of employment or authority" take their place.[2] This development helped the judges at length to see that the rule rested ultimately on grounds of public policy. "The rule of liability," said Lord Brougham in 1839,[3] "and its reason I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." It was put on the same grounds by Chief Justice Shaw of Massachusetts: "This rule," he said,[4] "is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*. . . . The maxim *respondeat superior* is adopted in that case, from general considerations of policy and security." But both in Lord Brougham's and in Chief Justice Shaw's statements we can see traces of the old theories. Lord Brougham introduces a phrase about the thing done being for the benefit of the master; and Chief Justice Shaw introduces words which are reminiscent of agency. A little later Lord Cranworth, though he makes use of the same phrases, stated the principle quite clearly as an absolute duty to guarantee third persons against hurt arising from the conduct of a business.[5] This truly describes the

owners, for it is grounded *quasi ex contractu*, though there was no actual agreement between the plaintiff and them."

[1] Vol. iii 382-385.

[2] Wigmore, Essays A.A.L.H. iii 533—"the Command phrase disappears as a regular one, and the Scope of Employment phrase, with its congeners, come into full control."

[3] Duncan v. Finlater (1839) 6 Cl. and Fin. at p. 910.

[4] Farwell v. Boston and Worcester Rly. Corp. (1842) 4 Met. 49, 3 Macqueen 316.

[5] "In all these cases the person injured has a right to treat the wrongful or careless act as the act of the master: Qui facit per alium facit per se. If the master himself

nature of the liability. As Sir F. Pollock puts it,[1] "the liability of an employer to the public for injuries caused by the acts and defaults of his servants, is analogous to the duties imposed with various degrees of stringency on the owners of things which are or may be sources of danger to others."

We shall see in the next chapter that the older theory as to the basis of the liability of the employer, which grounded it upon some negligence in the employer, either because the act of the servant was imputed to him or because he was negligent in employing an inefficient servant, has had some very unfortunate consequences in the rules applied to the liability of the crown for the acts of its servants. We shall see that, if the true view of the nature of the employer's liability had been reached at an earlier date, these consequences might have been avoided.[2]

But what, if any, are the limits to this absolute duty? We have seen that, from its first appearance, the courts wisely refused to limit it by confining it to a duty to compensate only those who were in some sort of contractual relation with the employer;[3] and, in consequence, a doctrine laid down at the end of the seventeenth century, has proved capable of regulating satisfactorily the relations of employers to the public at large under the changed industrial conditions of this twentieth century. But, at the beginning of the nineteenth century, the question of the extent of the employer's liability was raised in two classes of cases. The first class of these cases centres round the question, Who is a servant? The second class of these cases centres round the question, What is the employer's liability if the person injured is not an outsider but a fellow-servant of the tortfeasor?

(i) The question who is a servant for the purposes of this rule does not seem to have been raised till the end of the eighteenth century. In the case of *Bush v. Steinman*[4] the court held, in effect, that an employer was liable for the acts of an independent contractor. But Eyre, C.J., had considerable doubts as to the justice of imposing such a liability, because the actual tortfeasor was very remotely connected with the defendant.[5] The later

had driven his carriage improperly . . . he would have been directly responsible, and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business," Bartonshill Coal Co. v. Reid (1858) 3 Macqueen at p. 283 *per* Lord Cranworth.

[1] Essays in Jurisprudence and Ethics 128.

[2] Vol. ix c. 6 § 1.

[3] Above 476.

[4] (1799) 1 Bos. and Pull. 404.

[5] "At the trial I entertained great doubts with respect to the defendant's liability in this action. He appeared to be so far removed from the immediate author of the nuisance, and so far removed even from the person connected with the immediate

cases of *Laughter v. Pointer*[1] and *Reedie v. L.N.W.R.*[2] have justified these doubts, and established the modern rule that a master, though liable for the acts of his servant, is not as a general rule liable for the acts of an independent contractor.[3] But that rule is not without exceptions;[4] and this rule, as mitigated by these exceptions, has been found to be a fair qualification of the employer's liability to the public.

(ii) It is far otherwise with the rule applied by the common law in the case where the person injured by a servant is a fellow-servant. It is curious that no case, in which an action was brought against an employer for an injury caused by one of his servants to another, is known to have occurred till the case of *Priestley v. Fowler*.[5] In 1837 the court in that case were unanimous that no such action would lie. To a large extent they grounded their judgment on the injustice of imposing a new, and apparently indefinite series of liabilities, upon masters.[6] So far as the judgment was based on technical reasons it proceeded on three grounds: firstly, from the relation of master and servant there cannot be implied an obligation on the part of the master to take more care of the servant than he takes of himself; and any obligation of this kind, which he is under, is satisfied if he uses his best endeavours to safeguard his servant. Secondly, the servant, by entering on and continuing in the employment has chosen to abide the risk, of which he is likely to know as much if not more than the master. Thirdly, to allow such actions would be a direct incentive "to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who

author in the relation of master, that to allow him to be charged for the injury sustained by the plaintiff seemed to render a circuity of action necessary. . . . I hesitated therefore in carrying the responsibility beyond the immediate master of the person who committed the injury," at p. 406.

[1] (1826) 5 B. and C. 547. [2] (1849) 4 Ex. 244.

[3] Pollock, Torts (12th ed.) 79-81.

[4] These exceptional rules are well summarized by Underhill, Torts (9th ed.) 63-64.

[5] 3 M. and W. 1.

[6] "It is admitted that there is no precedent for the present action by a servant against a master. We are therefore at liberty to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or other. If the master be liable to his servant in this action the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. . . . The footman who rides behind the carriage may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker, or for a defect in the harness arising from the negligence of the harness maker, or for drunkenness neglect or want of skill in the coachman," at pp. 5-6, the reasoning is to some extent fallacious, as the coachmaker and the harness maker would obviously be independent contractors.

serve him."[1] This judgment was followed a few years later by Chief Justice Shaw of Massachusetts.[2] His judgment is admitted to be the best exposition of this doctrine, generally called the doctrine of common employment, which had been first laid down in the case of *Priestley v. Fowler*. He adopted some of the reasoning of that case;[3] but he put the doctrine on a very much firmer technical ground. He pointed out that the duties existing as between the employer and his servant were purely contractual. They were governed entirely by the contract. The contract contained no express clause by which the master undertook to indemnify the servant against the act of his fellow-servant, and no such term could be implied. On the other hand, the duties existing as between the employer and the public were not contractual, and the law had determined that a duty to indemnify the public for the torts committed by his servant in the course of his employment did exist.[4] There was thus a good technical reason for drawing this distinction between liability for wrongs committed by servants against fellow-servants, and wrongs committed by servants against outsiders; for, in the former case, the rights of the master and servant, having been fully settled by their contract, no place was left for any other liabilities not contemplated by the contract. Moreover, this reasoning answered the objection that, in a large undertaking, a servant has no more means of control over a fellow-servant than any other member of the public—"the master in the case supposed is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."[5]

But, after all, these decisions to a large extent ignored the conditions of modern industry. However good the technical reasons which could be adduced for the doctrine, it was quite clear that, in a great undertaking like a railway, a servant has as little opportunity of guarding against the negligence of many of his fellow-servants as a member of the public; and he could hardly be said to have consented to abide risks of which he had neither knowledge nor means of knowledge. The limitation thus imposed on the liability of employers was far too strict—a truth which is

[1] At p. 7.
[2] Farwell v. Boston and Worcester Rly. Corp. (1842) 4 Met. 49, 3 Macqueen 316.
[3] 3 Macqueen at pp. 317-319. [4] Ibid at p. 317. [5] Ibid at p. 320.

emphasized by the fact that no other country in Europe has adopted any similar doctrine.[1] In these latter days the result of this over-strictness has been that the Legislature has imposed a liability on employers, which errs almost as much in the direction of liberality. For under the modern Workmen's Compensation Act[2] a workman, though he has voluntarily entered the particular business, is better protected from the risks incident to its conduct than a member of the public—an extravagant degree of protection, which obviously removes one of the chief incentives to carefulness on the part of the servant.

It is obvious that the development of the law of crime and tort, during this period and in the succeeding centuries, has been affected, almost as much as the law of contract, by the new influences which began to be felt during this period. The new territorial state and its larger control over the actions of its subjects, the new relations between church and state, the growth of industry and commerce—all had a large influence in shaping these branches of the law. Much that was mediæval was retained, and more was made the foundation of an elaborate superstructure of rules, which, in many cases, have in effect created entirely new bodies of law. Much that was admittedly wholly new was added to meet new needs and new problems. Though in the criminal law too many antiquated rules both of substantive and adjective law were retained, yet, on the whole, the professional developments of this period in the law both of crime and of tort are a credit to the common law. As we can see from the later history of many of the branches of law which I have sketched in this chapter, they have resulted in the creation of a body of principles which has proved to be at once flexible and permanent—a body of principles, which, on the whole, has met adequately the constantly new needs of a progressive and expanding state.

At this point, to adapt the phraseology of the Roman Institutes, I leave the history of the technical development of the law of Things, and turn to the corresponding development of the law of Persons.

[1] Pollock, Torts (12th ed.) 101, and see 93 n. (f).
[2] 6 Edward VII. c. 58.

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