

sible to dispute;¹ and we cannot doubt but that this is due to the fact that some of the ideas of a primitive stage of legal development became stereotyped in our law. As we have seen, the doctrine of estates arose at a time when the difference between a right and the subject of a right was imperfectly apprehended. Many interests in land which the Roman lawyers would have classed as *res incorporales* are in English law existing estates in the land.² Primitive materialism has subtracted much from the department of incorporeal things and added it to the department of corporeal things. Here as in other branches of the law the technical working out of ancient rules has produced a wholly original legal conception.³

The Criminal Law and the Law of Tort.

*The Reign of Edward I
The Settlement of the Sphere
the Common Law*

By no means all the offences punishable by law were dealt with by the royal courts. We shall see that many of the smaller offences were dealt with by the local courts of various kinds;⁴ and, as we have seen, many offences afterwards taken over by the royal courts were, at this period, dealt with by the ecclesiastical courts.⁵ But already a certain number of the more serious offences fell within the jurisdiction of the royal courts, and were disposed of either by criminal or by civil processes.⁶ We begin therefore to see in outline some of the features which will be characteristic of our criminal law. We see also the rise of a semi-criminal action—the action of trespass—which will contribute to the creation of the misdemeanours of our criminal law, and will, with its offshoots, dominate not only our law of tort, but also, in process of time, the greater part of the field of common law jurisdiction.

Our criminal law of the present day divides crimes into treasons, felonies, and misdemeanours. The law of Edward I.'s reign had not distinctly defined the offence of treason; and it did not know the misdemeanour. But it had arrived at the conception of felony; and we can see the beginnings of the process which will lead ultimately to the received classification of crimes.

The more serious offences of which, as we have seen, the royal courts had long taken cognizance, had become known as felonies. The word "felony" is probably derived from the Latin *fell*, or *fel*, meaning gall. It comes to mean, therefore, an offence which is venomous or poisonous.⁷ Abroad it was used to signify

¹ E.g. reversions and remainders, P. and M. ii 124.

² Above 350-352.

³ Above 196; below 405.

⁴ Below 381-383, 389-391.

⁵ Vol. i 620, 621.

⁶ Above 256-257.

⁷ P. and M. ii 463, and references to the Oxford English Dictionary there cited; Y.B. 20, 21 Ed. I. (R.S.) 352 *Mettingham*, J., says that "felony is such a poisonous

those offences which involved a breach of the obligations existing between lord and vassal¹ The rule that the felon's land escheated to his lord shows that English law was not uninfluenced by this idea. And we shall see that the same idea was present at a later period in the view which English law took of treason.² But in English law the word has an extended meaning. It is a general word which covers all the more serious crimes which, being breaches of the king's peace, fell within the jurisdiction of his courts.³ This extension is, as Maitland has pointed out,⁴ very significant of the manner in which common law has been developed. "All the hatred and contempt which are behind the word *felon* are enlisted against the criminal, murderer, robber, thief, without any reference to the breach of the bond of homage and fealty." No doubt the feudal lords did not object to an extension which brought them more escheats; but, "this extension of felony, if it might bring them some accession of wealth, was undermining their power."⁵

Felony, then, comprised in the reign of Edward I. such offences as homicide, arson, rape, robbery, burglary, and larceny.⁶ All these offences might be prosecuted either at the king's suit by way of indictment, or at the suit of the individual by way of appeal; they all involved forfeiture of life or limb; a man accused of these offences might be outlawed; the felon's goods belonged to the crown, and his lands were forfeited to the crown for a year and a day, and then escheated to his lord.

We shall see that the scope of some of these felonies was wide. Killing in execution of a lawful sentence of a court, or in the arrest of an outlaw or manifest thief, was justifiable.⁷ But all other cases of killing were strictly speaking wrongful, though not necessarily felonious. Newer ideas as to criminal responsibility were, however, emerging in the rule that persons of tender age could not be held guilty of felony;⁸ and in the practice of

thing that it spreads its poison on all sides;" so Y.B. 21, 22 Ed. I. (R.S.) 354 *per* the same judge; Eyre of Kent (S.S.) iii 49 we get the practical deduction from this conception—Scott *arg.* says, "Felony is so heinous a thing that it attains the blood, so that no right can descend to another through a felon's blood."

¹ P. and M. i 284; it bears this meaning in Leg. Henr. 43. 7, and in other passages.

² Below 449-450.

³ P. and M. ii 463—the word is used thus generally in the assize of Northampton c. i.

⁴ *Ibid* i 285.

⁵ *Ibid* ii 464.

⁶ *Ibid* ii 464. Wounding, mayhem, and imprisonment were about this time ceasing to be regarded as felonies, *ibid* 509.

⁷ Northumberland Assize Rolls (Surt. Soc.) 94; Y.B. 30, 31 Ed. I. (R.S.) 512; Bracton's Note Book case 1084; vol. iii 311-312, 608.

⁸ Y.B. 30, 31 Ed. I. (R.S.) 510, *per* Spigurnel; Parlt. Roll 1305 (R.S.) no 470; vol. iii 372. Though it is laid down that a child under seven cannot be guilty of felony there is in the Register of Writs (*f.* 309b) a precedent of a pardon to a child under seven.

giving to persons who killed by misadventure or in self-defence, or who were of unsound mind, pardons which in later law will be pardons as of course.¹ It should be noted, however, that these persons still needed pardons, and that these pardons did not free them from the possibility of an appeal at the suit of the injured person or his kin;² and we may remember that the rules as to deodands were still in force. The various principles of law, old and new, and the rules of practice have not as yet resulted in any distinct classification of the different kinds of homicide. The term "murdrum" still meant that secret homicide for which the murder fine was payable.³ The term "manslaughter" has not yet appeared.

Britton mentions the crime of burglary.⁴ The offence is committed by those who feloniously in time of peace break churches, or houses of others, or the walls or gates of cities or boroughs. It does not as yet seem necessary that it should be committed by night. It probably represents the older hamsoken. Robbery and mere theft in Glanvil's day were distinguished by the fact that the former was a plea of the crown, the latter a plea of the sheriff. At this period both were felonies.⁵ But in the case of theft a line was drawn between grand larceny and petty larceny. If the thing stolen were not worth twelve pence, the offence was petty larceny and no felony.⁶ We can see that the essence of theft was already the wrongful taking of a thing out of another's possession. Though Bracton had said that the *animus furandi* was essential,⁷ the difficulty of proving this intent sometimes led at this period to the neglect of this essential element.⁸ Here, as in other cases, Bracton was before his time in his insistence upon the ethical element in crime. The doctrines which he derived from the canon law were too civilized for the immature fabric of the common law.⁹

¹ Vol. iii 312-313.

² Y.B. 30, 31 Ed. I. (R.S.) 514, "If a man be indicted for the death of another, and in respect thereof purchase the king's charter, and produce it before the justices in Eyre, it shall be asked if there is any one who will sue for the felony, then or never."

³ Vol. i 15; vol. iii 314.

⁴ i 42; vol. iii 369.

⁵ P. and M. ii 493, "Larceny became a plea of the crown under cover of a phrase which charged the thief with breaking the king's peace; to all appearance it was the last of the great crimes to which that elastic phrase was applied;" for the advantages of suing in this case by way of appeal see below 361.

⁶ Vol. iii 366-367; this is an old rule, see Leg. Henr. 59. 20.

⁷ f. 150b.

⁸ Y.B. 33-35 Ed. I. (R.S.) 502 *Mallore, J.*, says, "I saw a case . . . where one R., because his rent was in arrear, took his farmer's corn and carried it off, and disposed of it at his pleasure, and he was hung for that deed." *Malbersthorpe*—"It is not to be wondered at."

⁹ Above 258-259 for his views as to deodands; f. 105b he says, "Crimen vel poena paterna nullam maculam filio infligere potest"—but English law for many centuries knew the doctrine of corruption of blood as a consequence of a conviction of felony.

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

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

¹ Below 449-450; vol. iii 287-293.

² Above 256-257.

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

⁴ Britton i 123.

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

⁶ 13 Edward I. st. 1 c. 12.

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

it showed marked signs of decay. Before speaking of the new action of trespass, I shall briefly sum up its later history.

Like many another anachronism the criminal appeal lived long in the law because it had been forgotten.¹ Appeals of treason brought in Parliament were abolished in 1400.² Hawkins thought that even after that statute it was possible to bring such appeals in the ordinary courts; but he admits that when he wrote (i.e. early in the eighteenth century) they had long been obsolete.³ Appeals of robbery and larceny remained practically useful remedies till 1529, because no restitution of the stolen property could be had unless the thief or the robber had been convicted on an appeal.⁴ They disappeared when a statute, passed in that year, gave a writ of restitution in cases where the criminal had been convicted upon an indictment, provided that the owner had given evidence or otherwise procured the conviction.⁵ After some conflict of opinion⁶ it was settled in the latter part of the seventeenth century that the owner could get restitution even as against a purchaser in market overt.⁷ Appeals of rape were abolished by the Statute of Westminster I. (1275), but were apparently revived by the Statute of Westminster II. (1285).⁸ We hear nothing of them after the fifteenth century.⁹ For appeals of injuries under the degree of felony, the action of trespass was fast becoming a substitute in Edward I.'s reign. Britton recommends a recourse to this action rather than to an appeal.¹⁰ But it was still optional to the plaintiff to allege felony and to bring the appeal; and such an appeal was certainly brought in Edward III.'s reign.¹¹ No doubt Britton's advice was usually followed; but Coke, Hawkins, and Blackstone consider that such appeals were still possible in their day, if the damage amounted to mayhem, and if it had been intentionally inflicted.¹²

¹ See generally on this subject Hawkins, P.C. Bk. ii chap. 23; Reeves, H.E.L. ii 421-423; iii 38, 39; Stephen, H.C.L. i 247-250.

² 1 Henry IV. c. 14.

³ P.C. ii 161 (ed. 1724).

⁴ Fitz., Ab. *Corons* pl. 27, 392.

⁵ 21 Henry VIII. c. 11, "In like manner as though any such felon . . . were attainted at the suit of the party in appeal."

⁶ Kelyng 35-36, 48.

⁷ Hale, P.C. i 542-543.

⁸ 3 Edward I. c. 13; 13 Edward I. c. 34; Hawkins, P.C. ii 172.

⁹ Hawkins, P.C. ii 175.

¹⁰ i 123, 124; it was especially advantageous in that the benefit of clergy still held in the appeal, but not in the action, 3 Henry VII. c. 1; *Armstrong v. Lisle* (1697) Kelyng 93; cp. Pike, *History of Crime* i 212; and on the whole subject see Y.B. 18 Ed. III. (R.S.) lv-lix, and references there cited.

¹¹ Y.B. 18 Ed. III. (R.S.) 130—the procedure was the same as if it had been an appeal of felony, *ibid* lviii, lix.

¹² For an instance of such an appeal see 19 Henry VII. c. 36, R.P. vi 550 no. 34; see also Third Instit. 313; Co. Litt. 127; Hawkins, P.C. ii 157, 158; Bl. Comm. iv 310—in spite of the fact that mayhem is admitted by him to be under the degree of felony; Y.B. 19 Ed. III. (R.S.) 226, it is said that as a result of this appeal only damages will be got. The relation of the appeal of mayhem to the action of trespass

It is the appeal of murder which has had the longest history. Many of the rules regulating it recall such primitive bases of the criminal law as the blood feud and the wergild;¹ and such features no doubt recommended it to the turbulent and litigious fifteenth century. Fitzherbert tells us that in 1482 all the judges resolved that a person indicted for murder should not be arraigned within the year, so that the suit of the party might be saved.² This rule was changed in 1487;³ but it was nevertheless provided that acquittal on an indictment should be no bar to an appeal; and that, after such acquittal, the accused should remain in prison for a year and a day, in order to see whether any of the relatives wished to begin an appeal. As modified by this statute the appeal of murder existed till 1819; and a thin stream of cases, in which such appeals were brought, reported both in the regular reports⁴ and elsewhere,⁵ shows that it was not entirely disused. Holt, C.J., in 1701 called it "a noble remedy and a badge of the rights and liberties of an Englishman;"⁶ and when, in 1774, an attempt was made to abolish it by statute, Burke opposed the proposal, and Dunning denounced it as an attempt to overthrow "a pillar of the constitution."⁷ In fact there were two sets of reasons why the appeal of murder had so long a life. In the first place, we shall see that it was for some time thought that, if felony was committed, any civil right of action which might belong to persons injured by the felony, was merged in the felony; and that, even after this view

was discussed in Y.B. 12 Rich. II. 147-149; it seems to have been thought that the fact that an appeal was brought was no bar to an action of trespass, but the converse proposition seems to have been considered doubtful; it was, however, adjudged in *Hudson v. Lee* (1589) 4 Co. Rep. 43a that a recovery in trespass was a bar to an appeal of mayhem; and see *Hawkins P.C. Bk. ii 159*.

¹ E.g. the rules as to the relations of the deceased who were entitled to bring the appeal, see Y.B.B. 32, 33 Ed. I. (R.S.) 192; 20 Hy. IV. Trin. pl. 25; 17 Ed. IV. Pasch. pl. 1; *Hawkins, P.C. ii 163-166*; a woman could only sue an appeal for rape or for the death of her husband, *Bracton f. 148b*, though this rule was questioned by *Bereford, C.J.*, in 1313-1314, *Eyre of Kent (S.S.) i lxxx-lxxxi, 114-121*; but it would seem that there was some authority to show that if a woman did bring an appeal for any other cause, and the accused did not appear, he could be outlawed, *ibid*; no doubt this rule was made to secure the presence of the accused that he might be indicted, above 360 n. 7.

² *Fitz., Ab. Corone* pl. 44 (Mich. 22 Ed. IV.); vol. iii 315.

³ Henry VII. c. 1, "the party is oftentimes slow, and also agreed with, and by the end of the year all is forgotten."

⁴ *Lisle's Case* (1697) *Kelyng 85*; *Spencer Cowper's Case* (1699) 13 S.T. 1190; *Wilmot v. Tyler* (1702) 1 *Ld. Raym.* 671; the cases of *Bambridge and Corbet* (1730) 17 S.T. 395, 397; *Bigby v. Kennedy* (1770) 5 *Burr.* 2643, and cases there cited; *Ashford v. Thornton* (1818) 1 *B. and Ald.* 405.

⁵ There are a number of references to such appeals in *Luttrell's Diary*—see i 403 (1687); ii 214 (1691), 498 (1692); iii 30 (1692-1693)—S.C. 12 S.T. 950, an appeal threatened by *Mrs. Mountford* against *Lord Mohun*; iii 308 (1694); iv 255 (1697), 641 (1700); for two cases of 1724 and 1729 see below 363.

⁶ *Rex v. Toler* 1 *Ld. Raym.* at p. 557.

⁷ *Lea, Superstition and Force* 245.

was proved to be erroneous, it still survived, in cases where the felony had caused the death of another, in the changed shape of the thoroughly irrational rule that the death of a human being cannot give rise to any civil right of action.¹ The appeal of murder gave the relatives of a murdered man a chance to get something from the murderer by the threat to bring an appeal. There is evidence that in Edward III.'s reign the threat of an appeal was thus used to get compensation;² in the edition of West's *Symbologiegraphia*³ published in 1615 there are two precedents of agreements, one by a wife⁴ and the other by a brother,⁵ not to prosecute an appeal of murder; there is some reason to think that the numerous cases of these appeals of which we read in Luttrell's *Diary* in the late seventeenth and early eighteenth centuries, but which never got into the reports, were brought with a similar object;⁶ and in 1770 the widow of John Bigby brought an appeal against his murderers, Mathew and Patrick Kennedy, which was compromised for a payment of £350.⁷ In the second place, such a threat was effective because, though either an acquittal or a conviction on an indictment was a bar to the other appeals of felony, neither an acquittal nor a conviction for murder was, by reason of the express provisions of the statute of 1487, a bar to an appeal of murder.⁸ Therefore an appeal was still open to the relatives of the deceased, whatever the results of the trial. Now a verdict of an acquittal, however just, does not always satisfy the relatives of the deceased. This cause produced the appeals in the case of Lewis Houssart in 1724 and James Clough in 1729, in both of which a conviction was secured on the appeal after a verdict of acquittal on an indictment, and in both of which the appellees were executed.⁹

¹ See vol. iii 331-336 for the history of these rules.

² Hist. MSS. Com. Fifth Rep. X, and App. 369, there is a pardon in which (as was usual) the right of the relatives to bring an appeal was reserved; and there is a deed extant which shows that in this case the murderer paid money to the widow of the deceased to buy off her right to appeal him of the death of her husband.

³ For this book see vol. v 389-390.

⁴ Pt. I. § 169.

⁵ Ibid § 474.

⁶ Above 362 n. 5.

⁷ References to this case will be found in the *Annual Register* for 1770 pp. 74-75, 75-76, 84, 91, 92, 103, 109, 118, 161; the murderers had been convicted, but their sentence had been commuted to transportation.

⁸ Hale, *Pleas of the Crown* ii 249, 257; 3 Henry VII. c. 1; but a conviction for manslaughter on an indictment for murder was a bar, *Armstrong v. Lisle* (1697) Kelyng 93.

⁹ These cases are reported in a book entitled "Select Trials for Murder, etc., at the Sessions House in the Old Bailey," published in 1734-35. Houssart's Case is in vol. i 399, and Clough's in vol. ii 282. In the first case the prisoner was appealed by his wife's brother for the murder of his wife. The first appeal was abated for false Latin. On the second appeal it was pleaded among other things that the pledges for the prosecution, John Doe and Richard Roe, did not exist, on which proof was given that John Doe, a weaver, and Richard Roe, a soldier, were living in

It also produced the appeals in the cases of *Lisle*,¹ *Spencer Cowper*,² and *Bambridge and Corbet*.³ In the first of these cases the appeal was held not to lie as the appellee had been convicted of manslaughter and had had his clergy, and in the last two there was an acquittal. The last case, *Ashford v. Thornton*,⁴ arose from the same cause. In that case the appellee was unwilling to risk the verdict of a jury, and, being better advised than Houssart or Clough, threw his glove down in court, and challenged the appellor to battle. The result was that both trial by battle and the appeal of murder were abolished in the following year (1819).⁵

We must now turn to that "fertile mother of actions"—the action of trespass.⁶

We hear of an action of trespass in John's reign; and there are some few instances of it in Bracton's Note Book. In one case an action so begun appears to have ended in the Grand Assize;⁷ but generally the court rigidly set its face against using the action to try questions of title to land.⁸ The numerous real actions were proper for that purpose, and should be used. The action became common at the end of the reign of Henry III., just after the conclusion of the Barons' War. "This may suggest to us," says Maitland,⁹ "that in order to suppress and punish the recent disorder a writ which had formerly been a writ of grace, to be obtained only by a petition supported by golden or other reasons, was made a writ of course—an affair of everyday justice. Such MS. registers [of writs] as I have seen seem to favour this suggestion. I have seen no register of Henry III.'s reign which contains a writ of trespass, and it is not to be found even in all registers of his son's reign." This action was in Edward I.'s reign a quasi-criminal proceeding, i.e. though it was a proceeding begun at the suit of the injured individual, it was aimed at serious and forcible breaches of the peace,¹⁰ and it ended in the punishment of the defendant as well as in com-

Middlesex. He was convicted and hanged, "unpitied even by the mob." In the second case the appeal also was brought by the murdered woman's brother. I owe all this information to Sir Richard Harington.

¹ (1697) Kelyng 89.

² (1699) 13 S.T. 1190.

⁴ (1818) 1 B. and Ald. 405.

⁶ See generally for the early history of the action Maitland, H.L.R. iii 177-179.

⁷ Case 835; cp. Y.B. 32, 33 Ed. I. (R.S.) 58.

⁸ Case 378; vol. iii 26, 28 n. 3.

⁹ H.L.R. iii 178.

¹⁰ See e.g. Bracton's Note Book case 1121. The allegation is that the defendant came "cum gente armata circiter ducentis hominibus venit ad prædicta maneria et blada ita asportavit;" and cp. Y.B. 32, 33 Ed. II. (R.S.) 316-320; but as early as 1310 the allegation of "force and arms" is coming to be regarded as common form, Y.B. 3, 4 Ed. II. (S.S.) 29.

³ (1730) 17 S.T. 395, 397.

⁵ 39 George III. c. 46.

pensation to the plaintiff.¹ Its advantages over the appeal of felony were marked. The same nicety of pleading was not required. There could be no trial by battle.² Its scope was wider. Damages could be obtained. It was on account of these advantages that Britton advised plaintiffs always to have recourse to it rather than to an appeal.³

A trespass, then, in Edward I.'s reign is a tort in so far as it is begun by the action of the injured individual—but it is of a criminal nature. A man can be punished for his trespasses by the court which tries the action. The court, indeed, exercises this power in the case of other actions;⁴ but it is a power which obviously comes forward more prominently in the case of an action intended to redress serious wrongs. It is to the mixed character of this action—to its penal and its reparatory sides—that we must look for the growth of the misdemeanour on the one side, and, on the other, for a form of civil action which will supplement the deficiencies of our early law of tort. Looking at the criminal side, we see that many miscellaneous trespasses were presented at the tourn and the eyre.⁵ When the general eyre declined and the itinerant justices confined themselves mainly to legal business,⁶ when the justices of the peace took over the smaller criminal business,⁷ it is felonies and "trespasses" which will be presented to them for trial; and it is the trespasses so presented which will become the misdemeanours of our later law. Looking at the civil side we see that the clause of the Statute of Westminster II.,⁸ which gave a limited power to make new writs to meet cases, similar to those for which there was a remedy, but not exactly falling under any existing writ, was principally used to extend the scope of trespass. This will give to trespass its importance in the law of tort, and, ultimately, its dominance over the whole field of the common law. For cannot almost any cause of action whatever be regarded as a species of wrong to the plaintiff?

All this is still in the future. In the reign of Edward I. the scope of the law of tort as administered in the royal

¹ Y.B. 32, 33 Ed. I. (R.S.) 258—a case of beating, wounding, and imprisoning. The defendants were found guilty of imprisoning only; "therefore it was adjudged by *Bereford* that he should recover his damages, etc., and that the defendants should be taken;" Statute of Wales c. xi (cited P. and M. ii 525) shows that its object was punishment; and cp. Y.B. 18, 19 Ed. III. (R.S.) 14.

² Y.B. 32, 33 Ed. I. (R.S.) 318, 320.

³ Y.B. 21, 22 Ed. I. (R.S.) 390, a clerk is ordered into custody for forging a letter of presentation; *ibid* 274, 276, a defendant who has been found guilty of disseisin with force and arms by the assize is sent to prison.

⁴ Vol. i 79, 269.

⁵ *Ibid* 272-273.

⁶ *Ibid* 287-288.

⁷ *Ibid* 398 n. 3, 13 Edward I. st. 1 c. 24; below 455-456; vol. iii 350-351, 429 seqq.

⁸ i 123, 124.

courts was narrow. No action was given for defamation, as Parliament solemnly declared in 1295.¹ The only fraud remedied by the writ of deceit was some deceitful act committed or coming to the notice of the court in the course of the conduct of a case.² The only species of forgery punishable (other than forgery of the king's seal or money, which was treason) was "the reliance on a false document in a court of law."³ The only form of perjury which was punished was the perjury of an assize or a jurata.⁴ Those who failed in an appeal were punished,⁵ and a writ of conspiracy might be had against those who maliciously caused others to be indicted.⁶ Thus in Edward's reign there were remedies against personal violence, there were remedies against forcible seizure of property, there were remedies against various frauds and other offences which might come under the notice of a court which was trying a case. It is not till these frauds and other offences have become generally actionable wherever committed that we shall see the main outlines of our modern law of tort.

Of other personal actions brought in the royal courts the most common were detinue, debt, covenant, and account. The writ of detinue lay for the wrongful detention of a chattel which belonged to the plaintiff. It was generally brought against a bailee. Possibly at this period it could not be brought against any other person.⁷ A person who had parted with his goods involuntarily (i.e. otherwise than by a bailment) must sue either by the appeals of robbery or larceny, or, omitting the words of felony, by an action for a *res adirata*.⁸ But early in Edward II.'s reign, if not before, the action of detinue was extended to such a case.⁹ The writ of debt was originally almost one with the writ of detinue. To the end their wording was almost identical.¹⁰ The plaintiff seeks the *restoration* of money. "It was in fact a general form in which any money claim was collected, except unliquidated claims for damages by force, for which there was

¹ R.P. i 133, "Non sit usitatum in regno isto placitare in Curia Regis placita de defamationibus." This field was left for the present to the ecclesiastical courts.

² P. and M. ii 533, 534.

³ Ibid ii 539; cp. Y.B. 20, 21 Ed. I. (R.S.) 330—a forged tally; Y.B. 21, 22 Ed. I. (R.S.) 390, above 365 n. 4; vol. iii 400.

⁴ P. and M. ii 539-541.

⁵ Above 360.

⁶ Articuli super Cartas (1300) c. 10; R.P. i 96; above 301; vol. iii 401-407.

⁷ Vol. iii 324-326.

⁸ Above 265, 361; vol. iii 319-322; "adirata" means gone from his hand against his will—*adextratus*, P. and M. ii 160 n. 2; cp. Bracton's Note Book case 284; Y.B. 21, 22 Ed. I. (R.S.) 468; Holmes, Common Law 168, 169; vol. iii App. 1B (2).

⁹ Vol. iii 325-326.

¹⁰ Register f. 139; vol. i App. IV; below 368; App. Vb 27, c 58, 59; vol. iii. App. 1B (1); cp. Y.B. 3, 4 Ed. II. (S.S.) 26; Maitland, Forms of Action 342.

established the equally general remedy of trespass."¹ It was also the appropriate form of action for chattels which the plaintiff could not allege had ever been in his possession.² The cases in which it was most usually brought were chiefly five—"To obtain money lent, the price of goods sold, arrears of rent due upon a lease for years, money due from a surety, and a fixed sum promised by a sealed document;"³ to which may be added the recovery of a sum found due by arbitrators to whom a dispute had been submitted.⁴ Also "statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court to be due, can be recovered by it."⁵ It was not till later that the five first-named *causæ* became generalized, and that it was said that a *quid pro quo* is the essential pre-requisite for success in an action of debt brought upon a contract. As the action could still be brought on *causæ* which were not contractual in their nature, it had, as we shall see,⁶ some influence in later law upon the growth of the conception of quasi-contract.⁷ The action of covenant was the only action in which executory contracts could be enforced and unliquidated damages obtained. It was used chiefly as a basis for the *finalis concordia*, and in the case of agreements to let land for a term of years. It was just about this period that it was settled that a writing under seal was needed for its validity.⁸ The action of account dates from the early years of the thirteenth century;⁹ and it was improved by statute in 1267 and 1285.¹⁰ It was chiefly brought at this period against the bailiffs of manors, the guardian in socage, and partners.¹¹ We shall see that it is important in the development of the law of quasi-contract rather than of contract.¹²

If we look at the actions of detinue and debt we shall see that the line between property, contract, and delict is still very

¹ Holmes, Common Law 251.

² Y.B. 50 Ed. III. Trin. pl. 8; as to this case see below 368; vol. iii 355 n. 2.

³ P. and M. ii 208; for instances of various actions of debt see Y.B.B. 20, 21 Ed. I. (R.S.) 304—rent due; 21, 22 Ed. I. (R.S.) 2—price of land sold; *ibid* 254, 256—money lent; *ibid* 595—a sum certain promised by writing under seal; 33-35 Ed. I. (R.S.) 86, 88—sureties.

⁴ Eyre of Kent (S.S.) ii 23-27.

⁵ P. and M. ii 208; see also Y.B. 12 Rich. II. 180-181; neither in this case nor in the case of an action for debt brought on an arbitration could there be any wager of law, *ibid per* Thimling, J.

⁶ Vol. iii 425-426.

⁷ *Ibid*.

⁸ *Ibid* 417-420; P. and M. ii 218; vol. iii App. 1B (3).

⁹ P. and M. ii 219, citing Bracton's Note Book case 859 of the date 1232; vol. iii App. 1B (4).

¹⁰ 52 Henry III. c. 23; 13 Edward I. c. 11.

¹¹ Y.B.B. 20, 21 Ed. I. (R.S.) 180—by executors against a bailiff; 30, 31 Ed. I. (R.S.) 30—guardianship; 33-35 Ed. I. (R.S.) 294—partnership.

¹² Vol. iii 426-428.

confused. The writs of detinue and debt are both somewhat similar in form to the writ of right. They ask that something "be restored." They are both writs *Præcipe*. The pleadings of the parties in both actions allege a tortious detention, a tortious refusal to pay what is due.¹ To the last the law was never quite clear as to whether detinue sounded in tort or contract.² There is, perhaps, a slight perception of the distinction between tort and contract in the rule that the word "*debet*" must be used in the action of debt if the creditor is suing the debtor: the word "*detinet*" if the creditor's executor is suing. Money cannot be said to be due from anyone except the person who is bound personally.³ There is, perhaps, a slight hint of the distinction between a wrong to property and the breach of a contract in the rule that detinue only lay where the plaintiff could allege that he had a right to the possession of the actual thing claimed, whereas debt lay if he claimed that the defendant was bound to give one of a class of things.⁴ There is a tendency, in other words, to think that debt was the appropriate action in transactions of the nature of *mutuum*: detinue in transactions of the nature of *commodatum*.⁵ But in spite of this the proprietary traits of the action of debt survived to the end. In Edward III.'s reign the distinction between using the words "*debet*" and "*detinet*" in the writ of debt was explained, not by reference to any theory of contractual obligation, but on the ground that the creditor could demand the money as his property, whereas the executor could not.⁶ In 1670 Vaughan, C.J., said,⁷ "Contracts of debt are reciprocal grants. A man may sell his black horse for present money at a day to come, and the buyer may, the day being come, seize the horse, for he hath property in him." As we have seen, the action continued to be the appropriate remedy in many cases which can be brought under the head neither of contract nor of delict nor of the breach of any proprietary right.⁸

¹ See e.g. the count in Y.B. 20, 21 Ed. I. (R.S.) 138; cp. Maitland, *Forms of Action* 332.

² *Bryant v. Herbert* (1877) 3 C.P.D. 389; Maitland, *Forms of Action* 370.

³ Y.B. 21, 22 Ed. I. (R.S.) 256; and cp. Y.B. 33-35 Ed. I. (R.S.) 454.

⁴ Y.B. 50 Ed. III. Trin. pl. 8; cp. Y.B. 3, 4 Ed. II. (S.S.) 26.

⁵ P. and M. ii 204, 205; it is said, *ibid* n. 6, that about the middle of Henry III.'s reign the Chancery, in describing the loans of money made to the king by the Italian bankers, uses the words "*mutuo tradere*" instead of the word "*commodare*" which they had formerly employed.

⁶ Y.B. 12, 13 Ed. III. (R.S.) 170, "In a case in which a man demands as heir he demands a profit due to himself, in which case he shall say *debet*, but in case of executors, inasmuch as they are to recover for the benefit of the testator's estate, the words of the writ shall be *injuste detinet* only;" so the Register ff. 138b, 140, "*pur ceo que le debet suppose propertie, et executor ne poet clamer propertie de chose que fuit al morte.*"

⁷ *Edgecomb v. Dee* (1670) Vaughan's Rep. at p. 101.

⁸ Above 367.

The law of Edward I.'s reign draws no clear line between tort and contract. It knows only certain forms of action which can be brought under certain defined circumstances. But it is probable that the somewhat amorphous character of these actions made further developments the more easy. We may well doubt whether English law would have been able to develop a theory of contract upon quite original lines if its principles had been more fixed. Even when crime and tort and contract have become distinct branches of the law, there will remain in the forms of action abundant traces of the time when these branches were by no means distinct; and when the exigency of modern statutes requires a definition of a "criminal cause or matter,"¹ or a clear distinction between an action "founded in contract" and an action "founded in tort,"² it will not be easy to bring old rules under these modern rubrics.

II.—THE LAW ADMINISTERED IN THE LOCAL COURTS

The Influences which Shaped the Development of the Law

That the growth in the fixity of the principles and practice of the common law, which has just been described, was reacting upon the law administered in the local jurisdictions both of the country at large and the boroughs, will be obvious, if we examine the effect of this influence upon the sources of the law therein administered.

(1) The country at large.

In the thirteenth century landowners were beginning to catalogue their possessions, and to enrol the proceedings of their courts. This gives us the two most important sources of law for this and the following centuries—the cartularies and the manorial extents,³ and the court rolls.⁴

The cartularies contain documents and legal proceedings—the muniments of title of the possessions of the great landowners. Besides, they often contain many other miscellaneous documents.

¹ Above 199.

² Pollock, *Torts* (ed. 1904) App. A 557, 558.

³ E.g. the Ramsey Cartulary (R.S.); the Rievaulx Cartulary (Surt. Soc.); the Domesday of St. Paul's (C.S.); the Customals of Battle Abbey (C.S.); the Register of Worcester Priory (C.S.). See Maitland, *Collected Papers* ii 48-49; as Maitland points out, *ibid* 50, we must add to these a number of tracts on husbandry, associated with the name of Walter of Henley; as he says, "They bear directly rather on agricultural and economic than on legal history; but the historian of manorial law cannot afford to neglect them;" Walter of Henley and some other of these tracts have been edited for the Royal Hist. Soc. by Miss Lamond.

⁴ For such rolls see *Select Pleas in the Manorial Courts* (S.S.); the *Court Baron 107 seqq.* (S.S.); the *Durham Halmote Rolls* (Surt. Soc.).